

*Supreme Court of the State of New York*

***APPELLATE DIVISION***

*Fourth Judicial Department*

*Attorneys for Children Program*

Presents



**APPELLATE TRAINING FOR  
ATTORNEYS FOR CHILDREN**

March 26, 2013

THE APPELLATE DIVISION, FOURTH DEPARTMENT  
*presents:*

**APPELLATE TRAINING FOR ATTORNEYS FOR CHILDREN**

**Tuesday, March 26, 2013**

Canandaigua Inn on the Lake  
Canandaigua, New York

- 8:45 a.m. Registration
- 9:15 a.m. Welcome  
**Presiding Justice Henry J. Scudder**  
Appellate Division, Fourth Department  
**Tracy M. Hamilton, Esq.**  
Director, Office of Attorneys for Children  
Appellate Division, Fourth Department
- 9:30 a.m. A View From the Bench  
**Presiding Justice Henry J. Scudder**  
Appellate Division, Fourth Department
- 10:00 a.m. A View From the Clerk's Office (Including Tips From A-Z)  
**Frances Cafarell, Esq.**  
Clerk, Appellate Division, Fourth Department
- 10:45 a.m. Break
- 11:00 a.m. Compiling the Record on Appeal  
**David Foster, Esq.**  
Principal Appellate Court Attorney  
Appellate Division, Fourth Department
- 11:45 p.m. Lunch (provided)
- 12:45 p.m. Effective Brief Writing  
**Mary Hope Benedict, Esq.**  
Principal Law Clerk to Presiding Justice Henry J. Scudder  
Appellate Division, Fourth Department  
**Craig Peterson, Esq.**  
Chief Appellate Court Attorney  
Appellate Division, Fourth Department

**PLEASE SEE NEXT PAGE ➡**

- 1:45 p.m. Motion Practice  
**Alan Ross, Esq.**  
Deputy Clerk, Appellate Division, Fourth Department
- 2:30 p.m. Break
- 2:45 p.m. Role of Child's Attorney on Appeal/Ethics  
**Tanya Conley, Esq.**  
Attorney for Children  
Legal Aid of Rochester  
**Andrea Tomaino, Esq.**  
Principal Attorney  
Attorney Grievance Committee, Fourth Department
- 3:45 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 five and one-half (5.5) credit hours, of which two and one-half (2.5) credit hours can be applied toward the skills requirement, two (2.0) credit hours can be applied toward the professional practice (family law) requirement, and one (1) credit hour can be applied toward the ethics and professionalism requirement. This program is suitable for experienced or newly admitted attorneys.*

# **PERFECTING THE APPEAL**

**Presented by:**

David Foster, Esq.  
Principal Appellate Court Attorney  
Appellate Division, Fourth Department  
Supreme Court of the State of New York

Attorneys for Children Program  
The Appellate Division, Fourth Department

**Appellate Training for Attorneys for Children**  
Canandaigua, NY  
March 26, 2013

## **David A. Foster**

David A. Foster is a Principle Appellate Court Attorney at the Appellate Division, Fourth Department, assigned to the calender area. Mr. Foster is a graduate of St. Lawrence University and Boston College Law School. Prior to joining the Appellate Division, Mr. Foster was a member of the Monroe County District Attorney's Office for over 17 years. He served as Deputy Chief of the Violent Felony Bureau, Chief of the DWI Bureau, and Deputy Chief of the Special Investigations Bureau. Mr. Foster has also served as a Special Prosecutor in Livingston County.

## Perfecting the Appeal

An appeal by an Attorney for Children is "perfected" by filing the stipulated or settled record (just one record, not 10) and 10 copies of appellant's briefs with the Clerk of the Appellate Division, Fourth Department, together with a demand for exhibits, when necessary, with proof of service thereof; a copy of any and all prior orders entered by this Court (including an order of substitution; order extending time to perfect the appeal; order granting a stay, etc.); and proof of service of one copy of the record and brief on each opposing party to the appeal (22 NYCRR 1000.3 [c] [2]). **If the child is the appellant, you are expected to perfect the appeal as expeditiously as possible**, generally within 60 days of receipt of the transcript (see Family Court Act § 1121 [7]).

**NOTE:** If you wish to raise contentions in your brief on behalf of your client in opposition to the order appealed from, you must take a cross-appeal.

Preliminarily, the AFC's appointment by the Family Court judge continues throughout appeal without further court order or appointment (Family Ct Act § 1120 [b]). Accordingly, if, after a Notice of Appeal has been filed, you cannot or choose not to continue the representation, you must request that another AFC be appointed (Family Ct Act § 1120 [b], 1121 [5]). **A formal motion is not required.** Instead, **as soon as possible** after the Notice of Appeal is filed and served, you should write a **letter to the AFC Program**, requesting to be relieved of representation and appointment of a substitute AFC. You must attach the papers that would be necessary for a motion. Include copies of the **date-stamped** Notice of Appeal; proof of service of the notice of appeal (if your client is the appellant); the **date-stamped** order appealed from; the decision, if any; and any subsequent orders of the Appellate Division. The AFC Program will locate a substitute and will forward the information to the Clerk's Office, which will issue the order appointing a new AFC.

### 1 . Prepare Stipulated or Settled Record on Appeal:

The attorney perfecting the appeal should begin preparing the stipulated or settled record on appeal immediately upon receipt of all transcripts. All necessary parties, or counsel for the parties, must either sign a stipulation itemizing the documents, including exhibits, that constitute the record, or the Family Court judge, on motion, must sign an order itemizing those documents that constitute the record on appeal.

The **original** stipulation or Family Court order settling the record must be

included in the record filed with the Court.

### **a) Contents of the Record:**

The first step in preparing the record is gathering copies of all documents that constitute the record (see, CPLR 5526). Typically, these include:

- the CPLR 5531 statement
- date-stamped copy of the notice of appeal
- proof of service of the notice of appeal
- order appealed
- written decision, if any
- pleadings (petition and answer)
- trial transcript
- trial exhibits (which could be located in the Family Court Clerk's Office or in trial counsel's file), and
- the original stipulation of counsel or the Family Court order settling the record (original or certified copy).

Where there are audiotapes instead of stenographic minutes, the Family Court is required to send the audiotapes to a transcription service, certified by the Office of Court Administration, for transcription.

### **b) Ordering Transcripts**

On an appeal in which your client is the **appellant**, you (the attorney for the child) **must** make arrangements to **order transcripts** of the stenographic minutes necessary to a determination of the appeal. Please see Family Court Act § 1121 (6). The transcripts will **not** automatically be ordered for you. **On the paperwork, clearly indicate that the transcripts are for an appeal.**

To obtain transcripts, you **must** use a Minute Order Form, which you can obtain from the Attorney for Children Program's website, and then take the following steps:

1. The attorney for the child must complete the top portion of the Minute Order Form and present the form to Family Court for the judge's endorsement;
2. Following the judge's action, Family Court will retain a copy of the form and return the remaining copies to the attorney for the child for transmittal

to the court reporter;

3. Upon receiving the form with the judge's endorsement, the court reporter will prepare two certified copies of the transcript, file one copy with the Family Court Clerk, and deliver the other copy to the attorney for the child;
4. When the transcript is delivered, the attorney for the child will endorse the appropriate portion of the form;
5. The reporter will retain a copy of the form and forward the remaining copies, together with a completed Claim for Payment Form or Claim For Transcript Payment Form to the Attorney for Children Program office for review and payment.

### **c) Format of the record:**

Both the CPLR and Court rules require that:

- the record be reproduced on 8 ½ by 11 inch paper;
- the record be consecutively paginated (although transcript pages will bear a page number set by the court reporter, they must be re-numbered sequentially as part of the record);
- the record contain a table of contents indicating where in the record the various documents may be found;
- the record have a white cover labeled "Record on Appeal" with the correct caption of the proceeding (as set forth in the order appealed) and the name and address of the respective counsel or parties to the appeal; and,
- the record be bound on the left.

The form of the binding may be as simple as staples or spiral binding or as formal as adhesion binding done by a printing company.

**Note: The AFC Program will not approve disbursements for professional printing or professional binding of a record or brief. Filing and service can be effected by mailing with the U.S. Postal Service or by use of a delivery company such as FedEx. The AFC Program will not approve disbursements for more costly delivery methods.**

You may **not** use three-ring binders and should not use staples or metal prongs that protrude (metal fasteners may be secured and covered with plastic tape).

You may use multiple volumes if the record is large, provided that each volume has a cover and is properly marked (i.e., Volume 1 of 3; Volume 2 of 3; Volume 3 of 3).

You may use two-sided copying for the record; however, the record **must** be legible and the type size may not be smaller than pica type (the standard font in most word processing programs is pica size or greater).

## **2. File Exhibits or Sealed Transcripts:**

Exhibits, or sealed transcripts of in camera interviews of children conducted by the Family Court judge, must be provided to the Appellate Division. If there are any problems in arranging for direct submission of the exhibits or sealed transcript by Family Court to the Appellate Division, counsel must notify the Appellate Division of the problem, and provide the name of an individual in the Family Court Clerk's Office to contact to obtain the necessary documents.

In addition, the record on appeal should reference the exhibits or sealed transcripts, even if they are submitted under separate cover. The documents should be included in the table of contents. On the page referred to in the table of contents, appellate counsel should note the name of the document and the fact that it is submitted under separate cover to the Court.

## **3. File and Serve Briefs:**

A copy of appellant's brief must be served on each party. Ten copies of the brief must be filed with the Court, with proof of service on all parties.

Briefs **must** be bound on the left and reproduced on 8 ½ by 11 inch paper. The briefs must be paginated and a table of contents and cover are required. The brief should be labeled as the brief for the child/children (appellant or respondent as appropriate) and should bear the name and address of counsel.

The cover of the brief should indicate, in the upper right hand corner, whether the matter is to be **submitted or argued** and the amount of **time requested** for argument (up to 15 minutes on an appeal from an order; up to 30 minutes on appeal from a judgment). If no oral argument time is listed on the

brief, the appeal is deemed submitted and counsel will not be permitted to argue.

Rule 1000.4 (f) (5) sets forth color requirements for the cover of briefs. Where the appeal has been taken by an Attorney for the Children, the cover of the brief shall be white.

**\*\*\*NOTE: Compliance with the Rules is Required.**

***The Clerk shall reject any record, appendix or brief that does not comply with these rules, is not legible or is otherwise unsuitable (22 NYCRR 1000.4 [h]).***

#### **4. Review Scheduling Orders:**

Once the Clerk's office receives a complete filing by an appellant, a scheduling order is prepared. The order will specify the term of Court for which the matter has been scheduled and will fix the date of service and filing of respondent's briefs (22 NYCRR 1000.10 [a]).

- a party or his attorney shall notify the Clerk in writing within 15 days of the date of mailing of the scheduling order of unavailability for oral argument on a specific date or dates during a term.
- a respondent on appeal must make a formal motion on notice to all parties to obtain an extension of time to file a responsive brief (letter requests will not be accepted).
- either party may move to expedite the appeal by filing a motion within 15 days after the date of mailing of the scheduling order. The motion must contain an affidavit setting forth the circumstances requiring that the appeal be expedited.
- not less than 20 days prior to commencement of a Court term, the Clerk will mail to all attorneys or parties a notice to appear for oral argument on a specified date during that term.

#### **5. Miscellaneous:**

- If the appeal will not be perfected - in a case, for example, where the child-appellant does not want to pursue the appeal, or has failed to communicate with you despite your repeated attempts such that the failure constitutes an abandonment of the appeal, or where the appeal has been rendered moot –

**you must file the child's signed consent to withdraw the appeal or move to be relieved and to dismiss the appeal as moot or abandoned.** Please note the revision to the Appellate Division rules requiring attorneys to notify the Court **immediately** when there is a settlement of any issue or appeal, or if any issue or appeal has been rendered moot, and subjecting attorneys to the imposition of sanctions for noncompliance (22 NYCRR 1000.18 [c]).

- **Be aware of the Court's calendar and DO NOT allow an appeal to be mooted by your inaction.** For example, if the order appealed from will expire in August, do not wait until May to perfect. If necessary, after receipt of the scheduling order, you may want to consider a motion to expedite the appeal.