Panel Discussion: Ethical Issues Confronting the Attorney for the Child in Cases Involving Domestic Violence

Thursday, January 14, 2010—Buffalo
Friday, January 15, 2010—Syracuse
Thursday, January 21, 2010—White Plains
Friday, January 22, 2010—New York

ADVOCATING FOR CHILDREN IN CASES INVOLVING DOMESTIC VIOLENCE

January 2010

FACTS

- Carl and Anita have been married for 14 years and have two children, Sonny (age 13) and Molly (age 8).
- While not physically abusive until recently, Carl gradually asserted control over all aspects of Anita's life - insisting that she quit her job, keeping a tight rein on the family's finances and isolating her from her friends and family.
- Three years ago, during an argument in which Anita announced her intention to leave, Carl threatened her verbally, saying she would not make it out the door.

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FACTS (C0ntinued)

- The next day, while Carl was at work, Anita contacted a local domestic violence advocacy program and filed a petition in the Family Court, alleging that Carl had made verbal threats of serious violence that made her fearful for her safety and that of the children.
- She obtained a temporary order of protection ex parte from the Family Court.
- Carl cajoled her into not returning to Family Court on the adjourned date, and the matter was dismissed.

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Questions for Judges

1. Would you have assigned an attorney to represent Anita when she filed her petition?

2. Would you have dismissed the case upon Anita's non-appearance?

Question for Attorneys

3. Assume that you were assigned as counsel for Anita, what information would you have elicited from her during her ex parte appearance?

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FACTS (C0ntinued)

- Carl's verbal abuse increased, both in front of and outside the presence of the children, and the mood in the home remained tense but no calls to police or to domestic violence programs were made.
- Matters escalated into physical violence a few weeks ago when Carl accused Anita of having an affair. During the ensuing argument, Carl pushed Anita into a wall, knocking over a table and smashing dishes.
- Both children were in the next room watching TV, but when they heard the crash, Sonny rushed in to try to protect his mother. Anita sustained bruises and called the police.

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FACTS (C0ntinued)

- Carl was arrested and taken to the Criminal Court where a temporary order of protection directing Carl to stay away from Anita was issued.
- Anita fled to a domestic violence shelter with the children and within the week, Anita retained an attorney and commenced divorce proceedings in Supreme Court, requesting address confidentiality. The matter was referred to the IDV part.
- Carl cross-petitioned for custody and requested a temporary order allowing the children to spend at least half the time with him. An attorney was appointed for the children.

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Question for Judges

1. Would you have granted the mother's attorney's request for address confidentiality?

Questions for Attorneys

2. As the attorney for Anita, what applications, if any, would you make at this juncture?

3. As the attorney for Carl, what arguments would you make against the court continuing the temporary order of protection?

4. As the attorney for the children, would you support Anita's application to continue the temporary order of protection?

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Question for Judges

5. What are your rulings with respect to the applications made by the attorneys?

Question for Attorneys

6. As the attorney for Carl, what arguments would you make in support of his request for pendente lite relief allowing the children to spend at least half the time with him?

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Questions for Attorneys

7. As the attorney for the child, what position would you take regarding the father's request for access to the children? As the attorney for Anita?

8. To what extent does the seriousness of the injury or presence of the children either in the home or in the room during the incident affect your advocacy as the attorney for the children? As the attorney for either party?

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FACTS (Continued)

- Pursuant to the provisions of the order of appointment, the attorney for the children immediately contacted both parties' attorneys to arrange for the children to be brought to her office for interviews.
- She requested waivers allowing her to speak with Anita and Carl directly. She requested the name and address of Anita's domestic violence shelter in order to arrange for a social worker to visit the shelter and assess the children's environment.
- Additionally, she sought releases for the children's school, medical and therapy records.

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Question for Attorneys

1. As the attorney for the children, what provisions, if any, would you have wanted in the order of appointment?

Question for Judges

2. Do your orders of appointment usually include direction for the release of school and medical records, or must the attorney make a separate application?

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Questions for Attorneys

3. As the attorney for the child, do you make your requests for waivers to interview the parties in writing?

4. Assume that Anita refused to provide the name and address of the domestic violence shelter, would you as the attorney for the child make an application for this information?

Question for Judges

5. Would you grant such an application?

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FACTS (Continued)

- Anita brought the children to the office of the attorney for the children.
- In the course of the conversation with the children's attorney, Anita disclosed that she had become increasingly distraught, causing her to seek the services of a psychiatrist who prescribed anti-depressant medication to her.
- During the attorney's interview with the children, Molly expressed fear of her father and started to cry when the issue of visitation was raised.

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FACTS (Continued)

- Sonny, notwithstanding his anger at his father, expressed frustration with his mother for what he viewed as provoking his father.
- He said that he hated the shelter, missed his father and would prefer to live with him.
- The attorney for the children then brought an application seeking the mother's therapy records.

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Question for Attorneys

1. As Anita's attorney, would you have opposed the attorney for the child's application for Anita's therapy records?

Question for Judges

2. Would you grant the attorney for the child's application for Anita's therapy records?

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Questions for Attorneys

3. As the attorney for the child, do you have a conflict of interest based on the above facts?
   - If so, are you precluded from representing either child or both?

4. Assume that Molly is adamant about staying with her brother, does that fact affect your position as the attorney for the child?

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Questions for Attorneys

5. Assume that Sonny disclosed to you, as the attorney for the child, that he had been hit by Carl often but he didn't want it revealed because he still preferred to live with Carl, how would you proceed?
   - Assume that this disclosure was made to a social worker who, as a licensed social worker, is a mandated reporter under New York State law. If the social worker is a member of the attorney for the child's staff, does the social worker's role on the attorney's staff bring the worker into the attorney-client privilege thereby trumping the mandatory reporting law?
   - What if the social worker was appointed by the court pursuant to an application by the attorney for the child?

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Questions for Attorneys

6. Assume that both children wish to remain with their father. One and/or both of the children reveal to you, as the attorney for the child, that both parents have been drinking excessively, at least 3 or 4 nights a week.
   - How would this information affect your position?

7. Assume that in addition to the parties' two children, they have a third child, approximately 1 and a half years old, who was left by Anita with a babysitter at the shelter.
   - As the attorney for the child, would you ask Anita for an opportunity to meet with the infant?

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FACTS (Continued)

- During the in camera interview with the judge, Sonny readily expressed an opinion, but Molly cried when asked questions.
- Concerned about Molly's reluctance to communicate, the judge appointed a forensic expert to examine the children and the parties.
- The attorney for Carl requested that the court direct the mental health professional to interview the family individually as well as together in order to observe the interaction among them.

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Questions for Attorneys

1. As Anita's attorney, would you have opposed or supported the application made by Carl's attorney?
2. As the attorney for the child, would you have opposed or supported the application made by Carl's attorney?

Questions for Judges

3. Would you have appointed a mental health professional?
   - If so, what directives would you include in the order of appointment?
4. Would you grant the application made by Carl's attorney?

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FACTS (Continued)

- In the interim, Anita and Carl's attorneys conferred in the absence of the attorney for children and agreed to an interim settlement maintaining custody of the children with Anita and allowing unsupervised weekend visitation with Carl.

Questions for Attorneys

1. As the attorney for the children, how would you respond to the interim settlement agreed to in your absence?
   - What applications, if any, would you make?

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FACTS (Continued)

- Faced with a deadline to move out of the shelter, Anita moved with her children to her parents' home in North Carolina. She did not notify anyone of her move.

Questions for Attorneys

1. As Carl's attorney, what applications, if any, would you make on behalf of your client?

2. As the attorney for the children, would you support or oppose Anita's move with the children to her parent's home in North Carolina?
   - What applications, if any, would you make?

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Questions for Judges

3. Assume that Carl's attorney has brought a writ for the return of the children to New York. Would you grant or dismiss the father's application?
   - What factors would you consider in making this decision?

:::END:::

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ADVOCATING FOR CHILDREN IN CASES INVOLVING DOMESTIC VIOLENCE

Custody, Visitation and Support: Allegations of Abuse or "Parental Alienation"

January 2010

FACTS

- Dan commenced an action seeking a suspension of his child support obligation for his three children pursuant to his separation agreement on the grounds of custodial interference and parental alienation, and a refund of all child support payments he had previously made.
- In the complaint, he alleged several incidents in which his ex-wife, Dorothy, interfered with his parenting time and denied him telephone contact with the children, as well as incidents in which his children refused to come with him on his assigned visiting day.

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QUESTIONS

1. Does Dan's complaint state a cause of action for the suspension of his obligation to pay child support?
2. If he proves his case, would Dan be entitled to a refund of child support?
3. In Family Court, may parental alienation be invoked by the non-custodial parent as an affirmative defense to a child support order without the support order in place?

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FACTS (Continued)

- Assume that Dorothy alleged that the children were victims of child abuse by Dan and had witnessed him committing acts of domestic violence against Dorothy, which was the justification she offered for supporting the children's refusal to have contact with their father.
- Dan denied the allegations, accused Dorothy of parental alienation and requested the ability to produce an "expert" on the so-called "parental alienation syndrome."

QUESTION: How should the Court rule?

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FACTS (Continued)

- The father moved for termination of his child support obligations as to his children based upon their abandonment in that they refused all contact and visitation with the father.
- The father claimed that the mother brainwashed the children.

QUESTION: Should the Court terminate the child support order?

:::END:::

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FUNCTION OF THE ATTORNEY FOR THE CHILD

RULES OF THE CHIEF JUDGE

PART 7. ATTORNEY FOR THE CHILD

Section 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 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 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.

[PROMULGATED by order of the Chief Judge, Dated October 17, 2007]

NEW YORK RULES OF PROFESSIONAL CONDUCT
RULE 1.6:
CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
(1) the client gives informed consent, as defined in Rule 1.0(j);
(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime;
(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
(ii) to establish or collect a fee; or
(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

NEW YORK RULES OF PROFESSIONAL CONDUCT
RULE 1.14:
CLIENT WITH DIMINISHED CAPACITY

(a) 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.

(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.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (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.

Family Offense Cases and Cases with Orders of Protection:

Lallmohamed v. Lallmohamed, 23 A.D.3d 562 (2d Dept 2005): Mother proved by preponderance of the evidence that father committed acts constituting family offenses of harassment and stalking, warranting issuance of order of protection.

Smith v. Smith, 24 A.D.3d 822 (3d Dept 2005): In a family offense proceeding, petitioner seeking an order of protection needed only to establish that respondent committed the crime at issue by a fair preponderance of the evidence.

King v. King, 23 AD3d 938 (3d Dept 2005): Protective order issued by Family Court in custody proceeding between separated parents in which court awarded sole legal and physical custody to children's mother, prohibiting mother's paramour from coming within 1000 feet of the children, based upon his recent conviction of endangering welfare of a child, was in the children's best interests.

Hamm-Jones v. Jones, 14 A.D.3d 956 (3d Dept 2005): Mother had standing to file family offense petition against father, her former spouse, on behalf of their child.

Julie A.C. v. Michael F.C., 15 A.D.3d 1007 (4th Dept 2005): Evidence was sufficient to support finding that father willfully violated order of protection directing him to refrain from intimidating mother, justifying imposition of term of incarceration.

Diane G.B. v. Bryan L.B., 31 A.D.3d 1185 (4th Dept 2006): Father did not willfully violate order of protection, directing that father's daughter pick up and drop off parties' children for visitation purposes and that father not be present during exchange, when father was observed across the street from arranged location during exchange of children. Mother contended that the family court failed to consider her allegations of domestic violence, however, the record was devoid of any evidence of domestic violence and there were no allegations of domestic violence in her petition.

Ebony J. v. Clarence D., 46 A.D.3d 309 (1st Dept 2007): Evidence was insufficient to establish that father committed acts against mother constituting family offense of harassment in either first or second degree which would warrant issuance of order of protection.

Patton v. Torres, 38 A.D.3d 667 (2d Dept 2007): Order for protection issued against father, directing father to refrain from assaulting, stalking, harassing, and menacing mother, was not supported by a fair preponderance of the evidence, absent evidence that father committed the family offense of harassment as charged in the petition.

Anita L. v. Damon N., 54 A.D.3d 630 (1st Dept 2008): Separate fact-finding and dispositional hearings concerning mother's family offense petition against father were not required, where father walked out of hearing on mother's child custody and family offense petitions.

Kiesha G.-S. v. Alphonso S., 57 A.D.3d 289 (1st Dept 2008): Even if service and notice were properly effected on incarcerated father in family offense proceeding, father was entitled to a

hearing in connection with mother's family offense petition.

Mauzy v. Mauzy, 40 A.D.3d 1147 (3d Dept 2007): Finding that there was no family offense which required order of protection for wife was supported by testimony of husband that he interceded in fight between the children and that he did not think that he hurt oldest daughter, and testimony of children taken during *Lincoln* (in camera) hearing.

Boulerice v. Heaney, 45 A.D.3d 1217 (3d Dept 2007): Evidence was sufficient to establish that father committed a family offense during telephone conversation with mother in which he warned her that she "better watch [her] back at all times" as required to support order of protection on ground that his conduct amounted to aggravated harassment in the second degree; although father denied making threat after he was served with petition in which mother sought custody, threat was overheard by a member of mother's family.

Bronson v. Bronson, 37 A.D.3d 1036 (3d Dept 2007): In modifying child custody, Family Court was authorized to issue sua sponte an order of protection prohibiting husband's contact with mother except for purpose of child visitation and further prohibiting him from possessing firearms for one year, in light of husband's disruptive and bizarre behavior, including threats to wife and her paramour.

Hunt v Hunt, 51 AD3d 924 (2d Dept 2008): Fair preponderance of credible evidence supported the family court's determination that father committed acts constituting family offenses of harassment in the second degree and disorderly conduct, and thus order of protection directing father to stay away from mother and parties' child for a one-year period was warranted.

Gray v. Gray, 55 A.D.3d 909 (2d Dept 2008): Fair preponderance of credible evidence adduced at fact-finding hearing in family offense proceeding supported finding that appellant committed family offenses of harassment in second degree, attempted assault in third degree, menacing in second degree, and menacing in third degree, warranting issuance of an order of protection

Fleming v. Fleming, 52 A.D.3d 600 (2d Dept 2008): Family court's determination that wife committed two family offenses of harassment in the second degree, warranting the issuance of the order of protection, was supported by a fair preponderance of credible evidence.

Melikishvili v. Grigolava, 50 A.D.3d 1147 (2d Dept 2008): Evidence proffered in support of mother's family offense petition failed to establish that the father committed the family offense of assault against the child as charged in the petition.

Duane H. v. Tina J., 66 A.D.3d 1148 (3d Dept 2009): Mother's violation of order for protection by mailing letter and picture to child was properly deemed willful; Family Court rejected testimony of child's sister-in-law, who resided with mother and was listed as sender on envelope, that she sent letter and picture despite mother's instructions to contrary, as lacking credibility.

Cases Re: Role of the Attorney for the Child (22 NYCRR 7.2, Bias, Conflict of Interest)

Carballeira v. Shumway: 273 A.D.2d 753 (3d Dept 2000): Attorney for the child did not act

improperly in taking a position at odds with child's preference to live with mother.

Hanehan v. Hanehan, 8 A.D.3d 712 (3d Dept 2004): The attorney for the child did not show bias against father, during course of proceeding ending with issuance of protective order limiting father's access to children, simply because guardian adopted position favoring mother; guardian's loyalty was to children, and not to either parent.

Echols v. Weiner, 46 A.D.3d 825 (2d Dept 2007): In a proceeding to modify the visitation provisions of an order of the Family Court, there was no evidence that the attorney for the child had a conflict of interest or failed to diligently represent the best interests of the parties' child.

Luizzi v. Collins, 60 A.D.3d 1062 (2d Dept 2009): The mere fact that the attorney for the children did not adopt a position that was favorable to the father did not demonstrate bias; The role of the attorney for the children is to be an advocate for and represent the best interests of the children, not the parents.

Krieger v. Krieger, 65 A.D.3d 1350 (2d Dept 2009): 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.

Barbara ZZ. v. Daniel A., 64 A.D.3d 929 (3d Dept 2009): Citing Carballeira, the Appellate Division found that at all stages, the attorney for the child helped the children effectively express their wishes to the court, while zealously advocating separately for their particular wishes and interests. See also **Stewart v. Stewart**, 56 A.D.3d 1218 (4th Dept 2008).

In Camera Cases:

Lincoln v Lincoln, 24 NY2d 270 (1969): The Court has the right to conduct a confidential interview with the child on the record in the presence of his/her attorney but outside the presence of the parties' counsel.

Koppenhoefer v. Koppenhoefer, 159 AD2d 113 (2d Dept 1990): The custody determination of the trial court was reversed, since the court had failed to have an *in camera* interview with the children in the presence of the their attorney, and the children had not been able to otherwise communicate with the court.

Matter of Leslie C., 224 AD2d 947 (4th Dept 1996): Appellate Division discussing the difference between an in-camera hearing with child on a custody proceeding versus an abuse proceeding.

Minner v Minner, 56 AD3d 1198 (4th Dept 2008): The Family court should have conducted an in-camera interview of children in a proceeding to determine whether to permit the children to relocate out of state with their mother as that information would have been helpful to the court in making its determination

Other Cases of Interest:

Family court erred in finding that respondent mother "engaged in" an incident of domestic violence in the children's presence. While respondent was holding one of the children, her boyfriend chased her and closed her hand in the bedroom door, breaking her finger, and while respondent was attempting to leave the apartment with the child, her boyfriend picked her up by her head and bit her face and then pushed her over onto the child. With respect to that incident, petitioner established only that respondent was the victim of domestic violence and that the children were exposed to the violence.
Matter of Ravern H., 15 AD3d 991 (4th Dept 2005), *lv denied* 4 NY3d 709

Respondent's treatment of his mentally ill mother and his extended pattern of menacing, harassment, attempted assault and disorderly conduct towards her, constituted aggravated circumstances warranting five year order of protection notwithstanding failure to conduct dispositional hearing. Respondent never demanded a dispositional hearing and the evidence from the fact-finding amply supported the issuance of the order and its duration.
Matter of Hazel P.R. v Paul J.P., 34 AD3d 307 (1st Dept 2006)

Family Court did not err in dismissing the mother's family offense petition and in modifying a prior order by removing the provision that the two-hour period of weekly visitation of the children's father must be supervised by the mother. The mother failed to establish by a fair preponderance of the evidence that the father committed the violation of harassment in the second degree and the crime of menacing in the third degree. Further, the record established that the modification was in the best interests of the children.
Matter of Woodruff v Rogers, 50 AD3d 1571 (4th Dept 2008), *lv denied* 10 NY3d 717

Father's petition for visitation with his children properly dismissed where he killed children's mother, engaged in a pattern of domestic violence and children did not want to visit him.
Matter of Piwowar v. Glosek, 53 AD3d 1121 (4th Dept 2008)

Family Court erred in issuing broad stay-away order against father who hit child with belt. The mother had advised the court that she wished to withdraw the petition and the attorney for the children made no request for the stay-away order. There was no showing that the broad provision was reasonably necessary to protect the parties' children from future similar offenses.
Matter of Gil v Gil, 55 AD3d 1024 (3rd Dept 2008)

Father had standing to seek order of protection on his child's behalf against child's aunt and uncle. Proper inquiry should have been the child's relationship to respondents aunt and uncle, not father's relationship to respondents.
Matter of Bibeau v Ackey, 56 AD3d 971 (3rd Dept 2008)

One crucial purpose of UCCJEA is to protect victims of domestic violence who, on their face, may be perceived as forum shoppers, but in reality are fleeing to another state to escape abuse.
Matter of Felty v Felty, 66 AD3d 64 (2d Dept 2009)

Domestic Violence and Related Civil and Criminal Legislation: 2006-2009 UPDATE

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October, 2009

A. Governor's Comprehensive Domestic Violence Bill (Laws of 2009, Ch. 476; A 9017): This measure made several significant changes in both criminal and civil proceedings involving domestic violence:

• Domestic Violence Training for Children's Attorneys: Family Court Act §249-b was amended to require the Chief Administrator of the Courts to promulgate court rules requiring that attorneys for children receive initial and ongoing training in domestic violence as approved by the NYS Office of Court Administration after consultation with the NYS Office for the Prevention of Domestic Violence. The training must address: "the dynamics of domestic violence and its effects on victims and children, and the relationship between such dynamics and the issues considered by the courts, including, but not limited to, custody, visitation and child support."

• Findings in Custody and Visitation Proceedings: Domestic Relations Law §240(1)(a) was amended to require that upon considering the effects of proven domestic violence and abuse of a child in custody and visitation proceedings, the Court must state on the record how its findings, as well as the facts and circumstances, factored into its decision.

• Misdemeanor Sex Offenses as Family Offenses: Family Court Act §812 and Criminal Procedure Law §530.11(1) were amended to add the following sex offenses to the enumerated family offenses for which there is concurrent jurisdiction in criminal and family courts and for which mandatory arrest (unless the victim requests otherwise) and other provisions regarding domestic violence are applicable: sexual misconduct, forcible touching, sexual abuse in the third degree and, where the victim is incapable of consent for a reason other than being under 17, sexual abuse in the 2nd degree [Penal Law §130.60(1)].

• Transmission of Domestic Incident Reports to Probation and Parole: Criminal Procedure Law §140.10 was amended to require law enforcement officers to transmit Domestic Incident Reports "as soon as practicable" to the supervising probation department or the Division of Parole, as applicable, in cases in which the offender is known to the officer to be on probation or parole.

• Duration of Misdemeanor and Petty Offense Criminal Orders of Protection in Family and Non-family Offense Cases: Criminal Procedure Law §§530.12 and 530.13 were amended to provide that orders of protection issued in misdemeanor family and non-family offense cases shall not exceed the greater of: (i) five years from the date of the conviction, or (ii) five years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed. Orders of protection in petty offense cases shall not exceed the greater of: (i) two years from the date of the conviction, or (ii) two years from the date of expiration of the maximum term of a definite or intermittent term actually imposed.

• Limitations on Sealing of Domestic Violence Harassment Convictions: Criminal Procedure Law §160.55 was amended to exempt fingerprints and palmprints obtained as a result of a conviction of harassment in the 2nd degree from its sealing requirements, where the crime had been committed against a member of the same family or household as the offender. The record of such a conviction is retained and is available for law enforcement, pursuant to Criminal Procedure Law §§160.55 and 170.10. Where the Court finds, pursuant to Criminal Procedure Law §170.10(8-a) that an offender convicted of harassment in the 2nd degree is a member of the same family or household as the victim, the clerk of court must include a notation to that effect in its notification of the disposition of the case. To aid in this determination, Criminal Procedure Law §170.10(8-a) was amended to provide that the district attorney may serve a notice indicating the name of the victim and specifying the

offender/victim relationship within 15 days of arraignment. In such cases, the Court must make a finding either in writing or on the record regarding the relationship either beyond a reasonable doubt, where the offender contests the relationship, or by stipulation or admission as part of a plea agreement. "Member of the same family or household" was defined in Criminal Procedure Law §530.11 to include individuals involved in "intimate relationships," as well as persons presently or formerly married, those who have a child in common and those related by consanguinity or affinity.[1]

• Training Regarding Non-discrimination Mandate Protecting Victims of Domestic Violence: In an amendment to Chapter 80 of the Laws of 2009, *supra*, the NYS Division of Human Rights, on conjunction with the NYS Office for the Prevention of Domestic Violence, must, "[c]onsistent with available resources," develop training programs regarding the amendments to Executive Law §296 that prohibit employment discrimination against victims of domestic violence.
Effective: Dec. 15, 2009 (90 days after signing), except that amendments regarding sealing (CPL §160.55) take effect Jan. 14, 2010 (120 days after signing) and apply to convictions on or after that date and amendments regarding law enforcement access to convictions (CPL §170.10) take effect Oct. 16, 2009 (30 days after signing); family and non-family offense orders of protection amendments expire with those statutes (CPL §§530.12, 530.13), that is, Sept. 1, 2011.

B. Additional Custody, Visitation and Matrimonial Measures:

1. Custody Cases Involving Allegations of Abuse [Laws of 2008, ch. 538; S 6201-a]: This measure provided that if a parent makes a "good faith" allegation, based upon facts, that a child is a victim of child abuse or neglect or has been affected by domestic violence and if the parent "acts lawfully and in good faith in response to that belief to protect the child or seek treatment for the child," a court may not deprive the parent of visitation, custody or contact with the child "based solely on that belief or the reasonable actions taken based on that belief." If the parent's allegation is supported by a preponderance of the evidence, the court must take that evidence into account in determining the child's best interests regarding visitation and "shall not place a child in the custody of a parent who presents a substantial risk of harm to that child." **Effective**: Sept. 4, 2008.

2. Custody Cases Involving a Party or Parties in Active Service in the Military [Laws of 2008, ch. 576; Laws of 2009, ch. 473]: The 2008 measure added a new section 75-l, contained in (but not a part of) the *Uniform Child Custody Jurisdiction and Enforcement Act*, and the 2009 measure made similar amendments to Domestic Relations Law §240 and Family Court Act §651 to facilitate the process of modification of custody and visitation orders issued regarding a litigant in or returning home from active service in the military and to require the appointment of an attorney for the child in any such proceedings. Unless the parties have otherwise stipulated or agreed, an allegation that a parent has returned from active service in the military automatically constitutes a substantial change in

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[1] Criminal Procedure Law §530.11 defines "intimate relationship" as follows:
Persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship". [Laws of 2008, ch. 326].

circumstances sufficient to give the parent automatic standing to seek to modify an order of custody or visitation, thus allowing the court to address the issue of the child's best interests. In entering an order regarding a parent in active service in the military, the court must consider and, if feasible and in the child or children's best interests, provide for contact between the child or children and the member of the military by webcam, e-mail, telephone or other available means. If the parent has a leave of not more than three months, the court "shall consider the best interest of the child when establishing a parenting schedule." The measures also incorporate "[a]ny relevant provisions" of the *Service Member's Civil Relief Act* by reference. **Effective**: Mar. 24, 2009; Nov. 16, 2009.

3. Domestic Violence, Sex Offender and Court Records Checking Requirements [Laws of 2008. Ch. 595; Laws of 2009, ch. 295]: The 2008 measure required courts, prior to issuing any temporary, permanent or successive custody or visitation orders, to review the statewide domestic violence registry, the sex offender registry and the Family Court's "Universal Case Management System" for warrants and child abuse and neglect records. The court must notify the attorneys, self-represented parties and attorneys for children of the results of the review. However, in emergency situations where the information from these sources is not available on a timely basis, the court may issue a temporary emergency order to '"serve the best interest of the child" pending review of the information within 24 hours or (as modified by the 2009 legislation) if the 24-hour period falls on a day that the court is not in session, on the next day that the court is in session. Upon such review and notification of counsel and parties, the court may then issue temporary or permanent orders. Checks must be performed anew where successive temporary orders have been issued that last in excess of 90 days and before any final order is issued. The NYS Office of Children and Family Services, in conjunction with the NYS Office of Court Administration, was required to conduct a study of the feasibility of connecting court computer systems to the OCFS "Connections" system that includes the state central registry of child abuse and maltreatment, which was submitted to the Governor and Legislature by January 1, 2009. Effective: Jan. 23, 2009; Aug. 11, 2009.

4. Assignment of Counsel in Supreme Court Matrimonial Proceedings (Laws of 2006, ch. 538): Consistent with recommendations of the Matrimonial Commission, Judiciary Law §35 was amended to require appointment of counsel for indigent adults where such appointments would be required by Family Court Act §262, both in cases transferred to Supreme Court from Family Court and in cases in Supreme Court in which the Family Court "might have exercised jurisdiction..." This requirement applies chiefly to parents "seeking custody or contesting the infringement of his or her right to custody," to litigants facing contempt or a determination of a willful violation of an order, e.g., an order of child support or an order of protection, and to parties entitled to counsel pursuant to Family Court Act §262 in other cases in which the Supreme Court invokes its constitutional authority to exercise the powers of the Family Court. **Effective**: August 16, 2006.

5. Automatic orders at outset of matrimonial proceedings [Laws of 2009, ch. 72]: This measure requires a plaintiff in a matrimonial proceeding to serve an automatic order upon the defendant along with the initial summons. The order binds the plaintiff immediately upon the filing of the summons or summons and complaint and binds the defendant immediately upon service. The order, which lasts throughout the pendency of the action unless modified or terminated by the court or unless otherwise stipulated by the parties, prohibits both parties from transferring, removing, assigning, withdrawing, disposing or encumbering their assets. It further prohibits them from incurring "unreasonable debts," including borrowing against credit lines secured by the family

residence, obtaining cash advances on credit cards or other encumbering of assets, except for ordinary household or business expenses or reasonable attorney's fees. The parties are required to continue existing health or life insurance coverage and may not change the beneficiaries during the pendency of the order. **Effective**: Sept. 1, 2009.

6. **Notification of the ramifications of divorce upon health care coverage** [Laws of 2009, ch. 143]: This Office of Court Administration measure replaced the mandates of Domestic Relations Law §177, enacted as chapter 412 of the laws of 2007, with more flexible requirements. Prior to signing a judgment of divorce, separation or annulment, the Supreme Court is required to ensure that the parties have been notified that the judgment may or may not have implications for their continued eligibility for coverage under a spouse's health insurance policy. Service of such a notice upon a defendant with the initial summons is deemed sufficient notice in the event that the defendant defaults. If the parties come to an agreement or stipulation, the agreement must either provide for future health coverage or state that the parties are aware that the agreement will result in a loss of coverage; the parties would then be responsible for acquiring their own coverage. The requirements are not waivable by the parties but the Court may grant the parties a 30-day continuance to come into compliance and to obtain their own coverage. **Effective**: Oct. 9, 2009; applies to actions in which judgment has not been entered as of that date.

7. **Loss of Health Coverage as Factor in Equitable Distribution** [Laws of 2009, ch. 229]: This legislation amended Domestic Relations Law §§236B(5), 236B(6)(10) and 236B(6)(11) to add "loss of health insurance benefits as a result of dissolution of the marriage" as a factor both in equitable distribution of property and in maintenance awards. **Effective**: Sept. 14, 2009 (applicable to actions of proceedings commenced on or after that date).

C. Family Court Family Offenses: Intimate partners, JHO + Referee Authority

1. Access to Family Court by Cohabiting and Dating Partners [Laws of 2008, ch. 326; S 8665]: This measure amended section 812 of the Family Court Act and section 530.11 of the Criminal Procedure Law to provide an expanded definition of "member of the same family or household" to include individuals involved in "intimate relationships," so that they will be able to avail themselves of the concurrent family and criminal court family offense jurisdiction. In addition to those covered by the existing definition (persons presently or formerly married, those who have a child in common and those related by consanguinity or affinity), the bill added:

> Persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

In addition to expanding Family Court jurisdiction, this measure included crimes involving individuals in intimate relationships within the scope of criminal "family offenses," thus subjecting them to mandatory arrest [C.P.L. §140.10(4)], one year adjournments in contemplation of dismissal [C.P.L. §170.55], and the complainant notification and other provisions of C.P.L. §§530.11, 530.12.

Judiciary Law §212(2) was expanded to permit the Chief Administrative Judge to authorize

courts to permit references to court attorney referees and judicial hearing officers to determine *ex parte* applications for orders of protection during court hours, as well as after 5 PM. The NYS Office for the Prevention of Domestic Violence was required to develop curricula and "make available training" to judges, referees, judicial hearing officers, prosecutors and law enforcement regarding the new provisions, as well as "the necessity for timely service of orders of protection and family offense arrest warrants." NYS OPDV and the Division of Criminal Justice Services were required to submit a report to the Governor and Legislature within three years of enactment regarding "any effect upon police practices resulting from" the measure. **Effective**: July 21, 2008 (applicable to orders of protection pending and issued on or after that date); NYS OPDV training mandate expires Sept. 1, 2010).

2. Extension of Authorization for Referees and Judicial Hearing Officers to Issue *Ex Parte* Temporary Orders of Protection [Laws of 2008, ch. 216; A 11459/S 8303-a]: This measure provided a three-year extension to September 1, 20011 for the authorization for references to court attorney referees and judicial hearing officers to determine applications for ex parte temporary orders of protection that is contained in Judiciary Law §212(2)(n). This measure, which has permitted the night courts in the New York City Family Court to issue temporary orders of protection, was also expanded by the Family Court access bill, Laws of 2008, ch. 326, *supra*, to permit such references during Family Court hours, as well as after 5PM. **Effective**: July 7, 2008; **expiration**: Sept. 1, 2011.

3. Judicial Hearing Officer Pilot Programs [Laws of 2008, ch. 290; A 8781]: This measure provided a three-year extension of the pilot projects authorized by the Laws of 2002, ch. 219 for the Seventh and Eighth Judicial Districts (Rochester, Buffalo and surrounding areas) in which Judicial Hearing Officers are explicitly permitted to issue orders of protection in Family Court. **Effective**: July 21, 2008; **expiration**: June 30, 2011.

4. **Concurrent Jurisdiction: Criminal Mischief as a Family Offense in Family Court and Criminal Proceedings** [Laws of 2007, ch. 541; S 4542-a/A 8854-a; NYS OCA Family Court Advisory and Rules Committee proposal; Laws of 2008, ch. 601; Laws of 2009, ch. 45]: The 2007 measure added criminal mischief to the enumerated family offenses for which there is concurrent jurisdiction in family and criminal courts pursuant to in section 812 of the Family Court Act and section 530.11 of the Criminal Procedure Law. The 2007 bill did not address the issue of whether vandalism of property in which the offender has a joint possessory interest may be prosecuted, but it clearly applied, at minimum, to property separately owned by the petitioner in Family Court or complainant in criminal proceedings. The 2008 measure attempted to cure the gap by providing that"[i]t shall be no defense that one believes that he or she has a reasonable ground or right to damage such property because he or she owns such property along with another person unless such other person has given his or her consent to damage such property." Additionally, the 2009 statute amended Penal Law §145.13 to provide that, for purposes of criminal mischief prosecutions in criminal courts and family offense petitions in Family Court, "property of another" includes "all property in which another person has an ownership interest, whether or not a person who damages such property, or any other person, may also have an interest in such property." This permits criminal and Family Court prosecutions for vandalizing a complainant's property even if the complainant does not have sole ownership of the property and even if the offender may claim a partial or whole ownership interest. **Effective**: Nov. 12, 2007; Nov. 1, 2008; May 29, 2009.

D. Civil and Criminal Orders of Protection and Criminal Contempt:

1. Provision of Orders of Protection to Victims [Laws of 2008, ch. 56, Part D]: This measure, part of the language bill accompanying the Fiscal year 2008 New York Public Protection Budget, amended Criminal Procedure Law §§530.12, 530.13 and Family Court Act §842 to require criminal and family courts issuing orders of protection to provide copies to state or local correctional or jail facilities where defendants or respondents are or will be detained or the supervising probation department or Division of Parole if defendants or respondents are or will be supervised. Executive Law §221-a was amended to provide domestic violence registry access to probation officers to "disclose and share" information, subject to the confidentiality laws applicable to the orders of protection. **Effective**: Apr. 1, 2008.

2. Orders of Protection to Protect Pets (Laws of 2006, ch. 253; Laws of 2008, ch. 532): The provisions regarding orders of protection issued in juvenile delinquency, child support, paternity, custody, Persons in Need of Supervision, family offense and child protective articles of the Family Court Act, as well as the family and non-family offense orders of protection provisions of the Criminal Procedure Law, were amended to include conditions designed to protect companion animals or pets, as those terms are defined in section 350(5) of the Agriculture and Markets Law. That section defines "companion animal" or "pet" as "any dog or cat, and ... any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal," but does not include a "farm animal." Orders of protection may restrain individuals from intentionally injuring or killing companion animals or pets without justification. The uniform forms for orders of protection were revised to include these conditions and are available on-line at www.nycourts.gov. The 2008 amendment substituted the phrase "person protected by the order" for "petitioner" and added similar conditions for orders of protection issued in matrimonial cases, pursuant to Domestic Relations Law §§240, 252. **Effective**: July 26, 2006; Dec. 3, 2008.

3. Duration of Criminal Orders of Protection (Laws of 2006, ch. 215): Criminal Procedure Law §§530.12 and 530.13 were amended to provide that a final order of protection in a family or non-family offense case issued upon a felony conviction lasts for the period specified by the Court up to eight (instead of five) years from the date of conviction or eight (instead of five) years from the expiration of either the maximum term of an indefinite sentence or the expiration of a determinate sentence actually imposed. A final order of protection issued upon a Class A misdemeanor conviction lasts for the period specified by the Court up to five (instead of three) years or, in the case of a conviction for any other offense, up to two years (increased from one year). The term "conviction" includes youthful offender adjudications. **Effective:** Aug. 25, 2006.

4. Criminal Contempt: Predicate Offenses (Laws of 2006, ch. 349): This measure amended Penal Law §215.51 to provide that a Class D felony conviction for aggravated criminal contempt [Penal Law §215.52] within the past five years serves as a predicate to upgrade the Class A misdemeanor crime of criminal contempt in the second degree for violating a stay-away order of protection to the Class E felony crime of criminal contempt in the first degree. The former provision included only convictions for criminal contempt in the first and second degrees for violating stay-away orders of protection within the past five years as predicate offenses that would upgrade misdemeanor to felony contempt. **Effective:** November 1, 2006

5. Aggravated Criminal Contempt: Predicate Offenses (Laws of 2006, ch. 350):

Penal Law §215.52 was amended to provide that a Class D felony conviction for aggravated criminal contempt [Penal Law §215.52] serves as a predicate to upgrade the Class E felony crime of criminal contempt in the first degree for violating an order of protection to aggravated criminal contempt. It also provided that a Class E felony conviction for criminal contempt in the first degree for violating an order of protection, as defined in Penal Law §215.51(b), (c) or (d), within the past five years serves as a predicate to upgrade a first degree criminal contempt conviction for violating an order of protection (other than for telephone harassment) to aggravated criminal contempt. The former definition of aggravated criminal contempt only included violations of orders of protection in which the defendant intentionally or recklessly causes physical injury or serious physical injury. **Effective**: November 1, 2006,

6. Securing Orders and Temporary Orders of Protection [Laws of 2007, ch. 137; A 8193/S 4538; OCA Advisory Committee on Criminal Law and Procedure]: This measure amended Criminal Procedure Law §§530.12 and 530.13 to permit a criminal court to issue a temporary order of protection in conjunction with issuance of a securing order committing a defendant to the custody of the sheriff. This bill thus authorizes the court to prevent a defendant from communicating by telephone or other means during the time that he or she is in jail awaiting trial. **Effective**: July 3, 2007.

7. Electronic Transmittal of Orders of Protection [Laws of 2007, ch. 330; S 4704-c/A 7554-c]: This measure authorized the Chief Administrator of the Courts, with the approval of the Administrative Board, to promulgate court rules authorizing pilot projects to be implemented in Onondaga, Erie, Monroe, Nassau, Richmond, Albany, Westchester, Kings and New York Counties for the transmittal of orders of protection by facsimile or other electronic means to local police agencies for service. Participation must be voluntary. The Chief Administrator of the Courts must report to the Legislature and Governor by April 1, 2009 on the effectiveness of the pilot projects. Court rules have been promulgated to implement the pilot projects. **Effective**: July 18, 2007; expires July 1, 2010.

8. Prohibition on Fees for Service of Orders of Protection [Laws of 2007, ch. 36; NYS Office for the Prevention of Domestic Violence bill]: Conforming NY law to the federal *Violence Against Women Act* prohibition against charging domestic violence victims any fees or costs associated with obtaining or enforcing orders of protection, this measure amended section 8011 of the Civil Practice Law and Rules to prohibit sheriffs from charging the statutory $45 fee for service of orders of protection and related orders or papers when service has been directed by the court. *See* 42 U.S.C.A. §3796hh(c)(4). **Effective**: Aug. 20, 2007.

9. Mandatory Arrest Extension [Laws of 2007, ch. 56, §19; Laws of 2009, ch. 56, Part U, section 21(d)]: These bills, included in the 2007 and 2009 New York State budgets, extended Criminal Procedure Law §140.10(4), the mandatory arrest law for family offenses and violations of orders of protection, and related criminal domestic violence legislation first to Sept. 1, 2009 and then to Sept. 1, 2011. **Effective**: Apr. 9, 2007 (expires Sept. 1, 2009); Apr. 1, 2009 (expires Sept. 1, 2011).

10. Firearms License Revocation, License Ineligibility and Surrenders [Laws of 2007, ch. 198; S 4066/A 618-a]: This measure amended Criminal Procedure Law §530.14 to require, when a temporary order of protection is issued, that a defendant's firearms license, if any, be suspended if he or she has a prior conviction involving physical injury (instead of serious physical injury) for violating

an order of protection, that the defendant shall be ineligible to receive a license and that firearms must be surrendered. It further requires that, upon a conviction for a willful violation of an order of protection involving the infliction of physical injury (instead of serious physical injury), the defendant's firearms license, if any, must be revoked, the defendant must be ineligible to receive a license and must surrender any firearms. No similar amendment was made to Family Court Act §842-a or 846-a . **Effective**: Aug. 2, 2007.

E. Additional Measures Regarding Victims of Domestic Violence:

1. Orders to Terminate Residential Leases of Victims of Domestic Violence [Laws of 2007, ch. 73 + 616]: Chapter 73 authorized all courts (Supreme, County, City, Family, District, Criminal, Town and Village Courts) that issue orders of protection to also issue orders terminating residential leases or rental agreements. It created a new section 227-c of the Real Property Law that provided that a tenant who is a victim of domestic violence may request such an order from the Court that issued the order of protection on 10 days notice to the landlord, who must be given an opportunity to be heard. Before issuing a lease termination order, the tenant must prove and the Court must find that the tenant asked the landlord to voluntarily terminate the lease and was refused, that the tenant is acting in good faith and that the tenant or the tenant's child remains at substantial risk of physical or emotional harm if he or she stays in the rental property notwithstanding the issuance of an order of protection. The tenant must pay any rent that is owing and must deliver the premises free of all occupants (except the abuser) and in accordance with the lease.

A chapter amendment, chapter 616, clarifying procedures and delaying the effective date to October 1, 2007, was signed by the Governor on August 15, 2007. The chapter amendment extended the lease termination provisions to matrimonial matters [Domestic Relations Law §240(3)(f)] and non-family offense cases [Criminal Procedure Law §530.13(1)] and provided that a lease termination application may be made any time during the duration of the order of protection. It required 10 days notice to be given to any co-tenants, in addition to the landlord, and if the court is not satisfied that co-tenants and/or owners or landlords have been given adequate notice, it may adjourn the proceedings briefly or "take other steps to provide for such notice," but the court may not require the tenant to personally serve the application upon a co-tenant against whom the order of protection has been issued. It further provided that the tenant is not responsible for ensuring that the persons against whom the order of protection has been issued are not present when the premises are delivered to the landlord. Where there are co-tenants (other than the persons against whom the order of protection has been issued), the court may not terminate the lease without the co-tenants' consent but may sever the co-tenancy, so that the tenant applying for lease termination may receive that relief solely as to himself or herself. **Effective**: Oct. 1, 2007.

2. Domestic Violence Shelter Services for Undocumented Immigrants [Laws of 2008, ch. 584]: This measure amended Social Services Law §398-e to clarify that undocumented immigrants ("non-qualified aliens," under federal law and regulations) are entitled to receive residential services for victims of domestic violence. The former statute provided eligibility for "protective services for adults and children," but its applicability to domestic violence shelter services and services to human trafficking victims had been unclear. While federal and state law preclude *per diem* reimbursement for domestic violence shelter services for "non-qualified aliens," federal law permits a state to enact a law authorizing payment of state and local funds for benefits for which the immigrants would otherwise be

ineligible. *See* 8 U.S.C. §1621(2). This statute provided that authorization. **Effective**: Sept. 25, 2008.

3. Sealing name-change court papers [Laws of 2009, ch. 83]: This statute amended Civil Rights Law §64-a to require courts, in cases where applicants for a name-change seek a waiver of publication because of a danger to their personal safety, to immediately seal and safeguard from disclosure all information in pleadings and other documents pending final resolution of the cases, including, among other items, the applicants' current and proposed names, business and personal addresses and telephone numbers. **Effective**: July 7, 2009.

4. Employment discrimination against victims of domestic violence [Laws of 2009, ch. 80]: The legislation amended Executive Law §§292 and 296 to prohibit employers from discharging, refusing to hire or otherwise discriminating against an individual because of his or her status as a domestic violence victim, which is defined as a person who is the victim of a family offense as defined in Family Court Act §812. [FCA §812 defines a family offense in terms of the parties' relationship (relatives by consanguinity or affinity, present or former spouses, individuals with a child or children in common and intimate partners), as well as by the crime described (attempted assault or assault in the 2nd or 3rd degree, aggravated harassment in the 2nd degree, harassment in the 1st or 2nd degree, disorderly conduct, menacing in the 2nd or 3rd degree, reckless endangerment, stalking and criminal mischief in all degrees, and, pursuant to Laws of 2009, ch. 476, *supra*, sexual misconduct, sexual touching, sexual abuse in the 3rd degree and sexual abuse in the 2nd degree (where the victim is incapable of consent for a reason other than being under 17 pursuant to Penal Law §130.60(1)). Additionally, pursuant to Laws of 2009, ch. 476, the NYS Division of Human Rights, in conjunction with the NYS Office for the Prevention of Domestic Violence, must, "[c]onsistent with available resources," develop training programs regarding the amendments to Executive Law §296. **Effective**: July 7, 2009.

5. Prohibition on Compelling Domestic Violence Victims to Contact Abusers as Condition for Receiving Social Services Benefits (Laws of 2009, Ch. 428): This measure prohibits state and local government officials from requiring domestic violence victims to contact or provide information about their abusers as a condition of establishing their eligibility for social services benefits. This would apply, for example, to cases in which custodial parents on public assistance, whose rights to child support are assigned to local departments of social services, are currently asked to cooperate with the local agencies to facilitate establishment of paternity and issuance of child support orders. Such persons, if they meet the definition of domestic violence victim in Social Services Law §459, may not be required to contact their abusers or "complete any forms, provide any information, appear in person, or cooperate in any other manner" as part of a process to obtain or continue benefits. The domestic violence victims may, upon written consent, authorize an intermediary to make such contact or supply such information to the government officials "in a manner that protects the privacy, confidentiality and current location of the victim." **Effective**: Dec. 15, 2009 (90 days after Sept. 16, 2009 signing).

I. Additional Criminal Measures:

1. Incest (Laws of 2006, ch. 320): Article 255 of the Penal Law was amended to divide the crime of incest into three degrees. Incest in the first degree, a Class B violent felony, has been defined as commission of rape in the first degree or a criminal sexual act in the first degree against a victim under the age of 11 or 13 (latter where the offender is 18 or older), where the victim is known to the

offender to be related, whether or not by marriage, as an ancestor, descendant, brother, half-brother, sister, half-sister, uncle, aunt , nephew or niece. Incest in the second degree, a Class D felony, was defined as commission of rape in the second degree or criminal sexual act in the second degree against a victim under the age of 15 (where the offender is 18 or older) or incapable of consent due to mental disability or incapacity, where the victim is known to the offender to be related, whether or not by marriage, as an ancestor, descendant, brother, half-brother, sister, half-sister, uncle, aunt , nephew or niece. Third degree incest, a Class E felony, consists of incest as originally defined in the Penal Law, that is, marrying, engaging in sexual intercourse or oral or anal sexual conduct with a person the offender knows to be related, whether or not by marriage, as an ancestor, descendant, brother, half-brother, sister, half-sister, uncle, aunt, nephew or niece.

The measure further required payment of the supplemental sex offender victim fee of $1000 for these incest crimes and adds incest offenses against victims under the age of 18 to the enumerated crimes subject to the mandatory probation or conditional discharge condition prohibiting the offender from knowingly entering school grounds or facilities or institutions primarily used for the care or treatment of youth under 18, absent written authorization of the probation officer, court or facility director. It includeed these offenses in the felony sexual assault crimes subject to sentences of ten years probation. All three incest crimes were added to the enumerated crimes included in the definition of felony murder, to the crimes subject to the Sex Offender Registration Act [Corrections Law §168-a] and to the crimes rendering the offender ineligible for work release [Corrections Law §851]. The measure provided that, where the victim is under 18, the statute of limitations would not begin to run until the earlier of the victim turning 18 or the reporting of the crime to law enforcement or the statewide central register of child abuse and maltreatment. The crimes were added to those for which anatomically correct dolls may be used, for which a victim may not be requested or compelled to take a polygraph examination, for which a supportive person may accompany a child witness under 12 before a grand jury, for which a child witness may give video-taped grand jury testimony and for which a child victim under 14 may testify at trial via closed-circuit television if determined by the Court to be "vulnerable." An incest victim is entitled to the protection of section 50-b of the Civil Rights Law (imposing civil liability for the disclosure of his or her name), is entitled to submit a form to the prosecutor requesting notification of any attempt by the offender to change his or her name, is entitled to a private setting in which to be interviewed by law enforcement and is entitled to relaxed time-frames for reporting the crime to the Crime Victim Compensation Board.

With respect to the Family Court, the incest crimes were added to those for which a child victim under 14 may testify in a juvenile delinquency fact-finding proceeding via closed-circuit television if determined by the Court to be "vulnerable." [Family Court Act §343.1(4). These crimes were also added to the enumerated sex crimes in the child abuse definition of Family Court Act §1012(e) and the definition of "abused child in residential care" in Social Services Law §412(8). **Effective**: November 1, 2006.

2. Predatory Sexual Assault (Laws of 2006, ch. 107): This statute added new sections 130.95 and 130.96 to the Penal Law to create two new Class A-II felonies, predatory sexual assault and predatory sexual assault against a child, both of which subject the offender to the Sex Offense Registration Act. Designated Class B violent sex offenses were upgraded to predatory sexual assault where the offender caused serious physical injury, used or threatened the immediate use of a dangerous instrument, committed the crime against more than one person or was previously convicted

of a felony sex offense, incest or use of a child in a sexual performance. Class B felony sex offenses were upgraded to predatory sexual assault against a child where an offender over the age of 18 committed the crime against a child under 13. These crimes require a minimum sentence of 10 to 25 years; for a second felony child sexual assault conviction where the predicate offense is for a Class A-1, Class B or Class C felony offense, the minimum must be 15 to 25 years and for a persistent violent felony offender convicted of one of these crimes, the minimum must be 25 years. **Effective:** June 23, 2006

3. Elimination of Statute of Limitations for Designated Sex Offenses (Laws of 2006, ch. 3): This measure eliminated the criminal statute of limitations for the crimes of first degree rape, first degree criminal sexual act, first degree aggravated sexual abuse and first degree course of sexual conduct against a child [Penal Law §§130.35, 130.50, 130.70, 130.75]. Civil actions regarding these crimes against the offenders may be brought within five years from the termination of the criminal action (if a criminal action has been brought) or within five years of the incident (regardless of whether a criminal charge is brought or sustained) under new sections 213-c and 215(8)(b) of the Civil Practice Law and Rules. The criminal provisions of the new statute are applicable to offenses committed on or after June 23, 2006. The, CPLR provisions apply to incidents prior to June 23, 2006, except that the CPLR extension to five years after termination of the criminal action does not apply to civil actions already time-barred on that date. **Effective:** June 23, 2006.

4. "Cynthia's Law:" Shaken Baby Syndrome (Laws of 2006, ch. 110): A new section 120.02 was added to the Penal Law to define a new Class D violent felony of reckless assault of a child. The crime, committed by an offender 18 or older, was defined as recklessly causing serious physical injury to the brain of a child by "shaking the child, or by slamming or throwing the child so as to impact the child's head on a hard surface or object." Serious physical injury was defined to include "extreme rotational cranial acceleration and deceleration and subdural hemorrhaging, intracranial hemorrhaging and/or retinal hemorrhaging." Further, the Department of Health was required to conduct a public education campaign regarding shaken baby syndrome. **Effective**: Nov. 1, 2006.

5. Sex Offender Management and Treatment Act (Laws of 2007, ch. 7): The Mental Hygiene Law was amended to establish a civil commitment procedure applicable to designated sex offenders. A petition must be filed, followed by a probable cause hearing to determine whether the offender is a sex offender requiring "civil management" and, if so, the offender has a right to a jury trial to determine by clear and convincing proof whether the offender is a sex offender who "suffers from a mental abnormality." If so, the judge must determine whether the offender is a "dangerous sex offender" requiring either secure confinement or intensive parole supervision. The Penal Law has been amended to add a new "Sexually-Motivated Felony," an offense that has also been added to the enumerated juvenile offenses in the Penal Law and designated felonies in the Family Court Act and certain felony sex offenses have been reclassified as "violent felony offenses." **Effective**: April 13, 2007.

6. Definition of Vulnerable Witness [Laws of 2007, ch. 548; S 5049/A 4467]: This measure amended Article 65 of the Criminal Procedure Law to lessen the standard for declaring a child witness vulnerable. Clear and convincing proof is required that the child is likely to suffer serious, rather than severe, mental or emotional harm that is likely to impair the child's ability to

communicate with the finder of fact without the use of two-way closed circuit television. The term "factors" is substituted for the phrase "extraordinary circumstances." These provisions are applicable to juvenile delinquency proceedings pursuant to Family Court Act §343.1(4). **Effective**: Aug. 15, 2007.

7. Firearms: Certificates of Good Conduct or Relief from Disabilities [Laws of 2007, ch. 235; A 463/S 2663]: This measure provided that neither a certificate of good conduct from the Parole Board nor a certificate of relief from disabilities would obviate the prohibition against licensing a convicted Class A-1 or violent felon to possess firearms under Penal Law §400.00. The bill also eliminated the exemption of such felons from the prohibition against possession of rifles and shotguns under Penal Law §265.20(a)(5). **Effective:** Oct. 17, 2007 (90 days after July 18, 2007 signing).

8. HIV Testing of Accused Sex Offenders [Laws of 2007, ch.571; S 6357/A 9256; NYS Division of Criminal Justice Services Bill]: This measure required the court to order an accused sex offender to undergo HIV testing upon a written request of the complainant made within six months of the alleged crime and within 48 hours of the indictment or superior court information if the court found that the testing would provide medical or psychological benefits to the complainant. The test results must be disclosed to the complainant and defendant, but not the court. The court may order a follow-up test of the defendant upon a complainant's written request, if medically appropriate, and further follow-up testing if extraordinary circumstances have been found. The application must be heard in camera and the papers and proceedings must be sealed. This bill will permit New York State to certify compliance with the mandate in the Violence Against Women Act [42 USCA §3796hh(d)] that government entities test criminal defendants within 48 hours of the information or indictment upon a victim's request, notify the victim and defendant of the results as soon as practicable and provide any follow-up testing that is indicated. **Effective**: Nov. 1, 2007; testing is authorized in cases of indictments or superior court informations filed on or after that date.

9. Disabling or Removing a Telephone to Prevent Emergency calls [Laws of 2008, ch. 69]: This measure added disabling or removing a telephone in order to prevent a victim of a crime from calling for emergency assistance to the crime of criminal mischief in the fourth degree, a Class A misdemeanor. **Effective**: July 11, 2008 (60 days after May 12, 2008 signing).

10. Aggravated Harassment: Display of Nooses [Laws of 2008, ch. 74]: This measure added a new subdivision to the aggravated harassment statute that makes it a Class E felony to etch, paint, draw upon or otherwise place "a noose, commonly exhibited as a symbol of racism and intimidation, on any building or other real property, public or private, owned by any person, firm or corporation or any public agency or instrumentality, without express permission of the owner or operator of such building or real property." **Effective**: Nov. 1, 2008.

11. Injury to Elderly [Laws of 2008, ch. 68]: This measure elevated an assault causing physical injury from a Class A misdemeanor to a Class D felony where the victim is over 65 years of age and is more than ten years older than the accused. As an element of the crime, the victim's age must be proven beyond a reasonable doubt, but there is no requirement to prove that the accused knew or should have known the victim's age. [Note: restrictive placements for designated felonies involving serious physical injuries committed against elderly victims over 62 have long been required in Family Court. See Family Court Act §353.5(3). This measure added physical injury to a victim over 65 to the

crime of assault in the second degree, which is a designated felony where there has been a prior assault 2nd degree finding]. **Effective**: June 30, 2008.

12. Physicians Assistants as Sexual Assault Forensic Examiners [Laws of 2008, ch. 292]:This measure amended Public Health Law §2805-I to authorize physician assistants, licensed pursuant to Education Law §6542, to act as sexual assault forensic examiners ("SAFE"), where they have been specially trained and certified as qualified in the forensic examination and preservation of forensic evidence in sexual assault cases. **Effective**: July 21, 2008.

13. Luring a Child [Laws of 2008, ch. 405; A 8488-a]: This measure created a new Penal Law §120.70, establishing a new crime of "luring a child," which is a sex offense requiring the offender to register pursuant to Article 6-C (section 168 et seq.) of the Corrections Law. A person may be found guilty of the crime when he or she lures a child less than 17 years of age into "a motor vehicle, aircraft, watercraft, isolated area, building, or part thereof, for the purpose of committing any of the following offenses:" murder in the first or second degree, a felony sex offense, kidnapping in the first degree, promoting or compelling prostitution, sex trafficking, incest or use of a child in a sexual performance or promotion of a sexual performance by a child. The new crime of luring a child is a Class E felony, but if the underlying offense that the offender intended to commit is a Class A or Class B felony, then the crime of luring a child would be a Class B or Class C felony, respectively. **Effective**: Oct. 4, 2008.

14. Aggravated Harassment: Digital Transmission [Laws of 2008, ch. 510; A 9673]: This measure added transmission or delivery of a written communication designed to cause annoyance or alarm to the crime of aggravated harassment in the second degree, a Class A misdemeanor. The definition of written communication was expanded to include a "recording," as the term is defined in Penal Law §275.00(6), that is, "an original phonograph record, disc, tape, audio or video cassette, wire, film, or any other medium in which sounds, images, or both sounds and images are or can be recorded or otherwise stored, or a copy or reproduction that duplicates in whole or in part the original." **Effective**: Dec. 3, 2008.

15. Sex and Labor Trafficking [Laws of 2007, ch. 74]: This measure created new crimes of sex trafficking and labor trafficking, class B and D felonies, respectively, and provides that a seller of travel services to prostitution tourists may be guilty of the Class D felony of promoting prostitution. Victims of sex or labor trafficking are not deemed to be accomplices of sex or labor traffickers and are to be provided with an array of services delineated in a new Article 10-D of the Social Services Law that may be provided under contract through the NYS Office of Temporary and Disability Assistance. Sex trafficking was added to the list of crimes subject to the Sex Offender Registration Act, as is patronizing a prostitute under the age of 17. The sex and labor trafficking crimes may be the basis for enterprise corruption charges and are designated offenses under eavesdropping laws. **Effective**: Nov. 1, 2007.

16. Aggravated Murder of a Child [Laws of 2009, ch. 482]: This statute, enacted in response to the homicide of a child, Nixzmary Brown, authorized the penalty of life imprisonment without parole or other penalties applicable to Class A-1 felonies for the aggravated murder of a child less than 14 years of age by a defendant over the age of 18. Aggravated murder of a child was defined as a course of conduct involving torture "in a cruel and wanton manner" intentionally causing the child's death. **Effective**: Oct. 9, 2009.

LAW AND CHILDREN

New Professional Responsibility Rules and Attorney for the Child

On April 1st, 2009, the Rules of Professional Conduct will go into effect and replace the current New York Lawyer's Code of Professional Responsibility as the governing rules of professional responsibility for attorneys in New York State. The rules generally end New York's status as a professional responsibility renegade as they comport with the ABA Model Rules that serve as the template for professional responsibility in 47 other states. New York lawyers can now draw on a very large body of decisions and commentary from other states as they encounter ethical quandaries in their practice. Most practitioners also feel that the rules are much more clearly organized than the Code, making it easier for attorneys to seek guidance.

In the short term, however, lawyers will have to meet the challenge of familiarizing themselves with the rules, and with how they influence resolution of professional responsibility dilemmas in their practice. This column will explore how the rules impact two common ethical dilemmas for attorneys who represent children: under what circumstances may an attorney substitute judgment for a child client; and under what circumstances may an attorney for a child client disclose confidential information to third parties about the representation. With some caveats, we think that the rules are an improvement over the Code in these areas.

Substituting Judgment

The question of when a lawyer may advocate for a position different from a position articulated by a child client is one that has long caused consternation among practitioners and scholars. The question comes up on a nearly daily basis for lawyers who represent children, and demands clear ethical guidance. Consider the case of Amkia P.1 Amkia, a 10 year-old girl in foster care, emphatically desired to return to the care of her mother. Because Amkia had a chronic illness that was life-threatening if medication was not properly administered, the Family Court was concerned that Amkia would not be safe in her mother's care. Amkia's lawyer believed that Amkia would be at imminent risk of serious harm if returned to her mother, and therefore chose to substitute judgment and advocate

for her own view of what was best for Amkia - that she remain temporarily in foster care - rather than for Amkia's stated desire to return home. The Family Court rejected the claim that the law guardian's substitution of judgment meant that Amkia had ineffective representation, reasoning: "[i]n her role as law guardian for a 10-year-old child, a law guardian may properly attempt to persuade the court to adopt a position which, in the law guardian's independent judgment, would best promote the child's interest, even if that position is contrary to the wishes of the child."

While Amkia's lawyer chose to substitute her judgment for Amkia's and the Court agreed, the recent trend has been to caution law guardians against doing so except in extraordinary circumstances, and leave the determination of a child's best interests to the court not the child's lawyer. Most recently, the chief judge issued an Administrative Order that an attorney for a child must advocate the child's position unless either (1) the child client lacks the capacity for a knowing, voluntary and considered judgment or (2) following the child client's wishes would likely result in a 'substantial risk of imminent, serious harm to the child.**2** Both the New York State Bar Association and Legal Aid's Juvenile Rights Division take similar positions, using almost identical language .**3**

Remarkably, however, the Code did not contain a single mandatory provision offering guidance for attorneys on this issue. Ethical Consideration 7-12 urged lawyers to "safeguard and advance the interests" of a client incapable of making a considered judgment, but this broad advice was aspirational only, and not mandatory authority.**4**

The new rules, in contrast, speak to the issue directly in Rule 1.14(b) ("client with diminished capacity") and reinforce the philosophy of advocacy set forth in the Chief Judge's Administrative Order. The rule states that a lawyer must reasonably believe that three specific pre-conditions exist before she may ethically take protective action such as substituting judgment: (1) the client has diminished capacity; (2) the client is at risk of substantial physical, financial or other harm unless the lawyer takes action; and (3) the client can not adequately act in his own interests.**5** If all of these conditions exist, then the lawyer is permitted, though not required, to take action necessary to protect the client.

What does the new rule mean for lawyers who represent children? Most significantly, it proscribes substituting judgment unless a child will be at risk of substantial harm if the lawyer takes no protective action. It is no longer ethically permissible to substitute judgment for issues that arise in the course of representation of a child client, even if the client has diminished capacity and can not act in his own interests, unless that high level of risk exists. Rather than simply deciding some risk to Amkia exists, before substituting judgment, Amkia's lawyer must now do a careful assessment of how serious the risk is that Amkia will die because her medication will not be administered properly if she is returned home. She should also assess whether alternative measures such as visits by a home health care worker might significantly reduce the risk to Amkia.

Under the new rule, whether substitution of judgment is permissible becomes an issue-by-issue assessment requiring differential diagnosis - it can vary for the same client with the same capacity, depending on the severity of risk the issue presents to the client. A client who wants his lawyer to take a position that, while not in the client's best interests, does not put the client at substantial risk of harm, is entitled to have an advocate for that position.

The new rules also reinforce the guidance given by the New York State Bar Association, the Juvenile Rights Division and many others that a lawyer should always attempt to resolve any differences of opinion with a client through traditional lawyering duties, such as intensive client counseling.6 Through normal counseling, lawyers will often be able to explain to a client why a particular option may serve the client's best interests, and may even be persuaded by a client that the position of the client is the most sensible.

Confidentiality is a central component of the attorney-client relationship. The traditional rationale for requiring lawyers to treat their communications with clients as confidential runs as follows: a lawyer must have complete and truthful information to competently counsel and advocate for her client; a client will provide complete and truthful information only if he is assured that the lawyer will not and can not disclose that information without his consent; therefore, in order to assure competent representation, lawyers must be prohibited from disclosing confidential information without a client's consent.7

The general duty to maintain confidentiality, as well as the more narrowly focused attorney-client privilege are powerful prohibitions against a lawyer disclosing any communications with a client which do not fall under certain enumerated exceptions.

The old Code contained five exceptions: (1) where a client consents to disclosure; (2) where disclosure is mandated by law or court order; (3) where disclosure is necessary to prevent a client's commission of a crime; (4) where disclosure is necessary in the course of a dispute between a client and lawyer (e.g., a fee dispute); and (5) where disclosure is necessary to correct a false representation by the lawyer.

Lawyers for children frequently encounter situations which create a strong moral pull for disclosing confidential information, and which do not fall under one of these exceptions. Imagine the following scenario. A lawyer represents a mature and articulate 15-year-old child client, with no mental illness or learning disabilities, who was allegedly beaten with a belt by his parents. After a few months in foster care, the client is returned to his parents. The lawyer meets with her client, and finds out that the client is again being beaten, only this time much more severely. The client does not want this information disclosed, even after extensive counseling by the lawyer.

Since the client does not appear to meet the definition of a "client under a disability" for whom a lawyer could substitute judgment, the lawyer may breach confidentiality over the client's objections only if this situation falls under an enumerated exception to the confidentiality obligation. The Code contained no relevant exception; the rules, however, do. Under Rule 1.6(b) disclosure is permitted (but not required) when necessary to prevent "reasonably certain death or substantial bodily harm." This new exception, which applies to adult clients as well as child clients, allows lawyers to disclosure client confidences to protect vulnerable children facing serious risk of harm in extraordinary circumstances.

There are, however, costs to using this new exception 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 she 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.

In addition, a lawyer is severely hampered in her ability to advocate effectively in court if she does not know her client's description of the facts of the case. In the situation described above, for example, the lawyer can not effectively advocate for an order of protection for her client, or for appropriate parent training services for the parents, if she does not know the factual background. Given these possible consequences, placing a client communication within the new confidentiality exception requires careful professional judgment and great caution. The drafters of the rules implicitly acknowledge as much by making disclosure permissive rather than mandatory.

Another aspect of the new rules which is more troubling is that they contain a second new exception to confidentiality which seems to allow lawyers broad and undefined discretion to make disclosures over a client's objections.

Rule 1.6(a) allows a lawyer to make "disclosure impliedly authorized to advance client's best interests when reasonable or customary." This language, which is not contained in the ABA Model Rules on which the New York Rules are based,**8** will distress the many children's lawyers who have been fighting to move away from the ambiguity inherent in giving lawyers discretion to override children's directions about the objectives of representation based on the vague "best interests" standard. Such vagueness has in the past been seen by some attorneys as a license to substitute their judgment for their client's definition of the objectives of the representation based on the lawyer's personal beliefs of what is best for the child.

That interpretation would severely undermine the protection of confidential information that is at the heart of the attorney-client relationship for children, and indeed all clients. Though it is impossible to know at this point, the emphasis of other rules on client-directed advocacy makes it likely that such a broad interpretation is not what the writers of the rules intended.**9**

Conclusion

The New York child advocacy community should generally welcome the rules as a significant step in the right direction. They bring New York's formal professional responsibility doctrine into line with other states. More importantly, they support the philosophy of representation that New York's child advocacy community has embraced, that lawyers for children treat their clients with the same dignity and respect for autonomy as lawyers for adults do.

1. 684 N.YS.2d 761 (Bx. Fam. Ct. 1999).
2. Administrative Order of the Chief Judge of the State of New York §7.2 (Function of the attorney for the child).
3. New York State Bar Association Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings, Standard A-3 (2007); Tamara Steckler & Gary Solomon, New Era In Representing Children, NYLJ, Oct. 22, 2008.
4. New York Lawyer's Code of Professional Responsibility, Ethical Consideration 7-12 (2007).

5. New York State Unified Court System, Part 1200-Rules of Professional Conduct, Rule 1.14(b) (2009).
6. Rule 1.6(a) requires lawyers to "...as far as reasonably possible, maintain a conventional relationship with the client."
7. See Geoffrey C. Hazard, Jr. & W. William Hodes, 1 "The Law of Lawyering" §9-2 (3d ed. 2001); Monroe Freedman, "Lawyer's Ethics in an Adversary System" 27 (1975). While this syllogism is the basis for the confidentiality rules in the Model Code and Model Rules, there are certainly other reasons why confidentiality should be observed. See, e.g., Bruce Landesman, "Confidentiality and the Lawyer-Client Relationship, the Good Lawyer" ch. 8 (David Luban ed. 1984), at 191 (arguing that there exist moral reasons for the protection of confidentiality). In addition, some commentators question the soundness of the syllogism. See, e.g., Fred Zacharias, "Rethinking Confidentiality," 74 Iowa L. Rev. 351 (1989) (discussing a study showing that clients put far less stock in confidentiality than lawyers believe that they do).
8. At this point it is not clear why this exception was added, though perhaps subsequent commentary will elucidate the rationale.
9. Rule 1.2(a), for example, mandates that lawyers allow clients to set the goals of representation.

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