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Presents

The Attorney for the Child's Dilemma: When to Substitute Judgment

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1:00 pm - 2:00 pm

Presenters: Robin D. Carton, Esq.
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Hon. Karen Riley
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§7.2 Function of the attorney for the child.

(a) As used in this part, "attorney for the child" means a law guardian appointed by the family court pursuant to section 249 of the Family Court Act, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto.

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

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

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

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

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

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

Historical Note:

Added section 7.2 Oct. 17, 2007

POLICY CONSIDERATIONS:

THE ROLE OF THE ATTORNEY FOR THE CHILD

The role of the attorney for the child is to serve as a child's lawyer. The attorney for the child has the responsibility to represent and advocate the child's wishes and interests in the proceeding or action. To that end, counsel for children are to meet with ***every*** child-client, ***regardless of age***. An Attorney for the Child(ren) should always act in a manner consistent with proper legal practice and should not assume the role of a social worker, psychologist or advocate for one of the parties. Although it may be tempting to step outside of the role of counsel for the child, particularly when the circumstances of the case are especially tragic, the rules of good lawyering are as applicable to as to any attorney in a civil proceeding or action. Examples of improper practices include communicating with the parties in absence of their counsel and presenting reports containing facts which are not part of the record.

A rule relating to the function of the attorney for the child has been promulgated by order of the Chief Judge dated October 17, 2007 as follows:

§7.2 Function of the attorney for the child.

(a) As used in this part, "attorney for the child" means a law guardian appointed by the family court pursuant to section 249 of the Family Court Act, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto.

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

Summary of the Responsibilities of the Attorney for the Child

The Statewide Advisory Committee on Counsel for Children has developed as summary of the responsibilities of the attorney for the child:

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

(1) Commence representation of the child promptly upon being notified of the appointment;

(2) Contact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible;

(3) Consult with and advise the child regularly concerning the course of the proceeding, maintain contact with the child so as to be aware of and respond to the child's concerns and significant changes in the child's circumstances, and remain accessible to the child;

(4) Conduct a full factual investigation and become familiar with all information and documents relevant to representation of the child. To that end, the lawyer for the child shall retain and consult with all experts necessary to assist in the representation of the child.

(5) Evaluate the legal remedies and services available to the child and pursue appropriate strategies for achieving case objectives;

(6) Appear at and participate actively in proceedings pertaining to the child;

(7) Remain accessible to the child and other appropriate individuals and agencies to monitor implementation of the dispositional and permanency orders, and seek intervention of the court to assure compliance with those orders or otherwise protect the interests of the child, while those orders are in effect; and

(8) Evaluate and pursue appellate remedies available to the child, including the expedited relief provided by statute, and participate actively in any appellate litigation pertaining to the child that is initiated by another party, unless the Appellate Division grants the application of the attorney for the child for appointment of a different attorney to represent the child on appeal.

[APPROVED by the Administrative Board October 4, 2007]

The Attorney for the Child's Dilemma:
When to Substitute Judgment
Caselaw Review: March 2025
WBASNY CLE

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I. OVERVIEW:

Over the past 17 years since the new Rule 7.2 has been in effect, the Appellate courts have offered limited guidance on the issue of when it is appropriate for an AFC to substitute their judgment in a custody or child welfare case.

- Presenting from a busy practitioner's point of view
- Focusing on decisions after 2007
- **Not** an exhaustive list of cases
- Focusing more on decisions in which the court discusses the facts that support WHY the AFC should or should not have substituted their judgment, as opposed to the decisions in which the facts are not discussed, and we are left "scratching our heads"

II. WHEN CAN'T AN AFC SUBSTITUTE JUDGMENT?

- When the record does not support a finding that "the child lacks the capacity for knowing, voluntary and considered judgment"

- When the facts in the record do not support "substantial risk of imminent, serious harm to the child" if the child's wishes are granted by the court

A. Cases:

1. Silverman v. Silverman, 186 A.D.3d 123 (2nd Department 2020)

There was no evidence in the record that the children lacked capacity for knowing, voluntary and considered judgment. *This exception generally applies to young children and children with disabilities.* The children in this case were 11 and 13, they were both on high honor roll and involved in extracurricular activities. The court admonished the AFC for failing to present witnesses and evidence that would have supported the children's stated position, and for failing to zealously cross-examine witnesses who presented evidence contrary to the children's stated position.

The court found that the children "failed to receive meaningful assistance of counsel" The matter was reversed and remitted for new proceedings, and to appoint a new AFC.

2. Sloma vs. Saya, 210 A.D.3d 1494 (4th Department 2022)

AFC appealed from a decision dismissing father's modification petition on motion by the mother. The Fourth Department ruled that the child received ineffective assistance of counsel at the trial court level because the AFC advocated contrary to the child's wishes. The court ruled that there was no issue as to the child's capacity, and there was apparently nothing in the record to support a finding that following the child's wishes would be likely to result in "substantial risk of serious harm to the child." Further, the AFC engaged in trial conduct which undermined the child's position.

3. Matter of Brian S. (Scott S.), 141 A.D.3d 1145 (4th Dept. 2016) **Neglect**

The AFC in this neglect matter represented three teenaged children in the family – one of whom had a position which was different from the other clients. Nevertheless, the trial AFC took a position contrary to the position of two of the subject children, both of whom maintained that the third child was lying with respect to her allegations against the mother. The AFC elicited evidence through cross examination which was unfavorable to the children's positions.

The court ruled that the following factors did not constitute a substantial risk of imminent and serious harm to the children that would have justified the AFC's substitution of judgment: The children frequently skipped school, occasional drug use by the mother rendering her unable to care for the children, a single occasion of the mother hitting one of the children on the arm with a belt leaving a small mark. The matter was reversed and remitted for a new fact-finding hearing, and appointment of new AFC's.

B. **Takeaways**: (Things you shouldn't do)

1. The AFC cannot engage in trial behavior that undercuts the child's position
2. Improperly Substituting Judgment =Ineffective Assistance of Counsel
3. Frequent absences from school do not constitute "a substantial risk of serious imminent harm" that would justify substitution of judgment. (At least not in the Fourth Department)

4. Occasional drug use by a parent which renders them unable to care for their children does not justify substitution of judgment. (This might not be the case if the children were younger than teenagers)
5. A single strike on the arm with a belt does not justify substitution of judgment. (Again, the result could have been different had the children been younger)
6. Do not substitute judgment for teenagers who do not lack capacity

III. WHEN CAN AN AFC SUBSTITUTE JUDGMENT?

A. **When the child lacks the capacity for knowing, voluntary and considered judgment**:

1. **Cases**:

a. Matter of Mason v Mason, 103 A.D.3d 1207 (4th Dept 2013)

Upholds the AFC's substitution of judgment where the record supports that the child lacked capacity:

> "The mother contends that the Attorney for the Child improperly advocated a position that was contrary to the child's express wishes because the AFC failed to state the basis for advocating that contrary position. "….We note that ***the record supports*** a finding that the child lacked the capacity for knowing, voluntary and considered judgment" (Emphasis added)

b. Matter of Muriel v Muriel, 179 A.D.3d 1529 (4th Department 2020)

Allows substitution of judgment where the record contains evidence that the child lacks capacity and following the child's wishes would place them at substantial risk of imminent serious harm.":

"Here, the AFC fulfilled his obligation to inform the court that the subject children had expressed their wishes to live with their mother, notwithstanding his position that they should be placed in the father's custody (*see* 22 NYCRR 7.2 [d] [3]). Additionally***, the record supports a finding that the children "lack[ed] the capacity for knowing, voluntary and considered judgment"*** (*citations omitted*) and that following the children's wishes would have placed them at a substantial risk of imminent and serious harm." (Emphasis added) Children were "of a young age".

c. Matter of Grabowski vs. Smith, 182 A.D. 3d 1002 (4th Dept. 2020)

Validating the AFC's substitution of judgment in a case of a 10 year old experiencing parental alienation based on the theory that the [father's] persistent and pervasive pattern of alienating the child from the [mother] is likely to result in a substantial risk of imminent, serious harm to the child'

The fact that the trial Attorney for the Child on the mother's petition advocated a position contrary to the child's wishes did not deprive the child of effective assistance of counsel. The 10-year-old child's stated wishes were to have no contact with the mother, and to follow those wishes "would be tantamount to severing [the child's] relationship with her [mother], and [that] result would not be in [the child's] best interest[s]" (citation omitted).

2. **Take Aways**: What should you do in the trial court if you are going to substitute judgment due to lack of capacity?

MAKE A RECORD AS TO WHY YOUR CLIENT LACKS CAPACITY!

What do you put on the record?

- The child's age (obviously)
- Put the child's position on the record
- Any special needs the client may have- put the child's IEP, 504 plan, and other educational records, such as education evaluations that support your position that the child lacks capacity should go into evidence. Even if the court already has this information from prior conferences, put these documents in evidence at trial in order to support the substitution of judgment if there is an appeal
- Any psychological evaluations the child may have had – or call the psychologist as a witness.
- If there is a forensic evaluation that addresses the child's special needs, make sure that information gets in
- Consider calling teachers or service providers as witnesses
- Elicit testimony regarding the child's special needs from the parents and other witnesses when they testify
- Make sure to do a Lincoln hearing so that the judge can observe the child's special needs first-hand

But see Matter of Krieger v Krieger, 65 A.D.3d 1350, (2nd Department 2009) "The court cannot force the AFC to provide expert testimony in this regard. The Family Court erred … in requiring the attorney for the child to offer expert testimony on the issues of the child's capacity to articulate her desires and whether the child would be at imminent risk of harm if she moved with the father to the State of Ohio, prior to the attorney advocating a position that could be viewed as contrary to the child's wishes. The Rules of the Chief Judge do not impose such a requirement (*see* 22 NYCRR 7.2)"

B. **What constitutes a "substantial risk of imminent, serious harm to the child"**?

Does the risk of imminent, serious harm have to be physical harm? Or does the risk of imminent, serious emotional harm justify substitution of judgment?

It may depend on what Appellate Department you practice in…

1. Third Department:

   a. Matter of Zakariah SS. v Tara TT., 143 A.D.3d 1103 (3rd Department 2016)
   Court upheld AFC's substitution of judgment where there was "ample evidence" of parental alienation:

   " [W]e have recognized that evidence that a parent's intentional efforts to alienate a child from another parent is so inimical to a child's interests as to raise a strong probability that the offending parent is unfit to be a custodial parent

   …… Family Court relied heavily on the testimony of a licensed psychologist who had performed a custody evaluation. That psychologist opined that the child had been "brainwashed, coached and rehearsed" by the mother. "

   We find **ample evidence in the record** that the mother caused severe emotional distress to the child by her ongoing attempts to alienate the child from the father. If the child's professed wishes were acceded to, that distress was likely to continue and perhaps worsen. Moreover, the child's purported wishes were likely to lead to the continuation and amplification of severe and unwarranted damage to the child's relationship with the father. *In such circumstances, we find no fault in the attorney for the child's decision to advocate for a position contrary to the child's wishes,*

given that such wishes were "likely to result in a substantial risk of imminent, serious harm to [her]"
(Emphasis added)

Note: Child was about 11-12 at the time of the trial

b. Matter of Cunningham v. Talbot, 152 A.D.3d 886 (3rd Department 2017)

The court upheld the AFC's decision to substitute judgment for the children where there was evidence of parental alienation.

"Here, there was ***ample evidence*** that the father had thwarted the mother's efforts to contact the children, attempted to alienate the children from the mother and manipulated the children's loyalty in order to turn them against the mother….[A]s ***the record evidence supports*** a finding that the children's wishes were both a product of the father's influence and "likely to result in a substantial risk of imminent, serious harm to [them]," the attorney for the children was justified in advocating for a position contrary to those wishes."
(Emphasis Added)

2. Fourth Department:

a. Matter of Viscuso v Viscuso, 129 A.D.3d 1679 (4th Department 2015)

Validating the AFC's decision to substitute judgment when there was ample evidence in the record of actions that constitute parental alienation:

"Here, there is a ***sound and substantial basis in the record*** for the court's conclusion that the mother interfered with the father's relationship with the child by, inter alia, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, attempting to instill in the child a fear of the father, and encouraging the child to medicate herself before going to visit the father." (Emphasis added)

b. Matter of Vega v. Delgado, 195 A.D.3d 1555 (4th Department 2021)

Upholding AFC's substitution of judgment where there was evidence of parental alienation.

Here, ***the record supports the determination*** that "the mother's persistent and pervasive pattern of alienating the child from the father 'is

likely to result in a substantial risk of imminent, serious harm to the child'. (citations omitted)

c. Matter of Lopez v. Lugo, 115 A.D.3d 1237 (4th Department 2014)

Validated the AFCs' decision to substitute judgment when the risk of serious harm was of a more physical nature:

Although an AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]), an exception exists where, as here, the AFC "is convinced . . . that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child.(citations omitted) Both AFCs noted for the court that they were advocating contrary to their respective clients' wishes, and both amply demonstrated the "substantial risk of imminent, serious harm" (22 NYCRR 7.2 [d] [3]), including the mother's arrest for possession of drugs in the children's presence, the numerous weapons that had been seized from the mother's house, and the credible evidence establishing that the mother's husband assaulted one of the subject children who attempted to intervene when the husband attacked the mother with an electrical cord.

3. **Takeaways**:

If you think you should substitute judgment based upon "substantial risk of imminent, serious harm to the child**"** what should you do?

- Start from the premise that substitution of judgment should be rare
- Make a list of items of **admissible** evidence that will support a finding of risk of serious harm to the child
- Consult an experienced AFC colleague if available

IV. IS IT MALPRACTICE IF THE AFC DOES NOT SUBSTITUTE JUDGMENT?

Probably not:

Venecia V. v. August V.,113 A.D.3d 122 (1st Department 2013)

The father in this case attempted to avoid paying the AFC's bill by claiming she committed legal malpractice because she did not substitute judgment for children

ages 17, 14 and 11. The court rejected the father's argument that the AFC should have substituted judgment, despite the fact that the forensic expert opined that the mother had engaged in alienation tactics against the father.

III. CONCLUSIONS:

- Substitution of Judgment should be very rare – particularly in the First and Second Departments
- Before you substitute judgment for any child over the age of about 5 years old, you should engage in a careful analysis of what *admissible* evidence you have that either the child lacks capacity or is facing risk of serious harm if their wishes were to be granted by the court.
- Make a careful record at trial that supports your substitution of judgment
- If you are not substituting your judgement, but you don't agree with your client's position, you are still bound to advocate zealously for their position. You cannot engage in trial advocacy which undermines their position

CHILD DIRECTED REPRESENTATION IN FAMILY COURT:

THE NEW YORK STATE MODEL
A PRACTITIONER'S PERSPECTIVE

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Keywords: Family Court of New York, Representation of Children, Child Directed Representation, Law Guardian, Attorney for the Child, Chief Judge's Rule 7.2, Best Interest of the Child, Substituted Judgment.

Abstract: New York State has been a leader in enacting laws, rules and regulations which promote the empowerment and participation of children in Family Court proceedings.

In 2007, the New York State Courts instituted a major change in guidelines for representation of minor children in Family Court. The rules now require attorneys for children to directly represent the child's wishes to the court in every case involving custody, visitation, neglect, abuse, juvenile delinquency, guardianship, foster care review, and Persons in Need of Supervision (PINS). These attorneys are no longer called "Law Guardians" but rather are referred to as "Attorneys for the Child" to clarify the change in the attorney's role. With few exceptions, attorneys for the child have the same confidential relationship and same ethical duties in representing a minor child as do attorneys representing adults.

An attorney for the child may only "substitute judgment" and put their own position on record in very limited cases where: 1. The attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or, 2. The attorney has concluded that the court's adoption of the child's expressed preference would expose the child to substantial risk of imminent, serious harm. *New York State Chief Judge's Rule 7.2. New York State Bar Association Guidelines for Representing Children.* Overall, exceptions to this rule have been narrowly construed by the courts.

Introduction:

New York State has been at the forefront of a nationwide movement to promote direct representation for children in Family Court proceedings. In New York, the Family Court hears the following types of cases: custody and visitation disputes, guardianship and adoption; child welfare cases including abuse, neglect, and termination of parental rights; juvenile delinquency and PINS (Persons in Need of Supervision) matters; and family offense matters. The Family Law in New York has evolved over the past fifty years to strengthen the voice of the court-involved child by providing zealous client directed representation for the child and by either encouraging or requiring child participation in many types of Family Court proceedings. However, one of the most significant changes in the area of child representation in New York debuted in 2007 with the introduction of The Chief Judge's Rule 7.2 for Attorneys Representing Children.

One thing that has remained constant over the years is the focus of the Family Court's decision making process. The central consideration in all New York State Family Court proceedings is the court's determination of what is in the best interest of the child. This "best interest" determination must be made in the context of what are often the competing interests and rights of the parents. This article will highlight some of the changes that have occurred since 2007 and discuss, from a practitoner's perspective, how the changes have impacted Family Court practice.

A Brief History of Child Representation in New York State:

Since 1962, New York State law has given courts the ability to assign counsel for children.[1] The law was initially employed to assign counsel for children who were the subject of juvenile delinquency proceedings. This was required after the United States Supreme Court decision, In re Gault, 387 U.S. 1, 87 S.Ct 1428 (1967). In its current form, Family Court Act §241 provides that, "[M]inors who are the subject of family court proceedings or appeals in proceedings originating in family court *should (*emphasis added*)* be represented by counsel of their own choosing or by assigned counsel". [2] Over the past fifty years, this practice has expanded to the point where counsel is assigned for children in most Family Court cases of all types.[3] Thus it is clear that the Family Court Act favors assignment of counsel for children in all matters.

Prior to 2007, New York utilized a "Law Guardian" model for child representation in Family Court. Although somewhat vague, the general job of the Law Guardian was to "represent the child" and to "help them express their wishes to the court".[4] This ambiguity resulted in a practice whereby Law Guardians would express the child's wishes to the court on their behalf, but not necessarily advocate for those wishes if the Law Guardian believed that what the child desired was not in their best interest.[5]

When representing younger children, the role of the Law Guardian was more akin to that of a Guardian ad Litem. In those circumstances, the Law Guardian was expected to review all available evidence before using their own judgment to form an opinion as to what was in the child's best interest. This investigation generally involved interviewing parents and collateral sources, reviewing evidence, records and reports, such as forensic custody evaluations or mental health evaluations. When representing a young child during a trial, the Law Guardian's cross examination of witnesses could be broad enough to bring out all relevant evidence that might assist them in forming or strengthening their position as to what result would be in the child's best interest. When representing a young child, the Law Guardian was sometimes viewed as

[1] New York Court Act § Family 241, 242.

[2] Generally ,the only type of New York Family Court proceedings in which the child or his/her parent can choose their own counsel are Juvenile Delinquency and PINS, since there is usually no competing interest between the child and the parent in these cases. While Family Court Act § 241 would seem to permit an uninterested third party to hire an attorney for the child, it is extremely rare to see that done, so that, in all other cases, the court selects and assigns counsel for the child to ensure that the attorney has no competing loyalties.

[3] In the jurisdiction in which this author practices, the court appoints counsel for children in an estimated 98 or 99% of cases.

[4] Former Family Court Act § 249

[5] Since the author did not practice as a Law Guardian in the years prior to 2007, she consulted with several attorneys who were Law Guardians during those years to develop information in this regard. Those attorneys wish to remain anonymous. The author also utilized The Legal Aid Society Juvenile Rights Division "Practice Manual for Law Guardians" by Gary Solomon, Esq., 2005, which was used as a training manual for Law Guardians at the time. Mr. Solomon is considered an expert in the field of Child Representation in New York State.

"united in interest" with the court, since both the court and the Law Guardian were working toward promoting the child's best interests.

When representing an older child, the Law Guardian's role was supposed to be more of a direct advocacy role. "The older and more intelligent and mature the child is, the more impact the child's wishes should have on the law guardian's decisions." The Legal Aid Society Juvenile Rights Division "Practice Manual for Law Guardians" by Gary Solomon, Esq., 2005, Vol. I Representing Children in Abuse and Neglect Proceedings p.27. There was never an actual rule or law in place which declared what "older" or "younger" meant, and it seemed to have varied by jurisdiction, and may have been, at least in part, influenced by the policy of the individual judge. As a result, the courts grappled with what age was the "cutoff" for the Law Guardian to substitute their judgment for that of the client. For example, prior to 2007, certain court decisions upheld the practice of the Law Guardian substituting judgment for clients as old as ten or eleven years old.[6] Other case law made it fairly clear that once a child was fourteen or fifteen years old, they had a right to have their Law Guardian directly represent their position.[7] Despite that, a "gray" area existed in which the Law Guardian could report the child's wishes to the court, but still advocate for what the Law Guardian thought was in the client's best interest.

The ambiguity in the law presented Law Guardians with several dilemmas. First, at what age or level of maturity was a child considered "old enough" for the Law Guardian to advocate strictly for his or her wishes? What if advocating for the child's wishes was, in the Law Guardian's opinion, contrary to the child's best interest? Most importantly, what if advocating for the child's wishes put the child in some type of danger? Did "danger" only refer to physical danger or did it include emotional danger? How much danger was enough for the Law Guardian to substitute their own judgment and override the wishes of an "older child'?

Chief Judge's Rule 7.2: A Clarification

In 2007, the late New York State Chief Judge Judith S. Kaye instituted a major change in policy and practice for representation of minor children in Family Court. The Chief Judge's Rule 7.2 (hereinafter "Rule 7.2") requires the Attorney for the Child to directly represent the child's wishes to the court in every case involving custody, visitation, neglect, abuse, juvenile delinquency, guardianship, adoption, foster care review, and Persons in Need of Supervision (PINS).

Rule 7.2 was a crucial step toward clarifying the role of the attorney representing the minor client, even officially changing the title of the attorney's role from Law Guardian to Attorney for the Child (hereinafter "AFC") to more accurately reflect the role of the attorney as a direct advocate for the child's position.[8] "The [AFC] owes a duty of undivided loyalty to the child,

[6] See Carballeira v. Shumway, 273 A.D.2d753, 710 N.Y.S.2d 149 (3rd Dept. 1991) leave denied, 95 N.Y.2d 764, 716 N.Y.S.2d 38 (Upholding the use of substituted judgment for an eleven year old with some disabilities, but who had clearly expressed his wishes to the contrary); Matter of Amika P., 179 Misc.2d 387, 684 N.Y.S.2d 761 (Fam. Ct. Bronx. Co. 1999) (Law Guardian was justified in advocating that a ten year old client should remain in foster care despite her desire to return home)

[7] Matter of Colleen CC, 232 A.D.2d 787, 648 N.Y.S.2d 754 (3rd Dept. 1996)(Ruling that the Law Guardian provided ineffective assistance of counsel to a fourteen year old client when he impeached the child's testimony concerning sexual abuse).

[8] New York State Bar Association's 2015 Standards for Attorneys Representing Children

shall keep client confidences and shall advocate the child's position." New York State Bar Association Standards for Representing Children (2015) Commentaries at A-1. Further, "The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on: ex-parte communications; disclosure of client confidences and attorney work product; conflicts of interest; and becoming a witness in the litigation." This is the same mandate for Attorney-Client relationships contained in the New York Rules of Professional Conduct for Attorneys.[9] This resulted in a shift in practice for children's attorneys who previously had a more amorphous duty of confidentiality with their clients who were experiencing adverse events in their home. Prior to 2007, some courts expected that the Law Guardian would "report" to the court on problems in the home revealed by the child, even if the child requested confidentiality.

Client Consultation: The Hallmark of Direct Representation:

Central to Rule 7.2's mandate for direct representation of minors is the requirement that the AFC meet with, counsel and advise the child in an age-appropriate fashion. This component of the Rule cautions the attorney not to impose his/her judgment on the child during the consultation.

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

Some have raised the issue that meeting with very young children who are pre-verbal is not useful to the AFC. However, it is the practice of this author's agency to meet with every client, regardless of age. Social worker staff is often utilized to meet with young children and give a detailed report to the attorney. It is our experience that even a very young child with limited verbal skills can often give the interviewer some direction as to what the attorney's position should be. For example, a child can tell you how they "feel" when they visit the non-custodial parent, or perhaps whether they feel "safe" at home. If they are in foster care, they will likely tell you they miss their parents, and let you know what is going on in the foster home. Moreover, there have been many instances where social workers have identified special needs in these young children which require further attention.

Developing a rapport with a child of any age is critical to eliciting important information from them. Attorneys for children should be cognizant of the fact that the prospect of meeting with their attorney may cause the child some level of anxiety and fear. It is important to meet with the

[9] [22 NYCRR 1200.0 1.2[a]] NYSBA Standards for Attorneys Representing Children in Custody, Visitation, and Guardianship proceedings. 2015. Section A-2.

child alone in a calm, comfortable environment, away from the potential interference by any interested party. This author recommends spending ample time at the beginning of an interview getting to know the child and talking to them about subjects relevant to them. For example, depending on the child's age you might talk about favorite toys, video games, friends, clothes, music, school, sports, pets, hobbies, etc.. Showing the child that you are human is important too. If you have children or grandchildren, consider sharing some information about that with the client, so that they understand that attorneys are real people, too.

When explaining your role, the basics of the issue in litigation and the court process, make sure to use simple language with young children, avoiding legal jargon. Assure the child that you are not on anyone's "side" and you won't be repeating anything they say without their express permission. Repeat things using different words if you are not sure the child understands what you are saying. At the same time, try not to talk down to older children, which will immediately alienate them. Let your older clients know that in between personal meetings with you they are free to contact you directly without going through a parent, caseworker or foster parent. Offer older clients the option of texting you or emailing you if you can, then follow up with a phone call or videochat to explain the issue fully and answer questions.

If the child's position seems unreasonable, impractical, or contrary to the law or policy, the AFC needs to discuss that with them and give the child a "reality check". For example, "I understand that you want to leave foster care right now, but I don't think the judge will do that at the next court hearing because your mother is still struggling with her problem and she can't take care of you at this time. Would it help if you could visit with your mother more often in the meantime?" Through counseling your client, you can help guide them toward more realistic expectations of the likely outcome of each court hearing.

<u>The Very Limited Use of Substituted Judgment:</u>

Rule 7.2 requires the AFC to be a direct, zealous advocate for the client. However, practical considerations dictate that there will always be the occasional case in which adhering to the child's position would place the child in danger. In those situations, the AFC will have to substitute his or her judgment for that of the child client. Recognizing of this, Rule 7.2 addresses what has often been one of the "stickier" issues confronting attorneys for children: Rule 7.2 defines the circumstances in which an AFC may substitute his or her own judgment for that of the minor child:

> An Attorney for the Child (hereinafter "AFC") may only substitute his or her judgment for that of the minor child in very limited cases where:
>
> 1. The attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or,
>
> 2. The attorney has concluded that the court's adoption of the child's expressed preference would expose the child to substantial risk of imminent, serious harm.

New York State Chief Judge's Rule 7.2. New York State Bar Association Guidelines for Representing Children.

The words chosen by the drafters of Rule 7.2 are clearly calculated to place limits upon the ability of the AFC to override their client's wishes. Simply because a child is young, lacks maturity or has an undeveloped sense of judgment does not mean the attorney can use substituted judgment. It is noteworthy that the New York State Bar Association Standards for Attorneys Representing Children (2015) consider use of substituted judgment an "extraordinary step". [10]

While Rule 7.2 goes a long way to clarifying the circumstances in which an AFC may substitute his or her judgment for their client's, questions still arise as to how to interpret these exceptions. So, for example, how young or incapacitated must a child be to say that he/she "clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions"? What is the definition of 'substantial risk of imminent, serious harm"? Is the harm that is contemplated include only physical harm? Or does it include emotional harm? If so, does parental alienation constitute emotional harm? [11]

Perhaps recognizing that children of the same age can vary greatly in their maturity level and emotional development, neither Rule 7.2 nor the NYSBA Standards set forth a bright line age at which it is automatically acceptable for an AFC to substitute his or her judgment for that of the client. Certainly, if a child is preverbal, substituted judgment is permissible, however, it must be based upon legal analysis, facts, circumstances and evidence, as opposed to the attorney's "gut feeling" or personal preferences.[12]

Once a child is verbal and can engage in a conversation, the AFC has a duty to explore the issues at hand with the child in an age-appropriate manner. Most children start having this ability for a conversation sometime between approximately ages three and five years old. It is extremely helpful for the AFC to have some basic level of training on early child development, so that they can gauge the degree of maturity and reliability of the information coming from such a young child. It is also important to avoid suggesting answers to the child during the interview, as some children are so eager to please that they will automatically agree with everything the interviewer says. Therefore, it is usually best to use open-ended questions in these situations if possible. In New York State, AFC's are required to attend mandatory training sessions annually in order to remain up to date on important issues related to their practice. Training on interviewing techniques and child development is offered on a regular basis.

Usually there is something to be gleaned from an interview with a young child that can help direct the AFC's position. There are some young children who may completely lack the capacity to understand problems and issues in their family, but there are others who will at least partially understand the situation, and still others who can give you a complete run down of what's going on between the parents, and tell you what they think is best for them. Depending upon where your young client falls on this spectrum, you will at least have a starting point as to the direction you need to take in court.

In practice, under Rule 7.2 once the client is about 5 or 6 years old, barring any unusual capacity limitations, the AFC's ability to substitute judgment for client is very limited. Of course, the

[10] NYSBA 2015 Standards for Attorneys Representing Children, Commentaries. Section A-3

[11] The use of "Substituted Judgment" is never permitted in defending a child against Juvenile Delinquency or PINS charges.

[12] NYSBA Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings (2015) Section A-3.

client must still be counseled about any lack of "realism" inherent in their position and what actions the AFC expects the court to take. The AFC should also expect that the court may not always agree with their position since the position of the child, while respected by the courts, is not always controlling in the court's best interest determination.

The New York appellate courts have given practitioners some guidance on the use of substituted judgment since Rule 7.2 was enacted in 2007. Certain Appellate "Divisions", of which there are four in New York State, have rendered more decisions on this topic than others.[13]

In Silverman v. Silverman, 186 A.D.3d 123 (2nd Department 2020), an Appellate court found that the AFC improperly substituted their judgment during a custody trial. The court ruled there was "no evidence in the record that the children lacked capacity for knowing, voluntary and considered judgment. This exception generally applies to young children and children with disabilities**".** The children in this case were 11 and 13, they were both on high honor roll and involved in extracurricular activities. The court admonished the AFC for failing to present witnesses and evidence that would have supported the children's stated position, and for failing to zealously cross-examine witnesses who presented evidence contrary to the children's stated position. The court found that the children "failed to receive meaningful assistance of counsel" The matter was reversed and remitted for new proceedings, and to appoint a new AFC.

Two years later, in Sloma vs. Saya, 210 A.D.3d 1494 (4th Department 2022) an Appellate court determined that that the child who was the subject of a custody matter received ineffective assistance of counsel at the trial court level because the AFC advocated contrary to the child's wishes. The court ruled that there was no issue as to the child's capacity, and there was apparently nothing in the record to support a finding that following the child's wishes would be likely to result in "substantial risk of serious harm to the child." The court further found that the AFC engaged in trial conduct which undermined the child's position.

Several Appellate decisions have validated the AFC's decision to substitute judgment, but unfortunately these decisions do not include much factual recitation or analysis which would serve to guide practitioners. In Matter of Mason v Mason, 103 A.D.3d 1207 (4th Dept 2013), the court stated that"….[w]e note that the record supports a finding that the child lacked the capacity for knowing, voluntary and considered judgment". Here, we are left wondering how old the child was, or whether they were disabled. One important practice tip we *are* left with is to make sure the trial record supports the assertion that the child lacks capacity. *See also* Matter of Muriel v Muriel, 179 A.D.3d 1529 (4th Department 2020)(Upholding the AFC's substitution of judgment where the children were "of a young age").

Another interesting case is Brian S, 141 A.D.3d 1145 (4th Dept. 2016). Brian S. was a child welfare case in which the mother was charged with neglect. The case involved three siblings, ages 15, 13 and 12. One AFC was assigned to represent all three siblings.

The decision in Brian S. addressed the issues of effective assistance of counsel and substitution of judgment. Id. at 132. In this case, the children had differing positions as to whether or not mother was neglectful, and whether each wanted to remain living with her. This disparity

[13] New York is divided into four Appellate Divisions (Departments) based upon geography. The First and Second Departments are in the southern part of the state, the Third Department is in the central portion of the state, and the Fourth Department comprises the further north and western part of the state.

required divergent advocacy and litigation strategies. However, the AFC failed to bring that to the court's attention, deciding instead to substitute their judgment for Brian, apparently believing that the situation in the home presented an "imminent risk of serious harm" if the children lived with their mother. On appeal, one child alleged that the AFC never even consulted with her on her position.

The majority opinion found that under Rule 7.2, it was impossible for the AFC to zealously advocate for all three children's positions at the same time. Although the court acknowledged that there was evidence at trial that the children were truant, that the mother occasionally used drugs, and that the mother may have struck one of the children with a belt, the court found that these factors did not present an 'imminent risk of serious harm" such that the AFC would be justified in substituting his judgment for the clients. As such, the appellate court returned the matter to the trial court for appointment of separate AFC's for each child, and a new trial.

Other New York courts have emphasized the importance of effective representation for children. In Matter of Mark T. v. Joyanna U., 64 A.D.3d 1092 (3rd Det. 2009), the court held that an 11 ½ year old client was deprived of effective assistance of counsel when his AFC on appeal failed to meet with him during the appeals process (even though a different trial AFC had met with him during the trial court level proceedings). "…the appellate attorney should have met with the child and should have been directed by the wishes of the child, even if he believed that what the child wanted was not in the child's best interests. By proceeding on the appeal without consulting and advising his client, appellate counsel failed to fulfill his essential obligation. [citations omitted]. Moreover, in Matter of Michael H. v. April H., 34 Misc.3d 519 (Fam. Ct. Clinton County 2011), a custody dispute, the trial court declared a mistrial when the AFC took a position directly contrary to that of her 14 year old client, after the client had testified in an *in camera* hearing with just the AFC and the Judge. See also Matter of Alyson J . and Laurie J., 88 A.D. 3d 1201, 931 N.Y.S.2d 741 (3rd, Dept. 2011).

In dealing with the issue of whether "imminent risk of serious harm" extends beyond serious physical harm to include serious emotional harm, some courts have decided in the affirmative.[14] Several cases have recently held that extreme parental alienation can constitute "imminent risk of serious harm" such that an AFC is justified in substituting his or her judgment for the child's wishes.

In Matter of Vicuso v. Vicuso, 129 A.D.3d 1679 (4th Dept. 2015), although the opinion did not mention the age of the child, it is clear that the child expressed a clear wish to live with her mother. However, at trial, AFC advocated for custody to the father. The appellate court concluded that "the mother's persistent and pervasive pattern of alienating the child from the father is 'likely to result in a substantial risk of imminent serious harm to the child' [citations

[14] Matter of Lopez v. Lugo, 115 A.D.3d 1237 (4th Department 2014). The court upheld the AFC's substitution of judgment where the mother was arrested for possession of drugs in the children's presence, numerous weapons had been seized from the mother's house, and there was credible evidence establishing that the mother's husband assaulted one of the subject children who attempted to intervene when the husband attacked the mother with an electrical cord.

omitted] and we conclude that the AFC acted in accordance with her ethical duties." Id. at 1681. See also Matter of Zakariah SS vs. Tara TT., 143 A.D.3d.1103 (3rd Dept. 2016) (sanctioning AFC's use of substituted judgment for an 11 year old client in a custody case where the mother caused "severe emotional distress to the child by her ongoing attempts to alienate the child from the father"); Matter of Grabowski vs. Smith, 182 A.D. 3d 1002 (4th Dept. 2020) (upholding the AFC's decision to substitute judgment on the theory that the [father's] persistent and pervasive pattern of alienating the child from the [mother] is likely to result in a substantial risk of imminent, serious harm to the child); Matter of Cunningham v. Talbot, 152 A.D.3d 886 (3rd Department 2017) (validating the AFC's decision to substitute judgment for the children where there was evidence of parental alienation in the record). Matter of Vega v. Delgado, 195 A.D.3d 1555 (4th Department 2021) (ruling that the record supported the determination that the mother's persistent and pervasive pattern of alienating the child from the father 'is likely to result in a substantial risk of imminent, serious harm to the child')

While these cases still leave us with many questions, what *is* clear is that if parental alienation is to justify substituted judgment, the alienation must be extreme, and it is recommended that the AFC should have some evidence, in the form of psychologist or mental health testimony, to support overriding the child's wishes.

Conclusion:

Although some murky areas still remain for AFC's who practice in New York State, the Chief Judge's Rule 7.2 has made a marked difference in their practice, and in the courts' decision making process, as well. As a result of clearly defining the duties and obligations (both ethical and otherwise) for AFC's, Rule 7.2 makes an AFC's job more straightforward (in most cases) and leaves less room for us to inject our own personal opinions and value judgments into the equation. Minor clients can now fully trust that their legal representative will zealously advocate for their wishes. The result is that the question of what is in the child's best interest is fully left to the province of the court.

THE LEGAL AID SOCIETY
JUVENILE RIGHTS PRACTICE
MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Child Welfare Proceedings:
The Role Of The Attorney For The Child

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

Part One: Introduction

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

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

To ensure that another key perspective is considered by the judge, the subject child also is assigned a lawyer, who, in the vast majority of cases filed in New York City, is employed by The Legal Aid Society. Against this backdrop of competing parties and lawyers, the role of the child's lawyer seems clear. If, as they are bound collectively to do, the judge, and the lawyers representing the agency, the respondents and any intervening relatives marshal all relevant evidence and also invoke the child's interests, the child's lawyer should be free to focus on the one missing ingredient in this adversarial process: presentation and advocacy of the child's expressed position, as developed and refined through the lawyer-client counseling process.

Despite all this, the role of a child's lawyer in Family Court proceedings has long been a controversial subject for academics and court practitioners. Academia has produced a surfeit of

[1] These materials are derived from a document that was initially prepared by Gary Solomon and then revised during a collaborative process involving other Society staff. That document, representing the official policy of The Legal Aid Society, was made available to the public on October 22, 2008, along with a short New York Law Journal article, entitled "*Perspective: New Era in Representing Children*," that was co-authored by Tamara Steckler, JRP's Attorney-in-Charge, and Gary Solomon. The policy has not been altered but these materials have been updated with caselaw.

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

The Legal Aid Society's Juvenile Rights Practice is committed to the zealous representation of its clients, and to granting clients the opportunity to participate in decision-

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

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

With respect to representation of children in New York, *compare* Angela D. Lurie, *Representing the Child-Client: Kids are People Too*, 11 N.Y.L. SCH. J. HUM. RTS. 205, 238-239 (1993) (author recognizes hybrid role of lawyer assigned as "law guardian," who should abide by wishes of children who are capable of making "considered judgment" and make decisions on behalf of children who are not) *with* Diane Somberg, *Defining the Role of Law Guardians in New York By Statute, Standards and Case Law*, 19 TOURO L. REV. 529, 566 (2003) (author prefers "best interests" model for law guardians in child protective proceedings).

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

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

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

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

Part Two: Legal Background

New York Statutes and Rules

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

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

FCA §§ 242, 249(a), and 1016 also state that the attorney is assigned to "represent" the child.[4]

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

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

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

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

The attorney for the child used to be known as the "law guardian." In 2010, the Legislature amended the Family Court Act and other statutes to change the label from "law guardian" to "attorney" for the child. The legislative Memo states: "New York State's tradition of affording legal representation to children in a variety of proceedings is long-standing and nationally recognized. Its Family Court Act, enacted in 1962, was cited by the US Supreme Court in its seminal decision in Matter of Gault, 387 U.S. 1 (1967), which required counsel in juvenile delinquency proceedings and equated its role with counsel in criminal cases. However, almost from its inception, the ambiguous term "law guardian," although defined in section 242 of the Family Court Act as an attorney, has created debate and confusion. The term suggests a role that combines functions of the attorney-advocate with those of a guardian ad litem, functions that are inherently incompatible. This has fostered uncertainty not only among children's lawyers but also among other participants in family law proceedings, including judges, parents, and parents' attorneys, on such fundamental issues as attorney-client confidentiality, ex parte communications[5] and the impact of a child's preferences on litigation goals. The result has all too often been misunderstanding and clashing expectations about the actions and intentions of the child's lawyer, adding needless complexity and confusion to cases involving children."[6]

Even before these statutory amendments, the existence of a traditional attorney-client relationship was recognized via adoption of § 7.2 of the Rules of the Chief Judge, entitled "Function of the attorney for the child." Rule 7.2 states that in juvenile delinquency and person in need of supervision proceedings, "the attorney for the child must zealously defend the child," and that in other proceedings, the child's attorney "should be directed by the wishes of the child" if "the child is capable of knowing, voluntary and considered judgment," even if the attorney "believes that what the child wants is not in the child's best interests." The attorney "would be justified in advocating a position that is contrary to the child's wishes" when the attorney "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child...." There is no requirement that the attorney justify such a conclusion for the court.[7] Consistent with FCA § 241, Rule 7.2 also states that "[w]hen the attorney

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[5] For purposes of the prohibition against ex parte attorney communications with a represented party, a child represented by an attorney is considered a "party," and, therefore, neither the respondent's lawyer nor the petitioner's lawyer may communicate with the child without the consent of the attorney. *NYS Professional Conduct Rule 4.2.* The child also enjoys the protection of the attorney-client privilege. *Matter of Angelina AA.*, 211 A.D.2d 951, 953 (3d Dep't 1995) (child's attorney could not testify where child had not waived privilege, since child had attorney-client relationship with attorney).

[6] *See also New York State Bar Association Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings, Preface* (2007) (term "law guardian" is not used "because the label is outdated and confusing to attorneys and parties alike"); *State Bar Ethics Opinion 656*, N.Y.L.J., Jan. 21, 1994, at 2 ("Several commentators have noted that the [Family Court] Act's drafters apparently envisioned law guardians to be 'the equivalent to legal counsel,' even if the term 'guardian' assigns to these lawyers some of the additional investigative and parental functions of the guardian ad litem").

[7] *See Matter of Mason v. Mason*, 103 A.D.3d 1207 (4th Dep't 2013) (attorney for child was not required to state basis for advocating position contrary to child's express wishes; as required, attorney informed court of child's wishes, and record supported finding that child lacked capacity for knowing, voluntary and considered judgment);
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overrides the child's wishes, the attorney must inform the court of the child's expressed preference "if the child wants the attorney to do so." Rule 7.2 was promulgated shortly after, and is consistent with, the New York State Bar Association's Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings (*see* below).

Moreover, counsel chosen by the child certainly is obligated to advocate in a manner consistent with the child's stated position: indeed, if the lawyer did otherwise, the child would be entitled to dismiss the lawyer and choose another one.[8] Since the Legislature cannot have contemplated that children represented by an assigned attorney have inferior rights, it follows that an assigned lawyer cannot substitute her own judgment for that of the child merely because the child is not in a position to choose counsel. And, because FCA § 241 defines *all* lawyers for the child -- the Family Court Act does not contain separate definitions applicable in each type of proceeding -- there is no reason to believe that lawyers for similarly situated children in different types of proceedings should assume different roles.

Rule 1.14 of New York State's *Rules of Professional Conduct*, entitled "Client With Diminished Capacity," states in subdivision (a) as follows: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client." Rule 1.14(a) does not define "capacity to make considered decisions" or "diminished." Rule 1.14(b) states that "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." Rule 1.14(b) does not contain express authority to make litigation decisions on behalf of a client, and does not even authorize "reasonable necessary protective action" unless the lawyer reasonably believes that the client has diminished capacity *and* is at risk of harm. Nothing in Rule 1.14 requires any shift in the role of the child's attorney as now defined by the Legislature and Chief Judge's Rule 7.2.

New York State Bar Association Standards

Matter of Krieger v. Krieger, 65 A.D.3d 1350 (2d Dep't 2009) (court improperly required attorney for child to offer expert testimony regarding child's capacity to articulate desires, and whether child would be at imminent risk of harm if she moved with father to Ohio, before attorney advocated position that could be viewed as contrary to child's wishes; 22 NYCRR § 7.2, does not impose such a requirement).

That said, the case law pertaining to Rule 7.2, discussed later on, makes it clear that at least when facts in the record suggest that the attorney may be improperly invoking a Rule 7.2 exception, the court or a party is entitled to raise the issue. However a party must move for disqualification of the attorney in order to preserve the issue for appeal. *Matter of Emmanuel J.*, 149 A.D.3d 1292 (3d Dept. 2017).

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

The Committee on Children and the Law of the New York State Bar Association ("N.Y.S.B.A.") issued, in 1996, the *Law Guardian Representation Standards*, which have guided courts and practitioners.[9] In June 2007, the Committee on Children and the Law replaced the 1996 standards with new *Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings*. These standards were updated and re-issued in 2015, as *Standards for Attorneys Representing Children in New York Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceedings*.

The new standards clearly outline a traditional advocacy role for the child's attorney. "Whether retained or assigned … the attorney for the child shall, to the greatest possible extent, maintain a traditional attorney-client relationship with the child. The attorney owes a duty of undivided loyalty to the child, shall keep client confidences, and shall advocate the child's position. In determining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities and have a thorough knowledge of the child's circumstances. Ethics rules require a lawyer 'to abide by a client's decisions concerning the objectives of representation and ... consult with the client as to the means by which they are to be pursued.' (NY Rules of Professional Conduct [22 NYCRR 1200.0], rule 1.2[a]). In addition, the lawyer must 'reasonably consult with the client about the means by which the client's objectives are to be accomplished.' Rule 1.4(a)(2). In 2007 the Chief Judge of the New York State Court of Appeals made it clear that unless a child is not capable of expressing a preference or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions, or the child's articulated position would place the child at imminent risk of serious harm, the attorney must not 'substitute judgment' in determining and advocating the child's position, even if the attorney believes that what the child wants is not in the child's best interests. Rules of the Chief Judge, §7.2."[10]

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

[10] *N.Y.S.B.A. Standard A-1*; *see also N.Y.S.B.A. Standard A-3* (attorney "must not substitute judgment and advocate in a manner that is contrary to a child's articulated preferences," except when "[t]he attorney has concluded that the court's adoption of the child's expressed preference would expose the child to substantial risk of imminent, serious harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and /or supervision," or "[t]he attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions").

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

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Other Authorities

The traditional advocacy approach "appears to represent the majority approach among legal academics" in the United States.[11]

For example, standards issued by the American Bar Association ("A.B.A.") take the view that when the lawyer is assigned under State law as *counsel for the child,* the lawyer cannot properly perform the functions of a guardian *ad litem*. If the child is capable of communicating a preference, the lawyer must provide client-directed representation. "These Standards do not accept the idea that children of certain ages are 'impaired,' 'disabled,' 'incompetent,' or lack capacity to determine their position in litigation."[12] Because "the child is a separate individual with potentially discrete and independent views," "the child's attorney must advocate the child's articulated position * * * [i]n all but the exceptional case, such as with a preverbal child."[13] In an effort to preserve the role and functions of a lawyer, the ABA also asserts that when the child is unable to express a position or is incapable of understanding the legal or factual issues, the lawyer "should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision-making of the child's attorney and a person acting as guardian ad litem."[14]

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

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the attorney refrain from disclosing the child's expressed preferences.

[11] *See, e.g.*, Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L.REV. 895, n.4 (1999).

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

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

[14] *See Commentary to A.B.A. Standard B-4(1)*.

judgment for the child's and formulate and present a position which serves the child's interests."[15]

Requesting assignment of a GAL does not appear to be an option available to the child's lawyer in New York; the Legislature has provided for assignment of a lawyer who either advocates for what the child wants or substitutes judgment, and has not authorized assignment of a guardian *ad litem* as well.[16] However, in other respects, the N.A.C.C.'s approach, which permits the lawyer to "substitute judgment," is more suitable for New York lawyers than the ABA's approach, which, on its face at least, requires lawyers to advocate for the expressed wishes of toddlers.

The Questions Left Unanswered

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

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

[16] *See Fargnoli v. Faber*, 105 A.D.2d 523, 524 (3rd Dep't 1984) (law guardians, not guardians *ad litem*, should be appointed when minors are subject of proceedings in Family Court); *Anonymous v. Anonymous*, 70 Misc.2d 584, 585 (Fam. Ct., Rockland County, 1972) ("It would therefore clearly appear that the intention of the Legislature in enacting sections 241 and 249 of the Family Court Act was to provide for representation of a minor in a Family Court proceeding by a Law Guardian or counsel of his own choosing and not by a guardian ad litem pursuant to CPLR"); *compare Matter of Farah P.*, N.Y.L.J., Nov. 7, 2008, at 27 (Fam. Ct., Kings Co.) (guardian *ad litem* must be appointed pursuant to CPLR 1202 for young adult over age of eighteen who is by reason of mental illness or developmental delay incapable of understanding proceedings, assisting counsel and protecting his or her rights; child's attorney may make decisions for child under eighteen where child is unable to make those decisions, but once child turns eighteen the attorney ceases to have dual function of representing child's interests and desires). Moreover, by requesting appointment of a guardian *ad litem*, the lawyer, supposedly a loyal advocate, invites introduction of a new "player" into the proceeding who may well undermine the client's chances of achieving his or her stated goals. *Cf. A.B.A. Model Rules of Prof'l Conduct, Commentary to Rule 1.14* ("Disclosure of the client's diminished capacity could adversely affect the client's interests").

Part Three: JRP'S Representation Model

Counseling the Client and Developing a Litigation Strategy

Lawyers are better able than clients to recognize when goals are unrealistic or may not actually advance the client's broader interests. Needless to say, this is especially true of lawyers who represent children. Thus, it is vitally important for the child's lawyer to work hard to help the child understand the lawyer's perspective and thinking. Also, because there are limits to a young child's ability to comprehend the lawyer-client relationship and to accurately communicate her wishes and goals, the lawyer needs to "educate the client about the lawyer-client relationship," and, when "confusion derives from developmentally imposed obstacles, the lawyer's attempt at clarification must engage that developmental process."[17]

"The lawyer has a duty to explain to the child, in a developmentally appropriate manner, all information that will help the child to understand the proceedings, make decisions, and otherwise provide the attorney with meaningful input and guidance."[18] The lawyer's duties as counselor and advisor include: "[d]eveloping a thorough knowledge of the child's circumstances and needs,"[19] [i]nforming the child of the relevant facts and applicable laws,"[20] "[e]xplaining the practical effects of taking various positions, which may include the impact of such decisions on the child and other family members or on future legal proceedings,"[21] "[e]xpressing an opinion

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

[18] *N.Y.S.B.A. Standard A-2*; *but see* In re P.G.F., 247 A.3d 955 (Pa. 2021) (in termination of parental rights proceeding, majority concludes that where child is capable of expressing preference but not in fully informed and articulate fashion, attorney for child has some discretion to refrain from disclosing sensitive facts to child that could cause emotional harm).

[19] *N.Y.S.B.A. Standard A-2(1)*.

[20] *N.Y.S.B.A. Standard A-2(2)*. However, "[i]n some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders." *Commentary to NYS Professional Conduct Rule 1.4*; *see also In re P.G.F.*, 247 A.3d 955 (Pa. 2021) (where child understands to some degree what is at stake and is capable of expressing some preference, but is unable to do so in fully informed and articulate fashion, child's attorney has some discretion to withhold highly sensitive, significant, and potentially emotionally damaging information when attempting to discern child's preference; in termination of parental rights case, attorney for six-year-old child reasonably declined to explain to child that he had biological father where child was not aware father existed and had already bonded with step-father and viewed him as father, and attorney reasonably concluded that explaining these facts to child would have risked confusion, anxiety, and emotional trauma, potentially resulting in lasting damage to child's well-being).

[21] *N.Y.S.B.A. Standard A-2(3)*.

concerning the likelihood that the court will accept particular arguments,"[22] "[p]roviding an assessment of the case and the best position for the child to take, and the reasons for such assessment,"[23] and "[c]ounseling against or in favor of pursuing a particular position, and emphasizing the entire spectrum of consequences that might result from assertion of that position."[24]

Thus, in the end, "[t]he attorney's responsibility to adhere to the client's directions refers primarily to the child's authority to make certain fundamental decisions when, at the end of the day, the attorney and the child disagree," and "representation is also 'attorney-directed' in the sense that, particularly when representing a young child, an attorney has the responsibility to bring his/her knowledge and expertise to bear in counseling the client to make sound decisions."[25] In many instances, the child will follow the lawyer's sound advice.[26]

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[22] *N.Y.S.B.A. Standard A-2(4)*.

[23] *N.Y.S.B.A. Standard A-2(5)*.

[24] *N.Y.S.B.A. Standard A-2(6)*. *See also NYS Professional Conduct Rule 1.4(a)* (lawyer shall promptly inform client of "any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules," "any information required by court rule or other law to be communicated to a client," and "material developments in the matter including settlement or plea offers"; shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished," "keep the client reasonably informed about the status of the matter," "promptly comply with a client's reasonable requests for information," and "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law"; and shall "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); *NYS Professional Conduct Rule 2.1* ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice," and "may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation"); *Commentary to NYS Professional Conduct Rule 1.4* ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved…. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail…. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity"); *Report of the Working Group on the Best Interests of the Child and the Role of the Attorney*, 6 NEV. L.J. 682, 684-685 (2006) (lawyer should "let the child talk" and "listen to the child," begin with the child's agenda, gather information from collateral sources, explain the attorney-client relationship, encourage the child to speak with others, explain the court process, help child understand that she has right to have wishes advocated for without attribution, and help child understand the different pressures operating on her); Robert D. Fleischner and Dara L. Schur, *Representing Clients Who Have or May Have "Diminished Capacity": Ethics Issues*, 41 *CLEARINGHOUSE REV. J. OF POVERTY LAW AND POLICY* 346, 356 (September/October 2007) ("Clients often direct their attorneys to take positions that may undermine their long-term goals. When getting the client's input on a strategic decision in a case, ask the client more than once and in different ways. For example, perhaps your client was experiencing disability-related difficulties when you first asked about a particular issue. Asking again at a different time may yield a more informed decision. Trying to get to know the client and gaining an understanding of the client's long-term goals will help you in counseling the client about how to proceed in the short term").

[25] *Commentary to N.Y.S.B.A. Standard A-2*.

However, although the lawyer may attempt to persuade the child to select intermediate and long-term goals that are more realistic and appropriate than the goals identified by the child, the lawyer "must take care not to overwhelm the child's will and thus override the child's actual wishes" and "must remain aware of the power dynamics inherent in adult/child relationships and remind the child that the attorney's role is to assist clients in achieving their wishes and protecting their legal interests."[27] The counseling role should be undertaken to enlighten and guide the client, not to remove the client as an obstacle to the achievement of what the lawyer wants. This is particularly important given that the attorney for the child typically has a substantial influence on the proceedings.

Determining the Child's Capacity to Make Decisions

Generally

The lawyer's determination of the child's capacity to make decisions "should be made at the outset of the representation in accordance with a principled analytic framework."[28] Among the criteria that should be used in assessing capacity are: the child's developmental stage (cognitive ability, socialization, emotional development); the child's expression of a relevant position (ability to communicate with lawyer, ability to articulate reasons); the child's individual decision-making process (influence - coercion - exploitation, conformity, variability and consistency); and the child's ability to understand consequences (risk of harm, finality of decision).[29]

A lawyer should not "bootstrap" during this process by treating what appears to the lawyer to be a bad decision by the child as conclusive evidence of a lack of capacity even when

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

[27] *Commentary to N.Y.S.B.A. Standard A-2.*

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

[29] *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1313 (1996); *see also NYS Professional Conduct Rule 1.14* ("In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: (i) the client's ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known long-term commitments and values of the client"); *N.Y.S.B.A. Standard* A-3 (child's attorney may "substitute judgment and advocate in a manner that is contrary to a child's articulated preferences" when "[t]he attorney is convinced that the child is not competent due to an inability to understand the factual issues involved in the case, or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions"); *Commentary to N.Y.S.B.A. Standard* A-3 ("[a]ll that is required is that the child have a basic understanding of issues and consequences"); Report of the Working Group on the Best Interests of the Child and the Role of the Attorney, 6 NEV. L.J. at 685.

the child has been pressured or manipulated to some degree by an adult; the lawyer is free to counsel the child regarding a possibly bad decision, but not override it.[30] And, when the determination of capacity is a close call, the lawyer should seek the assistance of a qualified mental health professional, preferably one who is already involved with the child.[31]

A determination regarding capacity is not an "all or nothing," or immutable conclusion. A child may be capable of deciding some issues but not others. A child's disability "is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others."[32] Also, "[i]t is possible for the child client to develop from a child incapable of meaningful participation in the litigation… to a child capable of such participation during the course of the attorney client relationship. In such cases,

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[30] *Matter of Venecia V. v. August V.*, 113 A.D.3d 122 (1st Dep't 2013) (although father, who asserted legal malpractice as affirmative defense to fee claim of attorney for children, contended that attorney ignored abundant evidence that children's judgment was not voluntary and was manipulated by mother, and ignored forensic and other evidence of alienation, Rule 7.2 "actually prohibits the attorney for the child from advocating a position contrary to the child's stated position unless the attorney is 'convinced' that 'the child lacks the capacity for knowing, voluntary and considered judgment,' and there was no evidence that children lacked capacity and court determined that children were not rehearsed or coached); *Commentary to N.Y.S.B.A. Standard A-3* ("[w]hen considering whether the child has 'capacity to perceive and comprehend the consequences of his or her decisions,' the attorney should not make judgments that turn on the level of maturity, sophistication, or 'good judgment' reflected in the child's decision-making," and "may not use substituted judgment merely because the attorney believes that another course of action would be 'better' for the child"); *City Bar Ethics Opinion 1997-2*, 1997 WL 1724482 (lawyer "should not conclude merely from the fact that a decision appears to be a bad one that the client is not making a reasoned decision"); Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, N.Y.L.J., March 6, 2008, at 3 ("Must it not at least be considered that the child's attorney, without any objective measure of the child's capacity for considered judgment, will measure it by the extent to which the child's wishes correspond with the attorney's view of what is best for the child?"); Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 FORDHAM L. REV. 1473, 1485 (1996) (there is an "outcome test" under which the decision-maker is deemed competent "if the decision was substantively sound, from the vantage point of the judge, doctor, or other arbiter," but "[m]odern trends have frowned on the invidious biases of the status test and the paternalistic and tautological character of the outcome test"); *but see Matter of Cunningham v. Talbot*, 152 A.D.3d 886 (3d Dep't 2017) (attorney for children properly advocated position contrary to children's expressed wishes to have no visits with mother where children's wishes were both a product of the father's influence and likely to result in a substantial risk of imminent, serious harm).

[31] *Commentary to N.Y.S.B.A. Standard A-3* ("In certain complex cases, when evaluating whether the use of substituted judgment is permissible, the attorney may wish to consult a social worker or other mental health professional, keeping faithful to attorney-client confidentiality, for assistance in evaluating the child's developmental status and capability"); *see also Commentary to NYS Professional Conduct Rule 2.1* ("Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work").

[32] *See Commentary to A.B.A. Standard B-3*; *see also Commentary to NYS Professional Conduct Rule 1.14* ("In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, 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").

the attorney shall move from the substituted judgment exception… to the default position of client directed representation…. "[33]

The Child's Age

In Appellate Division and trial court decisions, there is strong support for the view that the child's lawyer ordinarily should provide traditional advocacy for teenagers. In *Matter of Albanese v. Lee*,[34] the First Department held that the Society for the Prevention of Cruelty to Children was properly relieved as guardian *ad litem* where the agency did not advocate the wishes of its fifteen-year-old client. In *Matter of Elianne M.*,[35] the Second Department held that "[w]here, as here, both the [attorney] and the teenage child have explicitly expressed their failure to communicate, the child has indicated her lack of trust in her appointed representative, her fear that this representative will not effectively communicate her wishes to the court and her belief that the [attorney] has been influenced by her adoptive mother, the proper course was to relieve the [attorney] and permit substitution of counsel of the child's choosing."[36] In *Suzanne T. v. Arthur L. T.*,[37] where the child's attorney, while reciting the fourteen-year-old child's preference for the mother, recommended that custody remain with the father, the court recognized that the attorney may assert a position which, in the attorney's independent judgment, would best promote the child's interest even if that position is contrary to the wishes of the child, but impliedly criticized the attorney by noting that *this* child was a very mature, strong-willed and articulate fourteen-year-old.[38] In *Marquez v. Presbyterian Hosp. in the City of New York*,[39] the court noted that "[t]he adversarial role for [children's attorneys] has, quite properly, predominated…. Recent cases, without any discussion of the issue, routinely treat [the attorneys] as though they were counsel in a criminal case. (citations omitted)."[40]

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[33] *See N.A.C.C. Standard B-4(3).*

[34] 272 A.D.2d 81 (1st Dep't 2000).

[35] 196 A.D.2d 439.

[36] 196 A.D.2d at 440.

[37] 12 Misc.3d 691 (Fam. Ct., Monroe County, 2005).

[38] 12 Misc.3d at 694.

[39] 159 Misc.2d 617 (Sup. Ct., N.Y. County, 1994).

[40] 159 Misc.2d at 622. *See also Matter of Delaney v. Galeano*, 50 A.D.3d 1035 (2d Dep't 2008) (where attorney for fourteen-year-old child appealed from order which denied his motion to hold respondent mother in contempt in visitation proceeding, Second Department, while citing 22 NYCRR §7.2(d)(2), dismissed appeal because child did not want appeal to proceed).

In the context of juvenile delinquency and persons in need of supervision proceedings as well, courts have recognized that an adolescent has presumptive authority to make fundamental litigation decisions.[41]

Support for traditional representation of younger children can be found in *Matter of Scott L. v. Bruce N.*,[42] where the court posited a hybrid lawyer/GAL role in which the child does not *control* the representation, but also recognized that children often should have controlling influence over the lawyer's advocacy. The court observed that "[t]he extent to which the child's wishes should influence the formulation of the position must vary according to the maturity, intelligence and emotional stability of the child in question. Where the child is a teen-ager of reasonably sound judgment, either [the child's attorney] or a guardian ad litem would be very likely to advocate for the outcome the child prefers, and properly so, since the wishes of a mature youngster also carry greater weight with the court than those of a younger child [citation omitted]." With respect to the seven and nine-year-old subject children, the court noted that "the [attorney] might arguably feel obligated to assert the position in the case which the child desires, and asserting a position in a litigation involves much more than merely expressing the child's wishes to the court."[43]

In *K.T. v. C.S.*,[44] the court found that where the ten-year-old child "was of sufficient age and maturity to express her own desires in an intelligent and compelling fashion," there was "no indication that her testimony was coached or was not the product of her true desires," and there was no indication "that [her] ability to express her views was compromised or that her desires were incompatible with the advancement of her best interests, the [child's attorney] had an obligation to advocate those wishes."

There are cases in which the lawyer's decision to advocate a position contrary to the expressed wishes of the child has been approved. In *Carballeira v. Shumway*,[45] where the child's lawyer advocated a position contrary to the expressed wishes of his eleven-year-old client, the Third Department refused to adopt a categorical requirement that the lawyer advocate for the result desired by any child who is old enough to articulate his/her wishes. The court noted that the attorney "has the statutorily directed responsibility to represent the child's wishes as well as

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

[42] 134 Misc.2d 240 (Fam. Ct., N.Y. County, 1986).

[43] 134 Misc.2d at 243-244; *see also Silverman v. Silverman*, 186 A.D.3d 123 (2d Dep't 2020) (attorney for children, who supported father, improperly substituted judgment and took position contrary to wishes of clients, who were thirteen and eleven years old at time of hearing, and were both on high honor roll and involved in extracurricular activities); *Matter of Jennifer VV. v. Lawrence WW.*, 182 A.D.3d 652 (3d Dep't 2020) (ten-year-old was old enough to be capable of expressing wishes, and whether younger child had capacity to do so was dependent not only upon age, but also upon level of maturity and verbal abilities).

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

[45] 273 A.D.2d 753 (3d Dep't 2000), *lv denied*, 95 N.Y.2d 764.

to advocate the child's best interest. Because the result desired by the child and the result that is in the child's best interest may diverge, [children's attorneys] sometimes face a conflict in such advocacy (citations omitted)." When such a conflict exists, "[d]epending on the circumstances, 'a [child's attorney] may properly attempt to persuade the court to adopt a position which, in the [attorney's] independent judgment, would best promote the child's interest, even if that position is contrary to the wishes of the child' (citations omitted)."[46] Similar rulings have been issued in other custody proceedings.[47]

However, it must be borne in mind that *Shumway* involved a custody dispute between biological parents, and so the child's liberty interests were not nearly as compelling as they are when the State attempts to remove a child from the parents' home.[48] Also, among the reasons underlying the *Shumway* ruling was the child's severely impaired condition. The court noted that the child suffered from several neurological disorders including Tourettes Syndrome, Obsessive-Compulsive Disorder and Attention Deficit Hyperactivity Disorder; that a psychologist had opined that the child was intelligent, but somewhat less mature than average, and could be easily manipulated by adults; that the child may have been blinded by his love for the mother, who exerted influence on his thoughts concerning custody; and that the child "did not articulate objective reasons for his preference" other than his dislike of discipline at the father's home and the lack of rules and discipline at the mother's home.[49]

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[46] 273 A.D.2d at 755.

[47] *See, e.g.*, *Matter of Muriel v. Muriel*, 179 A.D.3d 1529 (4th Dept. 2020), *lv denied* 35 N.Y.3d 908 (in case in which father established change of circumstances where mother engaged in conduct designed to alienate children from father, record supported finding that children, ages ten and seven, lacked capacity for knowing, voluntary and considered judgment); *Matter of Shaw v. Bice*, 117 A.D.3d 1576 (4th Dep't 2014), *lv denied*, 24 N.Y.3d 902 (separate attorneys not required where son expressed desire to reside with mother and daughter wanted to reside with father, but attorney for children advised court that position of son, who was age nine and wanted to live with mother because at her house "he can stay up late and he doesn't get in trouble," was "immature and thus not controlling" upon attorney); *Matter of Rosso v. Gerouw-Rosso*, 79 A.D.3d 1726 (4th Dep't 2010) (no error where child's attorney determined that nine-year-old child lacked capacity for knowing, voluntary and considered judgment); *Matter of James MM. v. June OO.*, 294 A.D.2d 630, 633 (3d Dep't 2002) (attorney did not violate duty to eleven and twelve-year-old clients when he filed neglect petition against mother, and recommended that father get custody, even though children preferred to stay with mother); *Armenio v. Armenio*, N.Y.L.J., Aug. 3, 1999, at 25 (Sup. Ct., Suffolk County) (attorney properly made recommendation that was contrary to desires of children, ages eleven and nearly seven, where attorney made "cogent legal and common sense arguments" as to why children's expressed preferences were not consistent with their best interests); *Reed v. Reed*, 189 Misc.2d 734, 737 (Sup. Ct., Richmond County, 2001) (even if attorney was not acting in accordance with wishes of six-year-old child, attorney's own position was relevant).

[48] Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, n.15 (in child protection proceedings, "children… face the risks of either returning to a dangerous home or severing their relationship with their entire immediate family"); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1426 (1996) (child's right in custody proceeding is to have the judge determine which caregiver will best serve child's interests).

[49] 273 A.D.2d at 755-756; *see also Matter of Amkia P.*, 179 Misc.2d 387, 389-390 (Fam. Ct., Bronx County, 1999) (attorney for ten-year-old child in child protective proceeding properly advocated position at odds with child's expressed wishes where child was afflicted with chronic, debilitating and life-threatening illness, appeared to have little comprehension of severity and complexity of her disease or of precariousness of her situation

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Moreover, in *Shumway*, the Third Department merely concluded that, in appropriate circumstances, a child's lawyer "may" adopt a position that is contrary to the wishes of the child, but did not suggest that an attorney abuses her discretion when she chooses to assign dispositive weight to the child's position.[50]

Indeed, in *Matter of Mark T. v. Joyanna U.*, 64 A.D.3d 1092 (3rd Dep't 2009), *lv denied* 15 N.Y.3d 715, the Third Department, while citing FCA § 241, Chief Judge's Rule 7.2, New York State Bar Association Standards, and the "Summary of Responsibilities of the Attorney for the Child" issued by the Administrative Board of the Courts of New York, held that the child was denied the effective assistance of appellate counsel in a paternity proceeding where the attorney, *inter alia*, decided that supporting affirmance would be in the eleven and a half year-old child's best interests.

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

While "[a]ny specific [age-related line] will be an arbitrary choice to some extent,"[51] we believe that age-related guidelines are useful. Children as young as two or three, while capable of communicating wishes, cannot be granted decision-making authority under any rational representation model. As already noted, a consensus among child advocates has been reached regarding children age ten or older, who usually are deemed entitled to client-directed representation,[52] and children under the age of seven, who usually are not. The advocacy model for children falling in that three-year gap has remained less certain. After revisiting these issues, we believe that many children between the ages of seven and ten are entitled to make decisions that an adult client would make. (We reiterate that when we refer in these pages to "client-directed representation," we mean that the child has authority to make certain decisions at the

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if she was not provided with proper medical care, and was intelligent and poised but was "still a young child, and as such she lack[ed] the sophistication, experience and maturity to decide for herself what is in her best interest in the complicated medical predicament in which she [found] herself").

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

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

[52] *See, e.g.*, Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 820 ("Children above the age of ten usually comprehend the issues and are capable of formulating a position with the assistance of counsel even if, on occasion, the assistance should be more structured than with an adult," but, with clients between the ages of five and ten, "counsel faces or should face, the tricky task of maximizing the child's input and participation without necessarily granting her a veto over her attorney's position").

conclusion of a complex process in which the lawyer, acting as counselor and adviser, works together with the child in developing the child's goals and positions.)

There is ample support for viewing children as young as seven as being capable of making decisions. At the 2006 University of Nevada, Las Vegas *Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, a working group recommended adoption of a statutory presumption that lawyers should function as client-directed advocates for children age seven and above, and, with respect to children younger than seven, should "[g]ive due consideration to the view of the child in determining what position to advocate, and present to the court the views of the child."[53]

Moreover, New York has made seven the minimum age at which a child may be deemed competent to stand trial on a charge of juvenile delinquency,[54] and a "[b]road consensus now exists within both the delinquency bar and the judiciary that lawyers for minors charged with crimes should take direction from their clients just as they would if their clients were adults."[55] No exception has been carved out for cases in which the lawyer believes that the delinquency

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[53] *Report of the Working Group on the Role of Age and Stage of Development*, 6 NEV. L.J. 623; *see also Model Rules of Prof'l Conduct, Commentary to Rule 1.14* (2006) (client with diminished capacity "often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody"); Jaclyn Jean Jenkins, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 173 (2008) ("Studies have shown that children as young as 6 years of age have the capability to reason and understand. Certainly from age 6, and at ages even younger than that, children are capable of having and sharing their view of what happened in the past and what they would like to see happen in the future. This is especially true for foster children, who, by necessity, have had to grow up more quickly than their peers"); Donald Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006) (author endorses "a bright line test, say at seven"); Guggenheim, *The Right To Be Represented But Not Heard: Reflections On Legal Representation For Children*, 59 N.Y.U. L. REV. at 91.

[54] N.Y. Fam. Ct. Act § 301.2(1). Indeed, the law of competency should be consulted when a lawyer is attempting to determine a child's capacity to make decisions in this context. *See, e.g., People v Picozzi*, 106 A.D.2d 413, 414 (2d Dep't 1984) (court should consider: (1) whether defendant is oriented to time and place; (2) whether defendant is able to perceive, recall and relate; (3) whether defendant has an understanding of the process of the trial and the roles of the judge, jury, prosecutor and defense attorney; (4) whether defendant can establish a working relationship with his attorney; (5) whether defendant has sufficient intelligence and judgment to listen to the advice of counsel and, based on that advice, appreciate (without necessarily adopting) the fact that one course of conduct may be more beneficial to him than another; (6) whether defendant is sufficiently stable to enable him to withstand the stresses of the trial without suffering a serious prolonged or permanent breakdown).

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

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

client is a neglected child.[56] Even assuming, *arguendo*, that the Legislature envisioned a slightly modified role for the lawyer when the defining purpose of the proceeding is to protect, rather than prosecute and obtain a finding of delinquency *against* the child -- indeed, that role *must* be modified when an infant is involved -- the fact remains that in child protective and permanency proceedings, the child faces a Fourth Amendment seizure,[57] removal/exclusion from the home, and involuntary confinement in a foster home or facility selected by the court or by governmental officials.[58] Thus, there is no reason why the "broad consensus" regarding the role of the lawyer in a delinquency proceeding should not guide the child's lawyer in a child protective, permanency or termination of parental rights proceeding, particularly given the fact that the Family Court Act contains only one, generic description of the child's lawyer.

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

> "During the school-age years, children become increasingly sophisticated in understanding the perspectives of others. The preschool child tends to see the situations of others egocentrically and tries to assimilate another person's viewpoint into her own viewpoint. Beginning at age 6, the child becomes more able to see and acknowledge another person's different point of view. Over the next several years the child gradually realizes that there can be multiple ways of viewing a situation and can imagine how her own ideas appear to another person.
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> As perspective taking improves, so does the child's ability to see below the surface of behavior and to attribute psychological qualities and motives to others. Up to age 8, children tend to describe others in terms of their behavior and physical characteristics. After 8, because of improving ability to analyze and synthesize information, they begin to describe others in terms of internal, psychological characteristics (citation omitted)….

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

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

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

> Children become more able to assess other people's intentions and the psychological resonances of communication.[59]
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> By age 7 the child has a basic grasp of the syntactical and grammatical structures of her native language…. Although there is a range of language ability across individual children, school age children generally possess sufficient facility with language to express what they are thinking and to tell coherent narratives having a beginning, middle, and end.[60]
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> By age 7, the child is moving away from egocentric thinking and is using logic. The child becomes aware that intuition based on an awareness of surface appearances is not always correct (citation omitted).[61]

Thus, we agree with those who "argue that children exhibit the ability to think rationally by the age of seven and sometimes even younger. They point out that the typical seven-year-old can comprehend information, make causal connections between events, and use these skills to assess the relative attractiveness of various options."[62] While "GAL advocates… argue that children's ability to engage in abstract thinking--in particular their ability to think through a range of merely hypothetical solutions--is highly compromised until adolescence,"[63] we do not

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

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

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

[62] Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L.REV. at 903-904. *See also Matter of Pedro M.*, 21 Misc.3d 645 (Fam. Ct., Albany Co., 2008) (while addressing requirement that court consult child during permanency proceeding, court establishes guidelines that presume child age seven or over should be produced in court; court notes that age of seven is generally considered the "age of reason" and is when children acquire a sufficient facility with spoken language to be able to communicate with adults, and it is the age at which juveniles can be charged in juvenile delinquency and persons in need of supervision proceedings); *cf. Castro v. Hochuli*, 343 P.3d 457 (Ariz. Ct. App., 2015) (five and a half year-old child's guardian ad litem had authority to seek removal of child's counsel in termination of parental rights proceeding based on allegation that counsel disregarded child's stated legal position).

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

believe that a child needs to arrive at that level of development in order to exert substantial influence over the lawyer's decision making.[64]

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

Giving children a voice in the process "empowers children, the disempowered victims of the circumstances (whether abuse, neglect, or parental separation) leading to the court's involvement. Lawyers who practice under the traditional attorney model are inspired by the considerable wisdom of children, whose judgment about their best interests often proves at least as sound as that of the adults who have substituted their own judgment. They also acknowledge children's power, as the subjects of the decisions being made, to prevent decisions the children oppose from being effectively implemented."[65] Denying the child a voice in the lawyer's advocacy "reinforces… the lesson, learned most thoroughly by abused and neglected children, that he should not expect to have any control over his fate."[66] It is also worth remembering that, given the psychological harm often caused by removal, and the physical and emotional health risks to which children are exposed while in foster care, a particular child's desire to return home to neglectful parents may be far from irrational.[67]

It is true that under New York law, the child's lawyer is bound by FCA § 241 to help the child express her wishes to the court, and thus the child will be heard. But the mere expression of a child's wishes, by a lawyer who immediately turns around and undermines the child's stated position by arguing for, or presenting evidence supporting, the opposite result, hardly provides

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[64] *See Commentary to N.Y.S.B.A. Standard A-3* ("When considering whether the child has 'capacity to perceive and comprehend the consequences of his or her decisions,' the attorney should not make judgments that turn on the level of maturity, sophistication, or 'good judgment' reflected in the child's decision-making," and "[a]ll that is required is that the child have a basic understanding of issues and consequences"); Linda Elrod, *Client-Directed Lawyers For Children: It Is The "Right" Thing To Do*, 27 PACE L. REV. 869, 912 (2007) (although some children arguably have capacity but lack judgment, "just because the child lacks the maturity to consider all the implications of a custody determination does not mean that their voice should be silenced").

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

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

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

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

the child with a *meaningful* voice.[68] "To place the burden of advocating the child's 'best interests' on the lawyer for the child rather than merely advocating the child's wishes is to deny the child an effective voice in the proceedings. Of course most abused or neglected children wish to go back to the abusive home, but who will articulate the child's desires or wishes, however irrational it may seem to adults, if the lawyer for the minor will not do so?"[69] Again, it must be remembered that FCA § 241 refers to the child's "interests," not the child's "best interests."

Admittedly, these determinations of a child's capacity carry some potential for arbitrariness,[70] but they are likely to be far less values-driven than a lawyer's decision to take a particular position on behalf of the client. This practice model limits the population of children for whom lawyers make decisions, and thus fosters consistency and reduces arbitrariness in child advocacy. Left to their own devices, many lawyers "are likely to arrive at decisions and advocate for positions on behalf of their child clients that are invariably based on what they believe to be best, based on the only value system they know, their own. Not only is there a significant chance that these decisions and ensuing positions may be against the best interest of the individual child, who is likely of a different race, ethnicity, and/or class than the legal representative, but it also leads to a system where the position taken by a child's attorney may largely be based, not on what would be best for the individual child with unique needs and values, but rather on the arbitrary chance of who was appointed to represent the particular child."[71]

While some people prefer that the child's lawyer always advocate in a manner consistent with her own, presumably mature perspective, rather than the wishes of the child,[72] we believe

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

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

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

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

[72] *See* Martin Guggenheim, *A Law Guardian By Any Other Name: A Critique of the Report of the Matrimonial Commission*, 27 PACE L. REV. 785, 809-810 (2007) ("Trial and appellate judges recognize that getting at the true facts in many cases can be difficult. Understandably, courts want any help they can get. For many judges deciding complex custody cases, the neutral child's lawyer is just what they are looking for to help them determine

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that the role we have adopted for the child's lawyer enhances the court's search for the truth and for the right result. The respondents' lawyers are duty-bound to seek family reunification, and dismissal of the charges, if that is what their clients desire. Often, these goals are consistent with the child's interests. The petitioning agency's lawyer will prosecute the case and otherwise protect the agency's interests, which, too, may be consistent with the child's.[73] When the child is residing in foster care, the child's lawyer is duty-bound to advance the client's health and safety interests by, among other things, advocating for appropriate court-ordered services, treatment, and agency supervision. When the child is residing at home, a lawyer who is making decisions on behalf of the child will advocate for services, treatment, or supervision designed to render the home environment safe, while a lawyer providing client-directed representation for a child who wants to remain home will do the same as long as the court orders enhance the child's chances of remaining at home.[74] The judge, having no client, must focus on the law, and, when appropriate, the child's best interests.[75] The judge also has broad discretion to solicit evidence the parties have not produced.[76] Thus, in the end, "the child's direction will merely give instructions to the

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the best interests of the child. * * * A very large part of the value of children's lawyers, whether to the Court of Appeals or to trial judges, is the 'reassuring' quality that the result the [attorney] chose to advocate comports with the result the court chose to reach").

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

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

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

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

lawyer. The child's views do not necessarily prevail. The process should be looked upon as a whole."[77] If the other lawyers and the judge fail to properly discharge their responsibilities, the solution lies in improving their performance, not in twisting out of shape the role and ethical responsibilities of the child's lawyer.[78] Indeed, "[i]f the strength of the adversary process lies in the full presentation and consideration of different points of view, then giving a greater voice to the child should not impair either fact-finding or decision-making."[79]

Allocation of Decision-Making Authority

Of course, the child's lawyer must differentiate between those decisions a competent client is entitled to make, and those decisions -- involving litigation strategy -- that a lawyer is entitled to make. Generally, "a lawyer shall abide by a client's decisions concerning the objectives of representation and…. shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter."[80] While "the child is entitled to determine the overall objectives to be pursued, the child's attorney, as any adult's lawyer, may make certain decisions with respect to the manner of achieving those objectives, particularly with respect to procedural matters," and need not "consult with the child on matters which would not require consultation with an adult client."[81]

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

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

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

[80] *NYS Professional Conduct Rule 1.2(a). See also Commentary to NYS Professional Conduct Rule 1.2* ("lawyers usually defer to their clients regarding such questions as… concern for third persons who might be adversely affected," and, "[a]t the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation"; "[i]n a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.4," but "if the lawyer intends to act contrary to the client's instructions, "the lawyer must consult with the client").

[81] *See Commentary to A.B.A. Standard B-4*; *see also Haziel v. United States*, 404 F.2d 1275, 1278 (D.C. Cir. 1968) ("The law allows counsel to speak for his client on many occasions. In an adversarial criminal proceeding, the client may be bound by his counsel's calculated decision when trial tactics are involved. (citation omitted.) Such circumstances arise for the most part when the assertion of a claimed right may backfire if incorrect. Since these decisions must often be made in the heat of trial, and frequently involve nice calculations of procedural

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In criminal proceedings, "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal [citations omitted]."[82] In a child protective, permanency, or termination of parental rights proceeding, the accused respondent should decide whether to go to trial or make an admission, whether to voluntarily take the stand and testify, and whether to agree to a proposed disposition. For the subject child in such a proceeding, who is not on trial, the principal concern is the child's liberty interest in residing where he/she wants to and being safe in that environment, and in having visits with those individuals the child wishes to see. Accordingly, the child's lawyer usually should be bound by a competent child's wishes regarding those issues. If the child wants to return home, the lawyer would argue at a post-removal FCA § 1028 hearing for the immediate return of the child, and/or argue at a fact-finding hearing for dismissal of the charges.

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

Similarly, while dismissal of the petition upon a fact-finding hearing is a pathway to a child's goal of reunification, perhaps the child's lawyer, having determined that dismissal is an unrealistic goal, has discretion to contact the respondents' lawyers and suggest that their clients make judicial admissions, or, at a hearing, maneuver towards a finding on the least serious charge and/or elicit mitigation evidence.

Moreover, there are numerous decisions, *not* directly related to custody or fact-finding, that may be of interest to the child but properly lie within the lawyer's domain. For instance, a lawyer bound by a client's wishes to seek reunification certainly should not be bound by the child's opinion regarding treatment and services the parent should be required to accept, the frequency and nature of agency supervision, or other matters that may affect the child's chances of returning home.[83] In fact, it may be appropriate for the lawyer to request or agree to the

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complexities and jurors' likely reactions, the attorney must sometimes make the choice without consulting his client").

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

[83] *NYS Professional Conduct Rule 1.2(e)* ("A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client"); Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 786 ("It may well be in the child's interests to advocate court-ordered services

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provision of crucial mental health services *for the child* even though the child objects, when those services undoubtedly would serve the child's long-term litigation goals.

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

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

Criteria For Lawyer's Decisions

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

When the child's lawyer appears at a post-filing removal hearing, or at a hearing held upon a parent's application for the return of the child, the issue is whether there is an imminent risk to the child's life or health, not whether it would be better for the child to be residing outside the home.[84] At the Article Ten fact finding hearing, the issue is whether the parent's acts amount to abuse and/or neglect, and/or whether State intervention is necessary, not the child's best interests.[85] Even at a dispositional hearing, or a permanency hearing held prior to termination of parental rights, a critical factor in the court's custodial determination is whether a return of the child to the parent would present a risk of neglect or abuse.[86]

In contrast, controversies in child protective proceedings that relate to parental and sibling visitation, or agency supervision, or treatment and services, or, when a return to a parent

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for his parent, thereby improving the home environment when the child is not removed or enhancing the possibility of reunification when the child has been placed").

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

[85] *See* N.Y. Fam. Ct. Act § 1012; Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 806 (the "best interests" of the child are "largely irrelevant unless and until parental malfeasance has been proven"); Douglas Besharov, *Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings*, 20 J. FAM. L. 217, 220-234 (1981) (child's counsel should seek dismissal when there is no persuasive evidence of abuse or neglect; when the child, although abused or neglected in the past, faces no such danger in the future; when the child is protected by virtue of parents' voluntary acceptance of social services; and when harmful effects of state intervention outweigh danger child faces from parents); N.Y. Fam. Ct. Act § 1051(c) (even where there is sufficient evidence of neglect, court may dismiss petition if it "concludes that its aid is not required on the record before it").

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

is not feasible, the choice of a custodian, do require the court, and thus the child's lawyer, to consider the child's best interests.[87] Of course, these "best interests" determinations often implicate the child's "legal interest in preserving her family's integrity and continuing her relationship with her family…. "[88]

Other than the law, there is no proper basis for the lawyer's exercise of discretion when the child is not making decisions. Accordingly, while a lawyer engaged in client-directed advocacy will argue the child's position even if the lawyer believes the law mandates a different result -- for instance, a lawyer representing a seventeen-year-old child who wants to return home would argue for that result despite the lawyer's opinion that there may be some risk of harm -- a lawyer making decisions on behalf of the child "[m]ust conduct a thorough investigation, including interviewing the child, reviewing the evidence and applying it against the legal standard applicable to the particular stage of the proceeding," and, through this objective analysis, determine the child's "legal" interests. The lawyer has no right to make "best interests" determinations and act upon them when the law clearly states that a different standard applies.[89] Indeed, "[a] lawyer can bring a particularly valuable form of attention to a case by insisting upon statutory fidelity to the standards established through the democratic process to serve the needs of children and families."[90]

Thus, if the child's lawyer does not believe that removal of the child is justified by an "imminent risk to life or health," as that risk was defined by the Court of Appeals in *Nicholson v. Scoppetta*,[91] the lawyer should argue for a return of the child. If there is insufficient evidence of neglect at the fact-finding hearing, the lawyer should argue for dismissal. If the parents pose no threat to the child at the time of disposition and are legally entitled to custody, the lawyer should not argue for placement. Of course, because courts often focus on "best interests" rather than the governing legal standard, the lawyer "must become adept at translating her proposals to the court into the language of 'best interests.'"[92]

It has been suggested that lawyers are not qualified to make "best interests" determinations.[93] Certainly that will be true in some instances, and so, when making decisions

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[87] *See Commentary to N.Y.S.B.A. Standard A-4.*

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

[89] *See Commentary to N.Y.S.B.A. Standard A-4.*

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

[91] 3 N.Y.3d 357 (2004).

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

[93] *See, e.g.*, Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. at 1525 ("The total discretion model … gives a lawyer a job

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that do have a "best interests" element, the child's lawyer should employ a decision-making process that takes full account of the child's wishes and life circumstances. The mistake made by many lawyers is to view client-directed advocacy and lawyer-directed advocacy as two distinct processes; having made a determination that the child lacks capacity to direct the representation, the lawyer proceeds to make decisions while pushing the child and her concerns to the periphery. But young children, even if not entitled to direct the lawyer, can make a substantial contribution to the lawyer's decision-making process.

It could be said that the lawyer's goal is to determine what position the child would take if he/she had the capacity to direct the representation.[94] Thus, effective representation "requires attorneys to be self-aware and respectful of the full context in which the client lives."[95] Using a multi-disciplinary approach, the lawyer should formulate a position "through the use of objective criteria, rather than solely the life experience or instinct of the attorney. The criteria shall include but not be limited to: Determine the child's circumstances through a full and efficient investigation; Assess the child at the moment of the determination; Examine each option in light of the two child welfare paradigms; psychological parent and family network; and Utilize medical, mental health, educational, social work and other experts."[96]

"Contextualized representation is particularly important because there are often vast socioeconomic or racial gaps between the attorneys and the clients they serve. As a result of these disparities, attorneys may not appreciate all of the particular legal and social dimensions of the presenting problem that is the initial or primary subject of the representation; the importance of the child's family, race, ethnicity, language, culture, gender, sexuality, schooling, and home; and the child's developmental status, physical and mental health, and other client-related matters outside the discipline of law."[97]

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for which he is neither trained nor qualified, prevents the lawyer from doing the job that he is qualified to do, and creates an unjust system where similar clients are not represented similarly").

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

[95] Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham, 6 NEV. L.J. 592, 593 (2006); *see also Commentary to NYS Professional Conduct Rule 1.14* ("In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interest, and the goals of minimizing intrusion into the client's decision-making autonomy and maximizing respect for the client's family and social connections").

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

[97] *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. at 593-594; *see also N.Y.S.B.A. Standard C-1* ("The attorney should take steps to educate him/herself in order to be reasonably culturally competent regarding the child's ethnicity and

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In connection with her conception of the "child in context,"[98] Professor Koh Peters poses seven questions "to keep lawyers for children honest":

> (1) In making decisions about the representation, am I seeing the case, as much as I can, from my client's point of view, rather than from an adult's point of view?
> (2) Does the child understand as much as I can explain about what is happening in his case?
> (3) If my client were an adult, would I be taking the same actions, making the same decisions and treating her in the same way?
> (4) If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?
> (5) Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for the child?
> (6) Is it possible that I am making decisions in the case for my own gratification, and not for that of my client?
> (7) Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?"[99]

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culture"); *Commentary to N.Y.S.B.A. Standard A-4* (when considering child's best interests, "the attorney's formulation of a position should be accomplished through the use of objective criteria, rather than the life experience or instinct of the attorney," and the lawyer "should take into account the full context in which the client lives, including the importance of the child's family, race, ethnicity, language, culture, schooling, and other matters outside the discipline of law"); *Report of the Working Group on the Role of Age and Stage of Development*, 6 NEV. L.J. at 666.

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

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

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In the end, "if the child's lawyer has spent the time necessary to understand the child's needs from the child's perspective and to establish rapport with the child, the range of what constitutes the child's best available legal interests will be acceptably narrowed."[100]

It is true that when the lawyer makes decisions on behalf of the child, the lawyer's advocacy can overlap with the judge's function. Moreover, one lawyer may have a different view of the law than another.[101] And, even lawyers who employ an individualized, *client-focused* analysis are not immune to the taint of subjectivity.[102] For these reasons, it has been suggested that the lawyer for an infant, with no client and guided only by the law and the lawyer's potentially biased opinions, has no legitimate role to play and should not participate in the fact finding hearing.[103] In reality, however, this option is not open at any stage of the proceeding to a lawyer who has been assigned by the court and is expected to participate, or to a law firm that is under State contract to provide representation to children in these proceedings.

More importantly, it is not true that the lawyer has no role to play. There are a number of important matters to be addressed during the often lengthy delays between the filing of the petition and the fact finding hearing. Moreover, unlike the judge, the child's lawyer is in a position to conduct a full investigation outside of court and supply the child with an advocate who is in possession of all the facts and takes full account of the child's wishes.[104]

Children, 64 FORDHAM L. REV. 1955 (1996).

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

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

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

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

[104] Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. at 817 ("The younger child would be effectively unrepresented and, at least in the absence of a guardian ad litem,

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"In all circumstances where an attorney is substituting judgment in a manner that is contrary to a child's articulated position or preferences or when the child is not capable of expressing a preference, the attorney must inform the court that this is the basis upon which the attorney will be advocating the legal interests of the child."[105] The lawyer should state the basis for disagreeing with the child's stated position.[106]

The lawyer also must ensure that the child's wishes are communicated to the court.[107] What is not clear is the manner in which the lawyer accomplishes this. At a minimum the lawyer must state the child's position with respect to a particular matter being determined by the court. Once the lawyer starts providing the child's reasons and communicates specific statements the child has made, the lawyer risks creating advocate-witness rule problems. Of course, one could argue that the child's attorney has an obligation to discuss with the child the possibility of testifying and communicate to the court the child's desire to testify, and, in any event, another party or the court may ask that the child appear in court.

Taking No Position

Nowhere is it written that, when assigned with responsibility for making decisions on behalf of a child, the lawyer *has to take a position*. It is inconceivable that a lawyer with a large caseload will not sometimes encounter legal issues, or "best interests" determinations, that are such close calls that the lawyer cannot in good conscience make a definitive pronouncement in court that may well sway the judge. For instance, when the statutory "*res ipsa loquitur*" presumption comes into play because the child has suffered serious injuries,[108] but the

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would have no representative to argue for his interests"); Duquette, *Two Distinct Roles/Bright Line Test*, 6 Nev. L.J. at 1246 ("The better view is that children indeed need advocates in this complex and often-chaotic process"); *cf. Matter of Ray A.M.*, 37 N.Y.2d 619, 624 (1975) (since child could not speak for herself in termination proceeding, her lawyer's "highly competent neutral submission is reassuring").

[105] *See N.Y.S.B.A. Standard A-4*.

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

[107] N.Y. Fam. Ct. Act § 241; *Matter of Tonjaleah H.*, 63 A.D.3d 1611 (4th Dep't 2009) (in termination of parental rights proceeding, no error where child's attorney did not meet with client to ascertain her wishes, but attorney indicated that staff from his office had met with child and determined that she had no interest in additional contact with father) *Matter of Brittany K.*, 59 A.D.3d 952 (4th Dep't 2009), *lv denied* 12 N.Y.3d 709 (any error was harmless where child's attorney did not apprise court of children's wishes at dispositional hearing, but had previously apprised court of children's wishes at fact-finding hearing, and thus court could consider children's best interests); *Matter of Derick Shea D.*, 22 A.D.3d 753, 754 (2d Dep't 2005) (orders terminating parental rights reversed, and matter remitted for new dispositional hearing, where attorney expressed opinion that best interests of children, ages ten and fourteen, called for termination of parental rights, and set forth his reasoning, but failed to state that children had expressed desire to be returned to mother); *see N.Y.S.B.A. Standard A-3* ("the attorney for the child must inform the court of the child's articulated wishes, unless the child has expressly instructed the attorney not to do so").

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

respondent parents are among many adults who cared for the child during the period when the injuries were sustained and/or the parents have offered a plausible explanation for the injuries or credible denials of guilt, should a lawyer who is genuinely torn take a position just for the sake of it?

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

Of course, the lawyer for an older child, for whom the lawyer is likely to provide client-directed representation, ordinarily should not take a position before speaking to the client or obtaining, through other means, clear-cut information regarding the child's position.[109]

The Risk Of Serious Harm Exception

Chief Judge's Rule 7.2 states that the child's attorney "would be justified in advocating a position that is contrary to the child's wishes" when "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child…."[110] A narrower "seriously

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

[110] *See Matter of Vega v. Delgado*, 195 A.D.3d 1555 (4th Dep't 2021) (attorney for the child born in 2009 did not improperly substitute judgment where mother's persistent and pervasive pattern of alienating child from father was likely to result in substantial risk of imminent, serious harm); *Silverman v. Silverman*, 186 A.D.3d 123 (2d Dep't 2020) (while trial court found that mother had "over parentified the two girls" and that they had "become totally dependent upon" the mother, and father was concerned about amount of school children missed while in mother's custody, there was no proof of substantial risk of serious imminent harm); *Matter of Muriel v. Muriel*, 179 A.D.3d 1529 (4th Dept. 2020), *lv denied* 35 N.Y.3d 908 (in case in which father established change of circumstances where mother engaged in conduct designed to alienate children, ages ten and seven, from father, record supported finding that following children's wishes would have placed them at substantial risk of imminent and serious harm); *Matter of Cunningham v. Talbot*, 152 A.D.3d 886 (3d Dep't 2017) (attorney for children properly advocated position contrary to children's expressed wishes to have no visits with mother where father had thwarted mother's efforts to contact children, attempted to alienate children from mother, and manipulated children's loyalty to turn them against mother; if father's and children's professed wishes were followed, mother-child relationship would be completely severed); *Matter of Emmanuel J.*, 149 A.D.3d 1292 (3d Dep't 2017) (attorney for children did not err in substituting judgment for two children, ages approximately seven and ten, who wanted to stay in home with deplorable conditions, where respondent neglected other child who had sleep apnea and hypoxemia which required use of apnea monitor and oxygen therapy while she sleeps, and one of the two children in question missed school because she repeatedly had head lice; was sent to school dressed inappropriately for the weather and smelling of urine or body odor, and would often cry when the issue of her hygiene was raised and stated that she was not supposed to visit the nurse's office and worried that she would get in trouble with respondent and her mother for

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injurious" exception, which appears to require a risk of serious *physical* harm, has been adopted in American Bar Association and National Association of Counsel for Children standards.[111] Further support for a narrower exception may be found in *City Bar Ethics Opinion 1997-2*,[112]

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doing so; suffered from urinary incontinence and frequent urinary tract infections and had, on more than one occasion, been locked in her bedroom overnight and thus forced to urinate on the mattress where she slept, and the resulting mess would not be cleaned; and displayed a marked improvement in demeanor, confidence and academic performance when she was in petitioner's care); *Matter of Zakariah SS. v. Tara TT.*, 143 A.D.3d 1103 (3d Dep't 2016) (in custody case involving mother's ongoing attempts to alienate child from father, no error in attorney for child's decision to advocate for position contrary to child's wishes); *Matter of Brian S.*, 141 A.D.3d 1145 (4th Dep't 2016) (neither fact that children frequently skipped school, nor fact that mother may have occasionally used drugs in house and was unable to care for children, nor fact that mother may have struck one child on arm with belt on one occasion, leaving small mark, established substantial risk of imminent and serious harm); *Matter of Isobella A.*, 136 A.D.3d 1317 (4th Dep't 2016) (attorney for child did not err in substituting judgment for child who was five and six years old where child lacked capacity, and following child's wishes would have been tantamount to severing relationship with father); *Matter of Viscuso v. Viscuso*, 129 A.D.3d 1679 (4th Dep't 2015) (same as *Isobella A.*; mother's pattern of alienating child from father was likely to result in substantial risk of imminent, serious harm to child); *Matter of Lopez v. Lugo*, 115 A.D.3d 1237 (4th Dep't 2014) (AFCs properly advocated contrary to clients' wishes where evidence of risk included mother's arrest for possession of drugs in children's presence, numerous weapons seized from mother's house, and assault by mother's husband against one of the children, who attempted to intervene when husband attacked mother with electrical cord); *N.Y.S.B.A. Standard A-3* (child's attorney may "substitute judgment and advocate in a manner that is contrary to a child's articulated preferences" when "[t]he attorney has concluded that the court's adoption of the child's expressed preference would expose the child to substantial risk of imminent, serious harm and that this danger could not be avoided by removing one or more individuals from the home, or by the provision of court-ordered services and/or supervision"); *Commentary to N.Y.S.B.A. Standard A-3* ("The Rules of the Chief Judge properly contemplate that extraordinary circumstances must be present before the child's attorney overrides a child's expressed position); *Commentary to N.Y.S.B.A. Standard A-4* (attorney "should only consider overriding the child's expressed position when a substantial risk of imminent serious harm is present"); *NYS Professional Conduct Rule 1.14(b)* ("When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian"); *A.B.A. Model Rules of Prof'l Conduct, Rule 1.14*.

[111] *See A.B.A. Standard B-4(3) and Commentary* ("Where the child is in grave danger of serious injury or death, the child's safety must be the paramount concern"); *N.A.C.C. Standard B-4(4) and Commentary*; *see also Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. at 609 (client-directed representation not mandated when "the child's expressed preferences would be seriously injurious"; seriously injurious "does not mean merely contrary to the lawyer's opinion of what would be in child's interests"); Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, at 1 (attorney may refuse to argue for result that would place child in "imminent danger," which "connote[s] a grave immediate danger"); Haralambie, *Response to the Working Group on Determining the Best Interest of the Child*, 64 FORDHAM L. REV. at 2017 (for some children, "a certain degree of physical maltreatment or neglect may be far outweighed by the importance of other benefits of life with the family: affiliation, continuity of environment, proximity to friends, activities, and school, availability of pets, and other needs that the family meets").

[112] 1997 WL 1724482. *See also NYS Professional Conduct Rule 1.6* (lawyer shall not knowingly reveal confidential information, or use such information to disadvantage of client or for advantage of lawyer or third person, unless "the client gives informed consent" or "the disclosure is impliedly authorized to advance the best

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where it was held that a lawyer may disclose confidential information concerning abuse or maltreatment in "extreme" and "rare" cases in which "the lawyer honestly concludes, after full consideration," that disclosure is necessary to prevent the client from being killed or maimed" by another person or from killing or maiming himself or another. Similarly, in *State Bar Ethics Opinion 486,*[113] it was held that a lawyer may disclose a client's expressed intention to commit suicide.

While the exception in Chief Judge's Rule 7.2 arguably includes serious *emotional* harm, the Rule merely permits lawyers to make decisions on behalf of children in certain cases, but does not require them to do so. Thus, JRP and other attorneys for children in New York remain free to adhere to the narrower standard. Similarly, *NYS Professional Conduct Rule 1.14(b)* permits, but does not require the lawyer to take protective action when the client is at risk of

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interests of the client and is either reasonable under the circumstances or customary in the professional community," and lawyer may reveal or use confidential information to extent lawyer reasonably believes necessary "to prevent reasonably certain death or substantial bodily harm," "to prevent the client from committing a crime," and "when permitted or required under these Rules or to comply with other law or court order"); *NYS Professional Conduct Rule 1.14(c)* ("Information relating to the representation of a client with diminished capacity is protected by Rule 1.6," but "[w]hen taking protective action pursuant to [Rule 1.14(b)], the lawyer is impliedly authorized under Rule 1.6[a] to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests"); *Commentary to NYS Professional Conduct Rule 1.6* **("**The lawyer's exercise of discretion… requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure… the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client…. A lawyer's permissible disclosure… does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding. … Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat"); *A.B.A. Model Rules of Prof'l Conduct, Rule 1.14*.

"There are, however, costs to using [exceptions to confidentiality] to disclose confidential information without a client's consent. Client confidentiality may matter most when the risks to children are greatest. One potentially devastating consequence of the lawyer disclosing the child's confidences is the negative impact on a lawyer's ability to serve as an effective counselor and advisor. A lawyer can give proper advice only if he has complete information about a client and his situation. Yet if a child is concerned that information he relates to his lawyer will be disclosed, he may understandably be much more reluctant to share that information, thereby depriving himself of a fully effective legal advisor." Andrew Schepard and Theo Liebmann, *New Professional Responsibility Rules and Attorney for the Child*, N.Y.L.J., Mar. 11, 2009, at 3.

[113] 1978 WL 14149.

substantial physical, financial or other harm, and also requires that the client be found to suffer from diminished capacity.

In some cases the lawyer will be unable to advocate for the child's desires because the argument would be frivolous.[114]

Before invoking the serious harm exception, the child's lawyer should first consider whether there is a safety plan that would adequately address the danger, and begin by advocating for imposition of such a plan.[115] And, when employing the exception, the lawyer "should advocate a remedy which is as close as possible to the child's wishes as possible, but does not result in imminent danger" of serious harm.[116]

The Lawyer's Role in Presenting Evidence

Ordinarily, a lawyer attempts to present evidence that advances the client's position, and to prevent the introduction of evidence that undercuts the client's position. However, in *Matter of Scott L. v. Bruce N.*,[117] a custody proceeding, the court opined that a child's lawyer, rather than "suppress or withhold information which could be relevant to the court's determination of the child's best interests, when such evidence runs contrary to the result the child desires," should uncover and offer evidence of abuse or neglect, and other evidence that has been withheld by the other parties. "Zealous advocacy should never be permitted to interfere with this crucial function." The court noted that "[t]here is nothing in the statutes nor in case law… which says that a [child's attorney] in a custody proceeding should advocate for the child's wishes at the expense of his over-all interests or at the expense of a full presentation of the facts."[118] Since the court had already held that the child's lawyer in a custody proceeding does *not* act in the

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[114] *See NYS Professional Conduct Rule 3.1* (a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous," and conduct is "frivolous" if "(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law; (2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or (3) the lawyer knowingly asserts material factual statements that are false"); A.B.A. *Standard B-4(3)* (lawyer may not advocate position that is prohibited by law or without any factual foundation); Sobie, *Representing Child Clients: Role of Counsel or Law Guardian*, N.Y.L.J., Oct. 6, 1992, at 1 ("Further, advocating the child's wishes when a court has found imminent danger may be deemed to be a frivolous position as defined in the Rules of Professional Responsibility, and attorneys are admonished to refrain from advocating a frivolous position"); *cf. Matter of Peter "VV"*, 169 A.D.2d 995, 997 (3d Dep't 1991) (PINS respondent not denied effective assistance of counsel where attorney acknowledged need for placement despite respondent's contrary desire, but "[t]here simply was no evidence in the record that would have supported a less restrictive alternative disposition").

[115] *See N.Y.S.B.A. Standards, A-3*.

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

[117] 134 Misc.2d 240.

[118] 134 Misc.2d at 245-246.

traditional advocate's role and is not compelled to advocate for what the child wants, the court's imposition of a superseding duty to present relevant evidence was not surprising.[119]

In contrast, when a lawyer is providing client-directed representation in a child protective proceeding, in which the child's liberty interests are more compelling than in a custody proceeding, there is no sound justification for this approach if the lawyer's decision to advocate for the result the child desires is to have any meaning.

A limited obligation to bring evidence of abuse or neglect to light is imposed upon the child's lawyer by FCA §1075, which states that when, upon receipt of a post-dispositional report from a child protective agency, the attorney for the child determines that "there is reasonable cause to suspect that the child is at risk of further abuse or neglect or that there has been a substantive violation of a court order," the attorney "shall apply to the court for appropriate relief pursuant to [FCA §1061]." However, an application for relief cannot be based on information protected by the attorney-client privilege. In addition, because the relief sought by the child's lawyer must be "appropriate," and §1061 requires "good cause" for any application to stay execution of, set aside, modify or vacate a dispositional order, the lawyer cannot apply for relief unless the facts warrant a new dispositional order. Finally, from a client-directed lawyer's perspective, relief is not "appropriate" when the child does not want it. While New York appellate courts have recognized that the lawyer has an obligation to ensure that the evidence supporting the client's position is fully presented, they have never suggested that the lawyer should present evidence that would *undermine* the client's position. On the contrary, in *Matter of Colleen CC.*,[120] the court found a violation of the right to effective assistance of counsel where a lawyer, while thoroughly questioning a fourteen-year-old client, "made a point of breaking down [the child's] direct testimony, raising the possibility that he had been "coached" by his mother during a recess and effectively impeaching him by exploring prior inconsistent statements, all for the obvious purpose of discrediting his allegations of abuse."[121]

When the lawyer is not providing client-directed representation, and plans to take a position at the hearing that is consistent with a properly formulated view of the child's legal interests, it does not seem prudent for the lawyer to challenge the introduction of relevant evidence or eschew opportunities to examine witnesses in an effort to ascertain more facts. It may seem inappropriate to expect the child's attorney to withhold judgment if he or she has performed a full investigation prior to the hearing. However, the lawyer cannot be dead certain of her position until after a full hearing.[122]

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

[120] 232 A.D.2d 787 (3d Dep't 1996).

[121] 232 A.D.2d at 788.

[122] *See Matter of Williams v. Williams*, 35 A.D.3d 1098, 1100 (3d Dep't 2006) (attorney improperly acquiesced in truncated custody hearing and formulated position in absence of complete record); *Matter of Apel*, 96 Misc.2d 839, 842 (Fam. Ct., Ulster County, 1978) ("For the [attorney] to undertake such an assessment, make a judgment on the basis of that assessment as to which of his client's interests should receive paramount consideration, and then tailor his trial strategy accordingly, is a self-servicing exercise in which the lawyer judges

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On the other hand, courts have made it clear that the lawyer for the child is not an investigative arm of the court. While the lawyer may make his or her position known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices. Consequently, courts should not direct the child's lawyer to make such reports, or ask or allow the lawyer to make statements that place the lawyer in the position of being a fact witness.[123]

Whatever role the child's lawyer is playing, the lawyer should prepare trial strategy in close coordination with counsel for any party whose litigation goals are aligned with the child's. "The child's position may overlap with the positions of one or both parents, third-party caretakers, or a child protection agency. Nevertheless, the child's attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position … and not a mere endorsement of another party's position."[124]

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the ultimate issues in the case and then sets out to implement his own judgment").

[123] *Weiglhofer v. Weiglhofer*, 1 A.D.3d 786, 789, n.* (3d Dep't 2003); *see also NYS Professional Conduct Rule 3.4(d)* (a lawyer shall not, "in appearing before a tribunal on behalf of a client: * * * (2) assert personal knowledge of facts in issue except when testifying as a witness; (3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein"); *Matter of VanDee v. Bean*, 66 A.D.3d 1253 (3rd Dep't. 2009) (court properly accepted submission by child's attorney as being in nature of summation, as it was based almost entirely upon testimony given by witnesses during hearing, and there was no indication that court based any part of determination on few statements and observations made by attorney that were not in testimony; attorney's account of interviews with child and parties was apparently provided to establish attorney's compliance with obligations to consult with client and have thorough knowledge of client's circumstances, and as foundation for her conclusion that three-year-old client could not advise attorney of wishes as to placement, custody or visitation); *Matter of D'Angio v. McGrath*, 64 A.D.3d 593 (2d Dep't 2009) (direction that attorney for children submit report "as to the progress being made in said supervised therapeutic visitation" replaced with direction that attorney obtain report "as to the progress being made in said supervised therapeutic visitation" from therapist conducting supervised therapeutic visitation and submit report to court and parties); *Cervera v. Bressler*, 50 A.D.3d 837, 840-841 (2d Dep't 2008) (child's attorney disqualified where he disclosed facts which were not part of record and constituted hearsay gleaned from mother, and made repeated ad hominum attacks on father's character, which effectively made attorney witness against father); *Naomi C. v. Russell A.*, 48 A.D.3d 203 (1st Dep't 2008) (court improperly asked attorney to discuss position of ten-year-old child regarding how well custody arrangement was working, but acted properly in disallowing "cross-examination" of attorney by petitioner's counsel; court should not consider hearsay opinion of child in determining legal sufficiency of pleading, and such colloquy makes attorney an unsworn witness, "a position in which no attorney should be placed"); *Graham v. Graham*, 24 A.D.3d 1051, 1054 (3d Dep't 2005), *lv denied*, 6 N.Y.3d 711 ("We have not given the [child's attorney's] summation greater weight than the arguments and positions of the attorneys for the parents and have treated the 'recommendations' of the [attorney] more properly as the position of the attorney representing the child").

[124] *See Commentary to A.B.A. Standard D-4. See also* Christine Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263, 1275 (2006) ("Children's lawyers should proactively pursue any position of parents that would serve children's interests"). However, the attorney for the child has limited authority to take an appeal when the litigant whose custodial rights are at issue does not wish to. *Compare Matter of Joey L.F. v. Jerid A.F.*, 218 A.D.3d 1297 (4th Dep't 2023) (in family offense proceeding, attorney for child lacked

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Part Four: Conclusion

No model of representation is perfect, and so debater's points can be scored against each one. But the perfect should not become the enemy of the good. We are compelled to choose this model because it is the best one.[125] Minimizing use of the guardian *ad litem* model reduces the number of instances in which representation becomes skewed by the preferences, and idiosyncratic biases and personal philosophies of individual lawyers. The age parameters we have set also make sense. Allowing lawyers to focus on maturity in determining when to provide client-directed representation leads to arbitrary determinations as to who is and is not "mature"--many older teenagers and adult clients would fail that test -- and permits a lawyer to discount the child's position whenever the lawyer thinks it reflects a lack of sound judgment. When the focus is on the child's baseline capacity to communicate a position and the reasons for it, rather than on the child's ability to make well-reasoned judgments, there will be more consistency in child advocacy. As long as the child's lawyer also concentrates on protecting the child in the home or institution in which the child is residing, the safety and best interests of the child will be promoted.

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

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

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standing to bring appeal on behalf of child where petitioner did not appeal even though it was her petition that was dismissed; absent unusual circumstances not present, AFC cannot overrule decision-making authority of parent, and there was no evidence that petitioner had interest adverse to child that would warrant termination of her role as guardian) and *Matter of Kylie P.*, 213 A.D.3d 463 (1st Dep't 2023) (although attorney for child in custody proceeding has authority to pursue appeal on behalf of child, child does not have full-party status and cannot veto settlement reached by parents and force trial after attorney for child has a full and fair opportunity to be heard) *with Matter of Amber B. v. Scott C.*, 207 A.D.3d 847 (3d Dep't 2022) (attorney for child could take appeal where grandmother did not appeal, but she submitted letter brief in support of AFC's position).

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