

THE APPELLATE DIVISION, FOURTH DEPARTMENT
IN COLLABORATION WITH
THE OFFICE OF COURT ADMINISTRATION
ATTORNEY FOR THE CHILD CONTRACTS

presents:

Focus on Juvenile Justice

Tuesday, March 19, 2013
SUNY at Buffalo
Center for Tomorrow
Buffalo, New York

- 9:00 a.m. REGISTRATION AND MATERIALS DISTRIBUTION
- 9:30 a.m. WELCOME
Tracy Hamilton, Esq.
Director, Attorneys for Children Program
- 9:40 a.m. The Role and Responsibilities of The AFC in JD Proceedings: A Practical Perspective
Professor Randy A. Hertz
Vice Dean, NYU Law School
Director, Clinical & Advocacy Programs
- 11:15 a.m. Break
- 11:30 a.m. Panel Discussion: Ethical Issues in JD Proceedings
Hon. James Dillon
Erie County Supreme Court
Professor Randy A. Hertz
Vice Dean, NYU Law School
Director, Clinical & Advocacy Programs
Theresa Lorenzo, Esq.
Attorney for Children
Legal Aid of Buffalo
- 12:40 p.m. LUNCH (provided)
- 1:40 p.m. JD Case Law & Statutory Update
Professor Randy A. Hertz
Vice Dean, NYU Law School
Director, Clinical & Advocacy Programs
- 2:40 p.m. Break
- 2:55 p.m. Juvenile Justice Reforms: Improving Outcomes for Youth & Families
Tim Roche
Associate Commissioner
NYS Office of Children and Family Services
- 4:10 p.m. Conclusion

The Appellate Division, Fourth Department has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York from March 2, 2011 to March 1, 2014. This program has been approved for a total of six (6.0) credit hours, of which one and one-half (1.5) credit hours can be applied toward the professional practice (family law) requirement, two and one-half (2.5) credit hours can be applied toward the skills requirement, and two (2) credit hour can be applied toward the ethics and professionalism requirement. This program is suitable for experienced or newly admitted attorneys.

James H. Dillon

JAMES H. DILLON is a Justice of the New York State Supreme Court, having been elected to that position in 2007. He handles trial, tort and contract matters, divorces, Article 81 matters and election law cases. He is assigned to Erie County but has handled cases in all eight counties in Western New York which compose the Eighth Judicial District.

Prior to his election to Supreme Court, Justice Dillon was an Erie County Family Court Judge for seventeen years. There, in addition to handling the many matters assigned to Family Court, he was instrumental in establishing one of the first Juvenile Treatment Courts in the State to aid juvenile delinquents who had substance abuse problems. During that time, the Erie County Family Court was named a model court for juvenile delinquency matters. Judge Dillon also served as President of the New York State Family Judges Association.

Prior to his service on the bench, Judge Dillon served as confidential Law Clerk to the Hon. Timothy J. Drury in Erie County Court and was an Assistant District Attorney in Erie County for nine years. He was also Assistant City Attorney for the City of Lackawanna and worked in a law office he shared with his father, William H. Dillon.

Judge Dillon is married to Karen Holmes Dillon, a retired math teacher in the City of Buffalo Public Schools. They reside in the Lakeview section of the Town of Hamburg. They are the parents of three daughters and have six grandchildren.

Judge Dillon was born on October 1, 1951. He and his nine brothers and sisters were raised in the City of Lackawanna by their parents, Winifred E. Dillon and William H. Dillon. He is a graduate of Lackawanna High School, Canisius College and the State University of New York at Buffalo School of Law.

Randy A. Hertz

Randy Hertz is the Vice Dean of N.Y.U. School of Law and the director of the law school's clinical program. He has been at the law school since 1985, and regularly teaches the Juvenile Defender Clinic and a simulation course entitled Criminal Litigation. Before joining the N.Y.U. faculty, he worked at the Public Defender Service for the District of Columbia, in the juvenile, criminal, appellate and special litigation divisions. He writes in the areas of criminal and juvenile justice and is the co-author, with Professor James Liebman of Columbia Law School, of a two-volume treatise entitled "Federal Habeas Corpus Law and Practice," and also the co-author, with Professors Anthony G. Amsterdam and Martin Guggenheim of N.Y.U. Law School, of a manual entitled "Trial Manual for Defense Attorneys in Juvenile Delinquency Cases." He is an editor-in-chief of the *Clinical Law Review*. In the past, he has served as the Chair of the Council of the ABA's Section of Legal Education and Admissions to the Bar; a consultant to the MacCrate Task Force on Law Schools and the Profession: Narrowing the Gap; a reporter for the Wahl Commission on ABA Accreditation of Law Schools; a reporter for the New York Professional Education Project; and the chair of the AALS Standing Committee on Clinical Legal Education. He received NYU Law School's Podell Distinguished Teaching Award in 2010; the Equal Justice Initiative's Award for Advocacy for Equal Justice in 2009; the Association of American Law Schools' William Pincus Award for Outstanding Contributions to Clinical Legal Education in 2004; the NYU Award for Distinguished Teaching by a University Professor in 2003; and the American Bar Association's Livingston Hall award for advocacy in the juvenile justice field in 2000.

Theresa Lorenzo

Theresa Lorenzo is a graduate of the State University of New York at Buffalo Law School. She has been an attorney for children at the Legal Aid Bureau of Buffalo, Inc. for over 25 years.

In 2009, Ms. Lorenzo received the Hon. Michael F. Dillon Attorneys for Children Award in recognition of her dedication to the provision of the highest quality of legal representation for children. The award, presented annually by the Appellate Division, Fourth Department's Attorneys for Children Program, signifies vigorous advocacy on behalf of children and is named for the late Justice Dillon who spearheaded the development of the highest quality of representation for children in the Fourth Department. Justice Dillon also initiated mandatory training for attorneys for children in New York state.

FOCUS ON JUVENILE JUSTICE
ETHICAL ISSUES PANEL DISCUSSION
CASE SCENARIO

Your fifteen-year-old client, Sid, recently moved to town from New Jersey. He spent the afternoon of Saturday, March 16 hanging out in the woods behind his high school, drinking beer with his friends Johnny and Malcolm. They joked about burning the school down. After awhile, Johnny and Malcolm left. Sid stayed behind. A few minutes later, a fire erupted in a dumpster behind the school. On his way down the street, Johnny looked back and saw flames leaping out of the dumpster. Johnny took photos of the fire and posted them on his Facebook page with a message that Sid set the fire, although no one is visible in the photos.

Just then, Nancy and Elizabeth left the school building after spending the afternoon rehearsing for the annual musical. Seeing garbage burning in the dumpster, Nancy called 911. Nancy and Elizabeth saw a male, seemingly intoxicated, running toward the woods. They noticed the male was wearing a New York Jets sweatshirt and assumed it is Sid, the new kid who never shuts up about the Jets.

Within a few minutes, the fire spread to the roof of the school. Sid made it to the woods, but he tripped over a rock and was apprehended by a responding police officer. The officer took Sid to the precinct. He asked Sid for his home number. The officer called and left a message for Sid's grandmother. Sid was given a Miranda warning. On his way down the hallway to be questioned, Sid walked past several adult prisoners who leered at Sid and made provocative comments to him. The officer told Sid things will "go better" for him if he talks. Clearly shaken, Sid confessed. However, now he denies having set the fire. The JD petition alleges that Sid is a juvenile delinquent who committed an act that, if committed by an adult, would constitute the crime of arson in the fourth degree.

Since moving to New York, Sid has been suspended from school twice for relatively minor disciplinary infractions, but he has not had any brushes with the law. Johnny has previously been adjudicated a PINS and has a JD proceeding pending. Malcolm is a straight-A student.

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

**HONORABLE HENRY J. SCUDDER
PRESIDING JUSTICE**



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

PREFACE

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

FUNCTION OF THE ATTORNEY FOR THE CHILD

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

Section 7.2 Function of the attorney for the child.

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

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

SUMMARY OF RESPONSIBILITIES OF THE ATTORNEY FOR THE CHILD

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

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

- (1) Commence representation of the child promptly upon being notified of the appointment;
- (2) Contact, interview and provide initial services to the child at the earliest practical opportunity, and prior to the first court appearance when feasible;
- (3) Consult with and advise the child regularly concerning the course of the proceeding, maintain contact with the child so as to be aware of and respond to the child's concerns and significant changes in the child's circumstances, and remain accessible to the child;
- (4) Conduct a full factual investigation and become familiar with all information and documents relevant to representation of the child. To that end, the lawyer for the child shall retain and consult with all experts necessary to assist in the representation of the child.
- (5) Evaluate the legal remedies and services available to the child and pursue appropriate strategies for achieving case objectives;

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

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DELINQUENCY PROCEEDINGS
Article 3, Family Court Act

A. The Function of the Attorney for the Child

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...in juvenile delinquency proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.

B. The Decisions of the Child

In certain areas of legal representation that do not affect the merits of the proceeding or substantially prejudice the rights of a child, the attorney for the child is entitled to make decisions. Otherwise the authority to make decisions is exclusively the child's and, if made within the boundaries of the law, such decisions are binding on the attorney. An attorney for the child in a juvenile delinquency proceeding must advise the child fully of the strengths and weaknesses of the case and the prospects of success on appeal, but it is for the child to decide what defense strategy should be followed and whether an appeal should be taken (*see generally* Code of Professional Responsibility, Canon 7).

C. Prior to the Initial Appearance

1. The attorney for the child should interview the child to ascertain detailed facts concerning the act(s) charged and the facts surrounding the child's arrest and questioning. (If the attorney for the child is not assigned until the initial appearance, the attorney for the child should request a brief adjournment to carry out these functions).
2. At the initial interview the attorney for the child should carefully ascertain the child's involvement, if any, in the act(s) charged; the child's possible involvement should be examined on a confidential basis outside the presence of the parents.
3. At the initial appearance, ordinarily the court will consider the issue of detention. Because of the impact this decision has on the child's rights and the course of the case, the attorney for the child must be prepared to address this issue in a manner consistent with the wishes of the child and to support this application with all available evidence. The attorney for the child should determine whether the child desires to remain at home. If removal from home is a possibility, the attorney for the child must

determine and advocate for the child's wishes, including possible temporary placement with a relative, friend or foster parent.

4. The child and his parents should be advised, in terms the child can understand, of the nature of the proceedings; the child's rights, including the right to testify and right to remain silent; the role and responsibilities of the attorney for the child; the attorney-client privilege, the fact-finding process; and the possible consequences of a finding.
5. The family situation and relevant social history should be explored with the child and his parents, including family relationships, prior court proceedings, school records, mental health history and any special needs.
6. The attorney for the child should obtain the names of all persons involved in the incident including all witnesses and co-respondents. The attorney for the child should determine whether any statements or admissions were made and the circumstances under which they were made. Possible affirmative defenses should be explored.
7. The attorney for the child should ascertain, to the extent possible, the reason the case was not adjusted; if the presentment agency or court approval is required for adjustment services, that possibility should be explored.

D. The Initial Appearance

1. The petition and supporting papers should be examined carefully and if any defects are found the attorney for the child should file appropriate preliminary motions, e.g., a motion to dismiss.
2. The attorney for the child should discuss the case with the presentment agency (and perhaps probation) to consider alternatives to a finding of delinquency, such as a dismissal, substitution of a PINS petition or an adjournment in contemplation of dismissal. (The timing of this discussion will depend, in part, on local custom.)
3. The decision whether to request a probable cause hearing, the timing of such hearing, and establishing dates for discovery and fact-finding are issues that the attorney for the child must consider, on a case-by-case basis. Deviation from the statutory standard may be exercised based upon the facts of the case and upon the consent of the child.

E. The Probable Cause Hearing (Detention Cases)

1. The probable-cause hearing should be used to determine whether it is

reasonable to believe that a delinquency act was committed, whether it is reasonable to believe the respondent committed such act and, if the court finds reasonable cause, whether continued detention is necessary.

2. The attorney for the child should attempt to interview major witnesses, such as the complainant or victim who may testify at the probable cause hearing. The attorney for the child should obtain copies of all relevant statements, lab reports, criminal history reports, etc., from the presentment agency's files.
3. The child should be interviewed again.
4. Evidence that supports the discontinuance of detention should be gathered, including school records, affidavits, and witnesses who could testify concerning the lack of probable cause or present alternatives to detention.
5. The attorney for the child must actively participate at the hearing.
6. The decision regarding filing a demand for a bill of particulars, dates for discovery and fact-finding are issues that the attorney for the child must consider on a case-by-case basis. If the court orders continued remand, deviation from the statutory standard may be made based upon the facts of the case and upon the consent of the child. In the absence of any countervailing factors or in the absence of the child's consent, the attorney for the child should demand an expedited fact-finding hearing date, and request the expedited service of discovery materials and a response to a bill of particulars.

F. Pre-Fact-Finding Hearing

1. The attorney for the child should interview the child and witnesses. Oral and written statements may be prepared. If helpful, the scene of the crime should be visited and the alleged acts re-enacted. If necessary, third parties, such as investigators or experts, should be retained where appropriate and/or to avoid the possibility that the attorney for the child may be called as a witness.
2. The strength and weaknesses of the presentment agency's case should be fully evaluated from the point of view of both fact-finding and disposition. The defense strategy should be developed with full consultation, in terms the child can understand, with the child. The attorney for the child's position and goals must be agreed to by the child.
3. Applicable statutes, case law and evidentiary rules should be reviewed.

4. Every possible defense, including incompetency or lack of intent, should be considered. If necessary, experts such as mental health specialists should be retained.
5. The scope of testimony and possible cross-examination must be carefully prepared with the child and major defense witnesses.
6. The full range of appropriate pre-trial motions (e.g. discovery, suppression, inspection, Wade, Huntley) should be considered and, when relevant, filed on a timely basis. Similarly, appropriate pre-trial hearings should be requested. The attorney for the child must be aware of and comply with applicable time limitations governing service of notice of intent to offer alibi evidence, evidence of mental health disease or defect, etc.
7. If appropriate, additional conferences with the presentment agency should be requested so that an agreed disposition, including an adjournment in contemplation of dismissal or an admission, can be explored.
8. Dispositional alternatives should be carefully explored, including possible community based programs or other dispositions that involve the minimum feasible loss of liberty. A dispositional strategy should be formulated prior to reaching a negotiated agreement or attending the fact-finding hearing.
9. The attorney for the child should not advise a child to make an admission to the petition unless pre-trial discovery and evaluation have revealed no viable legal impediment to a finding.
10. The attorney for the child must not enter an admission on behalf of the child except upon the consent of the child and only after fully advising the child, in terms the child can understand, of the facts, alternatives and consequences of the rights that the child is waiving.

G. The Fact-Finding Hearing

1. If appropriate, pre-trial motions that were not heard prior to the fact-finding hearing (e.g., suppression) should be filed.
2. The attorney for the child may present an opening statement.
3. Presentment agency witnesses should be cross-examined (unless cross-examination is waived in accordance with a valid defense strategy), and the attorney for the child should attempt to impeach such witnesses by using appropriate questioning, inconsistent prior statements, and other evidentiary methods.

4. Defense witnesses, including the child, should be questioned in accordance with pre-trial preparation; if necessary, character or rebuttal witnesses should be called.
5. The attorney for the child should present a summation.
6. If appropriate, post-trial motions and briefs should be submitted.

H. Pre-Dispositional Hearing

1. The probation report must be reviewed and discussed with the child and may be reviewed and discussed with the child's parents. Care should be taken when revealing undisclosed sensitive information contained in the report.
2. Appropriate dispositional alternatives must be explored with the child. The county attorney or probation officials may be consulted with regard to possible alternatives. The child's wishes must be ascertained and the child and the child's parents should be advised of possible alternatives.
3. The attorney for the child should develop a specific dispositional plan to present to the court and gather witnesses and evidence in support of the plan where it is likely to be contested. The attorney for the child must follow the child's wishes with regard to the specific disposition that the attorney for the child intends to present. Witnesses should be prepared as thoroughly as for the fact-finding hearing.
4. The attorney for the child should ensure, where appropriate, that the dispositional hearing is scheduled within applicable time limitations.

I. The Dispositional Hearing

1. The attorney for the child must advocate the child's decision regarding the dispositional alternative. All supporting evidence, including school records, mental health reports, prior history, affidavits and witnesses should be presented. Where appropriate, evidence concerning the absence of a need for treatment or supervision should be presented.
2. All supportive records, documents, reports and files referred to should be entered into evidence in order to preserve a record for appeal.
3. Witnesses testifying on behalf of the petitioner, including preparers of reports should be cross-examined concerning their recommendations in order to determine whether less restrictive alternatives have been exhausted.

4. The attorney for the child should present and argue a complete dispositional alternative consistent with the consent and needs of the child, including specific programs or dispositional orders and, if appropriate, alternative possibilities.

J. Post-Disposition

1. The attorney for the child must explain to the child and the child's parents, in terms the child can understand, the disposition and its consequences, including the rights of post-trial motions or requests for new hearings, the consequences of possible violations of the dispositional order, and the continuing jurisdiction of the court.
2. The child and the child's parents must be advised in writing of the right to appeal. The possibilities of appeal should be explored fully, including possible grounds. The attorney for the child should file a notice of appeal unless the child indicates explicitly and intelligently the decision to waive an appeal.
3. The attorney for the child must examine the dispositional order to ensure that the order conforms to the agreed disposition or finding.
4. If there is an appeal, the attorney for the child must comply with the guidelines set forth in the appeals section of these guidelines.
5. The attorney for the child should remain accessible to the child and other appropriate individuals and agencies to monitor implementation of the dispositional and permanency orders, and seek intervention of the court to assure compliance with those orders or otherwise protect the interests of the child, while those orders are in effect.