NEW YORK STATE SUPREME COURT
APPELLATE DIVISION, FOURTH DEPARTMENT

HONORABLE GERALD J. WHALEN
PRESIDING JUSTICE

ETHICS FOR ATTORNEYS FOR CHILDREN

March 2025

Table of Contents

GENERAL POLICY CONSIDERATIONS

I. Role of the Attorney for the Child

The role of the Attorney for the Child (AFC) is to serve as a child's lawyer. AFCs have the responsibility to represent and advocate child(ren)'s wishes and interests in proceedings and actions.

With regard to the role of the attorney for the child, please carefully review the Rule of the Chief Judge § 7.2 and the Summary of Responsibilities of the Attorney for the Child that follow on pages 8-9 herein, as well as Guidelines for Attorneys for Children (AFCs) in the Fourth Department.

II. Protocols

In view of the age of the AFC's clients and the sensitive nature of the cases in which AFCs are appointed, AFCs are presented with unique challenges. The AFC, however, should always act in a manner consistent with proper legal practice and should not assume the role of social worker, psychologist, or advocate for one of the parties (including child protective services). Although it may be tempting to step outside the role of counsel, particularly when the circumstances of the case are especially tragic, the rules of good lawyering are as applicable to AFCs as to any attorney in a civil proceeding or action.

Examples of improper practices include:

- engaging in *ex parte* communications with the judge without the express approval of all parties;
- communicating with the parties in the absence of their counsel and/or without the consent of the parties' counsel;
- requesting confidential documents without the proper authorization of a party;
- disclosing client confidences without the approval of the client. The AFC should avoid attributing to the child any statements or recommendations regarding the ultimate disposition of the case unless the child has specifically authorized the AFC to do so and understands the possible implications; and
- becoming a witness at any time during the proceeding or in any subsequent proceeding by the same parties.

Because trial courts vary with regard to their expectations of AFCs, the AFC should keep themself familiar with the ethical standards governing their role and ensure that their role

is understood by their client(s), the parties, the parties' attorneys, and the judge. Some trial courts may not be fully aware of the proper role of the AFC and, in some instances, may expect an AFC to assume an improper role. Presiding Justice Whalen, the Fourth Department Attorneys for Children Advisory Committee, and the Attorneys for Children Program Office work to educate the bench about the proper role of AFCs.

Please do not hesitate to contact the Attorneys for the Children Program Office to discuss any ethical quandaries or concerns.

III. Law Guardians to Attorneys for Children

In 2007, the Chief Judge promulgated Rule 7.2, which, together with Family Court Act § 241 sets forth the function and role of the Attorney for the Child (AFC). To fully understand and appreciate the Rule, the historic functions of law guardians, which preceded AFCs, is essential.

a. Law Guardians

There is a distinct difference between a law guardian and an AFC. Law guardians were expected to take a position reflecting the best interests of the child instead of what the child wanted, in effect substituting their judgment for that of the child. In addition, law guardians were often considered an arm of the court and frequently functioned in a quasi-judicial role. Courts expected law guardians to conduct investigations, prepare written recommendations and reports, and often heavily relied on those reports when making their decisions. It was not uncommon for law guardians to have private (ex parte) conversations with a judge to discuss the case and arrive at a solution. Sibling groups were viewed as single entities with little distinction between the individual siblings. Accordingly, divergent interests were not seen as conflicts of interest. Moreover, on rare occasions, law guardians testified regarding the contents of, and hearsay statements contained in, their reports and recommendations.

b. The Transition

Gradually, the appropriate role of attorneys appointed to represent children came into question. In *Matter of Keisic v Keisic,* 162 Misc.2d 521 (Sup Ct Erie County 1994), the court considered whether the child was the object of the proceeding or an interested party. In *Matter of Colleen C.C.,* 232 AD2d 787 (3d Dept 1996), the law guardians were chastised for taking a passive rather than active role in presenting evidence, and the Appellate Division determined that the children did not receive meaningful representation. In *Gary D.B. v Elizabeth C.B.,* 281 AD2d 969 (4th Dept 2001), the court was "compelled to address [a] troubling issue[]…. During trial, after the children began to express different preferences concerning the parent with whom they wished to live, the law guardian moved to withdraw from representing all of the children. The court should have granted that motion because the law guardian articulated a conflict of interest."

The court was chastised in *Matter of Graham v Graham,* 24 AD3d 1051 (3d Dept 2005) for adopting the law guardian's "report" in lieu of making its own findings. The Appellate Division noted that "when a court asks the child's attorney to make a recommendation, it improperly elevates the law guardian's position to something more important to the court than the positions of the attorneys for each of the parents….[A] law guardian should take a position on behalf of the child at the completion of the proceeding…and that position must be supported by evidence in the record".

The trend away from other law guardian practices continued. In *Cervera v Bressler,* 50 AD3d 837 (2d Dept 2008), Family Court "properly declined to direct the AFC to testify and submit his files and notes as part of discovery. To have ruled otherwise would have resulted in two violations of the ethical requirements applicable to all attorneys, including an AFC, that the attorney may not disclose a client's confidences and may not become a witness in the litigation." Further, "[an] attorney for the child[ ] [is] not an investigative arm of the court. While [AFCs], as advocates, may make their positions known to the court orally or in writing (by way of, among other methods, briefs or summations), presenting reports containing facts which are not part of the record or making submissions directly to the court ex parte are inappropriate practices."

c. Attorneys for Children

Rule 7.2 of the Chief Judge specifies certain prohibited conduct based upon the old law guardian system. Moreover, it provides only two instances in which an AFC can substitute their judgment for the child's wishes—recognizing the child's age and capability to make a sound judgment, and potential risk of harm. Now, if an AFC substitutes their own judgment for that of the child, said substitution must fall within one of the articulated exceptions. Ultimately, Rule 7.2 makes it clear that an AFC advocates for the child's preferences as an attorney, not as a "law guardian."

SECTION 7.2 OF THE RULES OF THE CHIEF JUDGE

I. Section 7.2 Function of the Attorney for the Child

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

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

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

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

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

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

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

22 NYCRR 7.2
(effective October 17, 2007)

SUMMARY OF RESPONSIBILITIES OF THE ATTORNEY FOR THE CHILD

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

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

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

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

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

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

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

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

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

ETHICAL ISSUES BY TOPIC

RULES AND OBLIGATIONS OF AFC UNDER RULE 7.2

Attorneys for Children (AFCs) are appointed "for minors who often require the assistance of counsel to **help protect their interests** and to **help them express their wishes** to the court" (Family Ct Act § 241 [emphasis added]). Historically, the language "help protect their interests" generated tremendous confusion in the perceived role of the AFC. Does an AFC advocate for a child's wishes, or should they serve as guardian ad litem reporting their view on the best interests of the child? As is further outlined in section 7.2 of the Rules of the Chief Judge it is clear that AFCs are now zealous advocates for their clients. AFCs protect their clients' interests just as an attorney for an adult would and may only substitute judgment in certain situations and under very specific circumstances.

I. AFC Is Not a Guardian Ad Litem

It is apparent from Rule 7.2 that the AFC is an advocate for the child and not a guardian ad litem. CPLR 1202 (a) provides that the "court in which an action is triable may appoint a guardian ad litem at any stage in the action." A guardian ad litem is "charged with the responsibility of close investigation and exploration of the truth on the issues and perhaps even of recommending by way of report alternative resolutions for the court to consider" (*Braiman v Braiman*, 44 NY2d 584 [1978]). A guardian ad litem, who need not be an attorney, is appointed to protect the best interests of a person under a legal disability, not to advocate their position. The Attorneys for Children Program is not responsible for payment where a guardian ad litem is appointed (*see* CPLR 1204).

II. AFC Must Meaningfully Assist and Zealously Advocate for Their Clients

An AFC must do much more than give their clients' position. They must provide meaningful assistance to their clients and be zealous and active attorneys promoting that position (*see Matter of Payne v Montano*, 166 AD3d 1342 [3d Dept 2018]). Rule 7.2 not only sets forth this standard and lists the limited exceptions for substituting judgment but changes the title of the child's attorney from Law Guardian to Attorney for the Child, a clear signal that the Court is looking for assigned counsel for children to act as their attorneys, not as their guardians. An AFC who fails to either meaningfully assist their client or zealously advocate for their wishes may be found to have provided ineffective assistance of counsel.

a. Ineffective Assistance of Counsel - Case Law

Matter of Sloma v Saya, 210 AD3d 1494 (4th Dept 2022). The AFC provided ineffective assistance of counsel where the AFC did make the child's wishes known, but did not zealously advocate the child's position. The AFC did not cross-examine certain witnesses and his cross-examination of the father was designed to elicit unfavorable testimony contrary to his client's position. The two exceptions to Rule 7.2 (lacking capacity for knowing, voluntary and considered judgment or substantial risk of imminent serious harm) were not present. Finally, the AFC's position on a motion to dismiss was contrary to his client's wishes. The

Court concluded that the AFC's actions may have been the result of "good intentions," but the AFC did not zealously advocate for his client and the child was denied effective assistance of counsel.

Matter of Brian S., 141 AD3d 1145 (4th Dept 2016). In a neglect case, three teenaged children with differing positions were represented by one AFC. A majority of the Appellate Division determined that the two older teenaged children were deprived of effective assistance of counsel because the AFC failed to advocate for their position. In addressing Rule 7.2, the Court found that there was neither a basis to conclude the two older children lacked capacity for knowing, voluntary and considered judgment, nor a basis to conclude that following those children's wishes was likely to result in a substantial risk of imminent serious harm. The AFC's most serious concern was the children skipping school and there was evidence that the mother occasionally used drugs in the home and that she may have struck the youngest child on her arm, leaving a small mark.

Matter of Jennifer V.V. v Lawrence W.W., 182 AD3d 652 (3d Dept 2020). The AFC wholly failed to fulfill the obligations imposed by Rule 7.2 upon an appeal. The only stated basis in his brief for his determination to advocate for the children's best interests rather than for their wishes was their ages. At 10, the older child was certainly old enough to be capable of expressing her wishes, and whether the younger child, at six, had the capacity to do so was not solely dependent upon her calendar age, but also upon such individual considerations as her level of maturity and verbal abilities. Additionally, although the record revealed that the AFC met with the children during the Family Court proceeding, it did not appear that he met or spoke with them again during the appeal notwithstanding the AFC's obligation to consult with and advise the children to the extent of and in a manner consistent with their capacities.

Matter of Payne v Montano, 166 AD3d 1342 (3d Dept 2018). The AFC did not take an active role in the proceedings, did not call any witnesses, conducted a brief cross-examination of the mother, the sole witness at trial, and did not attempt to elicit any further information about the child's behavior and demeanor relative to his visits with the father. As a result, the trial AFC did not provide effective assistance of counsel.

Matter of Colleen C.C., 232 AD2d 787 (3d Dept 1996), page 6 herein.

Silverman v Silverman, 186 AD3d 123 (2d Dept 2020), page 14 herein.

Matter of Schenectady Co. DSS v Joshua B.B., 168 AD3d 1244 (3d Dept 2019), page 17 herein.

Matter of Lamarcus E., 90 AD3d 1095 (3d Dept 2011), page 17 herein.

Matter of Mark T. v Joyanna U., 64 AD3d 1092 (3d Dept 2009), *lv denied* 15 NY3d 715 (2010), page 17 herein.

III. AFC May Only Substitute Judgment in Very Specific Circumstances

As directly stated in Rule 7.2, an AFC may substitute judgment under the following circumstances: "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."

Note, there is no requirement that an attorney shall substitute judgment. Rule 7.2 lists situations where an AFC "would be justified" in substituting judgement, but there is nothing in Rule 7.2 that requires the substitution of judgment.

IV. A Few Points to Keep in Mind Regarding Substituting Judgment

No matter the age or ability to communicate, an AFC must meet with their clients (see pages 16-20 herein for more information).

Whether a child has the capacity to express their wishes is not solely dependent upon their calendar age but also upon such individual considerations as their level of maturity and verbal abilities (*see Matter of Jennifer V.V. v Lawrence W.W.*, 182 AD3d 652 [3d Dept 2020]).

If an AFC does substitute judgment, they must still communicate their client's position to the court, if the child wants the attorney to do so.

V. Helpful Case Law

Although reasonable AFC can differ on whether circumstances exist to substantiate substituting judgment, Fourth Department caselaw, as well as caselaw from the other Departments, provides guidance.

a. AFC Justified in Substituting Judgment

Matter of Muriel v Muriel, 179 AD3d 1529 (4th Dept 2020). The AFC was not ineffective for advocating a position that was contrary to the children's wishes. The AFC fulfilled his obligation to inform the court that the subject children had expressed their wishes to live with their mother notwithstanding his position that they should be placed in the father's custody. The record supported the finding that the children lacked capacity for knowing, voluntary and considered judgment and

that following the children's wishes would have placed them at a substantial risk of imminent and serious harm.

Matter of Viscuso v Viscuso, 129 AD3d 1679 (4th Dept 2015). The Fourth Department determined that the AFC was justified in substituting judgment where following the child's wish to remain with her mother would be tantamount to severing the child's relationship with her father. The loss of that relationship would result in imminent, serious harm to the child. Similar Fourth Department cases include *Matter of Grabowski v Smith*, 182 AD3d 1002 (4th Dept 2020), *lv denied* 35 NY3d 910 (2020); *Matter of Vega v Delgado*, 195 AD3d 1555 (4th Dept 2021); and *Matter of D.T. v C.T.*, 215 AD3d 1232 (4th Dept 2023). A similar cases from the Third Department is *Matter of Zakariah S.S. v Tara T.T.*, 143 AD3d 1103 (3d Dept 2016).

Matter of Lopez v Lugo, 115 AD3d 1237 (4th Dept 2014). Both AFCs, who advocated positions contrary to their client's wishes, amply demonstrated a substantial risk of imminent serious harm to the children if their wishes were followed. The substantial risk that was demonstrated included the mother's arrest for possession of drugs in the children's presence, the numerous weapons that had been seized from the mother's house, and the credible evidence establishing that the mother's husband assaulted one of the subject children who attempted to intervene when the husband attacked the mother with an electrical cord.

Matter of Mason v Mason, 103 AD3d 1207 (4th Dept 2013). The mother contended that the AFC improperly advocated a position that was contrary to the child's express wishes because the AFC failed to state the basis for advocating that contrary position. Because she did not move to remove the AFC, the issue was not preserved for appeal. In any event, the contention lacked merit because the record supported the finding that the child lacked capacity for a knowing, voluntary and considered judgment and while the AFC substituted judgment, he did inform the court of the child's wishes as required in Rule 7.2.

b. <u>AFC Improperly Substituted Judgment</u>

Silverman v. Silverman, 186 AD3d 123 (2d Dept 2020). The AFC improperly substituted judgment for clients aged 11 and 13 at the time of the hearing by joining the father in advocating for custody modification, opposing the introduction of evidence that may have supported one child's claim that the father tried to strangle her, failing to call witnesses or present evidence in support of the mother retaining residential custody, and acting in direct contravention of her clients' wishes without a finding that the children either lacked the capacity for knowing, voluntary, and considered judgment, or faced a substantial risk of serious, imminent harm.

Matter of Sloma v Saya, 210 AD3d 1494 (4th Dept 2022), page 11 herein.

Matter of Brian S., 141 AD3d 1145 (4th Dept 2016), page 12 herein.

Matter of Jennifer V.V. v Lawrence W.W., 182 AD3d 652 (3d Dept 2020), page 12 herein.

CONSIDERATIONS REGARDING CLIENT CONTACT

I. Client Contact – General Expectations

An AFC is obligated to have regular, consistent and meaningful contact with all clients. To best preserve confidentiality and obtain a thorough knowledge of the child's circumstances, client contact should occur in person. Unless the AFC is representing the client on a juvenile justice matter, the AFC should advise parents and custodians not to bring clients to court to meet with the AFC. The AFC should ask the client how they prefer to have contact with the AFC and the AFC should be guided by the client's preference.

Where the matter may be dismissed or withdrawn, the preferred practice is for the AFC to meet with the client prior to consenting to the dismissal. Should the Court proceed with a dismissal over the AFC's objection, the AFC should note their objection on the record.

Where safety concerns are raised and the AFC has been unable to meet with their client, the AFC is obligated to address the allegations pertaining to safety. The AFC may take action including but not limited to investigating the allegations themself. Within the framework of the AFC's ethical obligations to their client and being mindful of the potential ramifications that may be adverse to their client's position (i.e., removal), the AFC may wish to consider requesting that the court order a child protective investigation pursuant to Family Court Act § 1034 and/or New York Social Services Law § 422.

a. AFC Must Meet with Very Young Clients

An AFC is not excused from having client contact if the child client is an infant, toddler or preschooler (*see* Section 7.2 of the Rules of the Chief Judge and Guidelines for AFCs in the Fourth Department). Information that only can be obtained from meeting a very young client includes whether an infant or young child appears to be receiving appropriate care. For example, does the infant smell clean, or do they have a sour odor indicating they are not being bathed at regular intervals? Additionally, the AFC should note whether the client appears to have met age-appropriate developmental milestones. The condition of the client's teeth provides additional information relative to whether the client is receiving appropriate care. Broken, discolored or rotting teeth may indicate the client is not receiving necessary care. The AFC can also observe whether the child and caregiver appear to be bonded and how the caregiver responds to the child's needs.

Pursuant to Rule 7.2, the AFC 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** (emphasis added). Conversations with the parties' attorneys, DSS caseworkers, foster parents, and/or review of documents and reports alone, without client contact, do not equate to

compliance with Rule 7.2 (*see* Section 7.2 of the Rules of the Chief Judge and Guidelines for AFCs in the Fourth Department).

Case law makes it clear that client contact is a significant component to the meaningful representation of a child. Failure by the AFC to meet with clients can constitute ineffective assistance of counsel. In *Matter of Schenectady Co. DSS v Joshua B.B.,* 168 AD3d 1244 (3d Dept 2019), the court determined that the child did not receive the effective assistance of counsel where the record was bereft of evidence indicating that the AFC consulted with the child, who was from four-and-a-half to six years old throughout the time of the litigation. The court noted "inasmuch as consultation with the child and subsequent communication of the child's position to Family Court are of the utmost importance, it is clear that the child did not receive meaningful representation." Similarly, in *Matter of Lamarcus E.,* 90 AD3d 1095 (3d Dept 2011), the court determined that the appellate AFC's failure to consult with and advise the child to the extent of and in a manner consistent with the child's capabilities constituted a failure to meet her essential responsibilities as the AFC. The court remarked "client contact, absent extraordinary circumstances, is a significant component to the meaningful representation of a child." *See also Matter of Mark T. v Joyanna U.,* 64 AD3d 1092 (3d Dept 2009), *lv denied* 15 NY3d 715 (2010) (The child did not receive meaningful assistance of appellate counsel where the substituted appellate AFC failed to meet with the child who was 11½ years old at the time of the argument of the appeal).

b. <u>AFC Must Meet with Clients with Special Needs and/or Disabilities</u>

An AFC is not excused from having contact with clients with special needs and/or disabilities, including but not limited to autism (*see* Section 7.2 of the Rules of the Chief Judge and Guidelines for AFCs in the Fourth Department). The AFC should note the developmental milestones the client has met. The condition of the client's teeth provides information relative to whether the client is receiving appropriate care. Broken, discolored or rotting teeth may indicate the client is not receiving necessary care. The AFC should assess how the child communicates and whether that means can be used to facilitate a conversation between the AFC and the child (i.e., language boards, electronic devices, etc.).

Pursuant Rule 7.2, the AFC 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** (emphasis added). Conversations with the parties' attorneys, DSS caseworkers, foster parents, and/or review of documents and reports alone, without client contact, do not equate to compliance with Rule 7.2 (*see* Section 7.2 of the Rules of the Chief Judge and Guidelines for AFCs in the Fourth Department).

Case law makes it clear that client contact is a significant component to the meaningful representation of a child. Failure by the AFC to meet with clients can

constitute ineffective assistance of counsel (*see Matter of Schenectady Co. DSS v Joshua B.B.,* 168 AD3d 1244 [3d Dept 2019]; *Matter of Lamarcus E.*, 90 AD3d 1095 [3d Dept 2011]; *Matter of Mark T. v Joyanna U.,* 64 AD3d 1092 [3d Dept 2009], *lv denied* 15 NY3d 715 [2010], page 17 herein).

c. AFC Must Meet with Clients for Whom English Is Not Their Primary Language

An AFC is not excused from having contact with clients for whom English is not their primary language (s*ee* Section 7.2 of the Rules of the Chief Judge and Guidelines for AFCs in the Fourth Department). The AFC Program has authority to pay the cost of interpreter services required by an AFC to effectively represent their client. The AFC Program will reimburse the interpreter directly. Please refer to Attorneys for Children Internet Voucher System Manual & Reimbursement Guidelines for additional information.

Pursuant to Rule 7.2 of the Rules of the Chief Judge, the AFC 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** (emphasis added). Conversations with the parties' attorneys, DSS caseworkers, foster parents, and/or review of documents and reports alone, without client contact, do not equate to compliance with Rule 7.2 (*see* Section 7.2 of the Rules of the Chief Judge and Guidelines for AFCs in the Fourth Department).

Case law makes it clear that client contact is a significant component to the meaningful representation of a child. Failure by the AFC to meet with clients can constitute ineffective assistance of counsel (*see Matter of Schenectady Co. DSS v Joshua B.B.,* 168 AD3d 1244 [3d Dept 2019]; *Matter of Lamarcus E.*, 90 AD3d 1095 [3d Dept 2011]; *Matter of Mark T. v Joyanna U.,* 64 AD3d 1092 [3d Dept 2009], *lv denied* 15 NY3d 715 [2010], page 17 herein).

d. Difficulty in Arranging a Meeting Is Not An Excuse

If an AFC encounters difficulty in arranging an appointment to meet with clients, to comply with Rule 7.2 and Guidelines for AFCs in the Fourth Department, the AFC may wish to consider making phone calls and/or sending letters and emails to counsel, in an effort to secure the cooperation of the parties. The AFC could also ask the judge, during a court appearance, to order a party to make the child available to them at a date and time set on the record. A motion for an order directing the parties to produce the child for observation or interview by the AFC at a set date and time could be another option for an AFC to consider.

When an AFC encounters difficulty setting up an interview with older clients, in addition to the foregoing suggestions, the AFC may also wish to consider attempting to meet with the child at school or daycare.

e. Factors to Consider When Determining Where to Meet with Clients

When the client is of sufficient age, an AFC should ask the client where they prefer to meet and how they prefer to communicate. The client's preferences should be respected whenever possible and practicable.

i. Meeting the Client at School

Before going to school to meet with a client, an AFC should consider the client's age and the potential impact on the client in terms of missing class, becoming embarrassed, etc. If the AFC decides to proceed with meeting the client at school, the AFC should treat school staff with courtesy and respect. The AFC should provide reasonable notice to the school and refrain from calling the school and demanding to meet with the client on short notice. If appropriate, the AFC should arrange to meet with the client at the guidance counselor's office where vulnerable clients can receive support, instead of the main office. The AFC should take steps to assure client confidentiality is preserved during the meeting by requesting that any school staff member in the room with the AFC and the client remain out of earshot – i.e., seated across the room, not next to the client and the AFC. It is important to note that school districts may decline to permit the AFC to meet with the client at their school, even when presented with the AFC's order of appointment. Sometimes, calling the attorney for the school district and politely restating the request results in the school district reconsidering their decision and permitting the AFC to meet with the client.

ii. Meeting the Client in the Client's Home

An AFC should be mindful that ring doorbells, hidden cameras, cell phones and other recording devices may be present in the client's home and may be used to record the client interview. Under no circumstances should the AFC interview the client in their bedroom or be alone with the client in their bedroom with the door closed.

iii. Meeting the Client at the AFC's Office

An AFC should be mindful that the client may be intimidated or otherwise ill at ease in an unfamiliar and formal setting like an office. The AFC may wish to consider having toys, and coloring books and/or other child-friendly activities available to help the client engage with the AFC and feel comfortable in an office environment.

iv. Other Places to Meet the Client

An AFC may wish to consider meeting the client in a non-traditional location, such as a park, a library or in a quiet corner of a fast-food restaurant. However, the AFC Program is unable to reimburse food and beverage expenses.

REPRESENTING CULTURALLY AND SEXUALLY DIVERSE CLIENTS

I. Zealous, Equal, and Sensitive Representation

It is the responsibility of an AFC to provide their clients with equal and culturally sensitive legal representation without regard to race, color, national origin, gender, religion, socio-economic status, mental health, cognitive/intellectual ability, disability, pregnancy, gender identity or expression, sexual orientation, predisposing genetic characteristics, domestic violence victim status, familial status, immigration status, criminal conviction status, and/or any other relevant consideration. An AFC also has an affirmative obligation to zealously advocate for their child clients (*see* Section 7.2 of the Rules of the Chief Judge and Guidelines for AFCs in the Fourth Department).

II. AFC's Responsibility to Educate Self

To achieve zealous, equal, and culturally sensitive legal representation, an AFC must acknowledge and educate themself on the diversities of their client(s) and the family of which their client(s) are a part. This should include, but not be limited to, the following:

- Familiarizing oneself with holidays, customs, values and traditions of the child(ren) and the family;

- Familiarizing oneself with gender identity preferences and honoring those preferences (i.e. pronouns) in conversations with both the AFC's client(s), as well as in court and with others;

- Being mindful of stereotypes and sensitive to how same may impact the child(ren) and the family;

- Being mindful of issues of importance within various cultural communities (i.e. hair in the African American Community, opposite genders transporting, touching, or being providers for Muslim children, maintaining religious/cultural dietary restrictions/practices, etc.);

- Being mindful that in multiracial and multiethnic families, the parents themselves may disagree on how to blend their cultures. The AFC may serve as a resource to help educate the families on differences in traditions and values; and

- Communicating with the child(ren) in their preferred language, utilizing the services of an interpreter when necessary.

III. Suggested Tools

To acknowledge and educate themselves regarding diverse families affords AFCs the ability to honor diversities, which is inherently consistent with the best interests of the

child(ren) and the families. If the AFC is unsure where to turn for tools to educate themself, or if the AFC has questions, contact the AFC Program Office for resources and/or guidance or contact a colleague who may be able to assist you. The AFC may also wish to contact a local cultural center and attend community events put on by a specific culture/ethnicity/religious group.

SUCCESSIVE APPOINTMENTS AND CONFLICTS OF INTEREST

I. Successive Appointments

Successive appointments are favored. Authority for this proposition is found in Family Court Act § 249 (b), which provides: "In making an appointment of an attorney for the child pursuant to this section, the courts **shall,** to the extent practicable and appropriate, appoint the same attorney for the child who has previously represented the child" (emphasis added).

In *Matter of Kristi L.T. v Andrew R.V.,* 48 AD3d 1202 (4th Dept 2008), *lv denied* 10 NY3d 716 (2008), the parties had proceedings before at least three different judges. The same AFC[1] was appointed for the child in the first two matters but was not reappointed by Family Court in the third matter because the mother objected to his appointment. The court recognized, however, that in appointing an AFC "the court shall, to the extent practicable and appropriate, appoint the same [AFC] who had previously represented the child [Family Ct Act § 249 (b)." **The record established that the prior AFC was available, and the Appellate Division concluded that he should have been reappointed (**emphasis added).

II. Conflicts of Interest

An AFC is subject to the same conflict rules as any other attorney. Conflicts may arise when one attorney is appointed to represent a sibling group, or if an attorney has represented a party in the past.

a. Sibling Groups

The general practice is to appoint one attorney to represent a sibling group. This generally does not present a conflict unless the express preferences of the siblings differ or reflect a different view of the facts. The AFC should carefully examine the pleadings before undertaking representation of a sibling group – a conflict may be obvious. Additionally, it is helpful to interview the eldest sibling first and ask, "Do your sibling(s) feel the same way as you?" If the answer is no, only interview that eldest sibling and request the court appoint another AFC for the younger sibling(s).

In *Matter of Brian S.* (141 AD3d 1145 [4th Dept. 2016]), page 12 herein, the siblings in a neglect proceeding all had separate stated goals and to achieve the goal of any one child would have inherently undercut the position of another. It was improper for one AFC to represent the entire sibling group (*see also Gary D.B. v Elizabeth C.B.,* 281 AD2d 969 [4th Dept. 2001], page 6 herein; *Corigliano v Corigliano,* 297 AD2d 328 [2d Dept 2002]; and *Matter of Beulah J.*, 191 AD3d 1395 [4th Dept 2021]).

[1] For ease of reference, "law guardian" has been replace by "AFC" in the discussion of cases that predated the implementation of Rule 7.2.

However, unless there is an actual conflict, disqualification of the AFC is not necessary *(see Matter of Zirkind v Zirkind*, 218 AD2d 745 [2d Dept 1995]; *Anonymous v Anonymous,* 251 AD2d 241 [1st Dept 1998]; *Matter of Rosenberg v Rosenberg*, 261 AD2d 623 [2d Dept 1999]; and *M.M. v K.M*., 62 Misc.3d 487 [Sup Ct Nassau County 2018] ["Lacking any evidence of a conflict of interest created by (the two siblings') divergent views, there was no reason to remove the AFC."]).

b. <u>Generational Conflicts</u>

An AFC cannot represent a child when they have previously represented a litigant in a proceeding with the same or substantially related issue presented (*see* Rule 1.9 of the Rules of Professional Conduct [22 NYCRR 1200.0]). This general rule includes prior representation of a child's parent, as when an attorney has represented a child's parent as a child, confidences and information shared by that parent or known to that attorney in the course of representation may impact the current client, to the detriment of the prior child client.

AFCs should maintain a conflict check system and consult that system before undertaking representation.

A different rule, or exception to this general rule, may apply to institutional providers. Even so, best practice is to avoid even the appearance of a conflict.

CLIENT CONFIDENCES

I. General Considerations

The confidences of a child client are subject to the same attorney client privilege as enjoyed by an adult client (*see* Rule 1.6 of the Rules of Professional Conduct [22 NYCRR 1200.0]). In fact, given that a child's confidences are often made in relation to the child's parents, the child's privilege is heightened. Disclosure of confidences may impact a child's ongoing relationship with their parents once the litigation is concluded.

However, the need to keep confidences does not abrogate the AFC's obligation to not only be an advocate, but also a counselor. Some confidences may need to be disclosed to achieve the client's wishes and desires, or to protect the child. In those instances, the attorney should attempt to convince the child to allow disclosure while describing to the client how and before whom the disclosure would be made (*see Matter of Carballeira v Shumway,* 273 AD2d 753 [3d Dept 2000], lv denied 95 NY2d 764 [2000][AFC's actions did not constitute an improper disclosure of a client confidence where the child consented to the AFC telling respondent about a suicide threat made by the child]).

II. Disclosure Without Consent

Rule 1.14 of the Rules of Professional Conduct (22 NYCRR 1200.0) permits disclosure of confidences in certain circumstances. The rule permits an attorney who is representing a client with diminished capacity (including a minor, *see* Rule 1.14 [a]), to take reasonably necessary protective action to protect the client when the client is at risk of substantial harm. Rule 1.14 mirrors Rule 7.2 (d)(3) which permits substitution of judgment when the child's wishes are likely to result in substantial risk of imminent, serious harm where disclosure may be necessary to protect the child.

However, disclosure of confidences is limited only to the extent reasonably necessary to protect the child's interests.

III. AFC Is Not a Mandated Reporter

Lawyers are **not** included in the list of persons required to report child abuse or neglect to the Child Protective Hotline. This exclusion applies equally to child clients and adult clients. Even if an AFC believes there is unreported child abuse or neglect, that attorney cannot divulge a child client's confidences and make a report based upon those confidences. However, the report could be made with the child's consent, such consent premised upon the attorney counseling the child as to all possible ramifications.

ATTORNEYS FOR CHILDREN AS WITNESSES

Unless an exception applies, Rule of Professional Conduct Rule 3.7 (22 NYCRR 1200.0) requires an AFC to refrain from taking a case if the AFC is likely to be a witness on a significant issue of fact. However, once an AFC commenced representation, the following applies:

I. Attorney-Client Privilege

An AFC may not testify if attorney-client privilege applies (*see Matter of Angelina A.A.*, 211 AD2d 951 [3d Dept 1995], *lv denied* 85 NY2d 808 [1995] [Family Court properly refused to allow the AFC to testify about veracity of statements the child made at in-camera hearing. The child had an attorney-client relationship with her AFC and did not waive privilege]; *Matter of Rebecca B.,* 227 AD2d 315 [1st Dept 1996] [subpoenas demanding the testimony of the AFC and the social worker hired by the AFC were properly quashed based upon attorney-client privilege and work product]).

II. AFC May Not Be Questioned on the Record or Ordered to Testify

It is error for the court to direct an AFC to testify as a witness (*see Matter of Cobb v Cobb*, 4 AD3d 747 [4th Dept 2004], *lv dismissed* 2 NY3d 759 [2004] [the AFC's testimony on behalf of petitioner appeared to be in direct contravention of the Code of Professional Responsibility]; *Cervera v Bressler*, 50 AD3d 837 [2d Dept 2008] [Supreme Court properly declined to direct the AFC to testify and submit his file and notes as part of discovery because to rule otherwise would have resulted in two violations of the ethical requirements applicable to all attorneys, including an AFC, that the attorney may not disclose a client's confidences and may not become a witness in the litigation]).

In *Matter of Naomi C. v Russell A.*, 48 AD3d 203, 204 (1st Dept 2008), the Appellate Division dismissed a petition to modify an order of custody, stating:

> Although the court was warranted in dismissing the petition on its face, we point out that the questioning of the [AFC] by the court is something that should not be repeated. With the parties present, the court asked the [AFC], on the record, to discuss the position of the 10-year-old child regarding how well the current custody arrangement was working. Although the court was correct to disallow the "cross-examination" of the [AFC] by petitioner's counsel, the court should not consider the hearsay opinion of a child in determining the legal sufficiency of a pleading in the first place. Most importantly, **such colloquy makes the [AFC] an unsworn witness, a position in which no attorney should be placed.** "The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to...becoming a witness in the litigation" (Rules of the Chief Judge § 7.2 [b]) (emphasis added).

In *Cervera v Bressler,* 50 AD3d 837 (2d Dept 2008), the Appellate Division determined that the court erred in denying the father's motion to remove the AFC because the AFC submitted affirmations that included facts not in the record, which were hearsay gleaned from the mother. That behavior, as well as the AFC's ad hominum attacks on the father's character, was unprofessional and improper and amounted to the AFC acting as a witness against the father.

III. Attorney-Witness Rule

A party may attempt to have an AFC removed pursuant to the attorney-witness rule. However, said movant bears the burden of demonstrating that the testimony of the opposing party's counsel is necessary to their case, and that such testimony would be prejudicial to the opposing party (*see Matter of Herald v Herald*, 305 AD2d 1080 [4th Dept 2003] [although the mother sought disqualification of the AFC on the ground that the AFC might be called as a witness, she failed to meet her burden that the testimony was necessary]; *Matter of Morgan v Becker*, 245 AD2d 889 [3d Dept 1997] [permitting the AFC to testify about observations during home visits was inappropriate, but harmless]; s*ee also Matter of Kala Y. v Quinn Z.*, 232 AD3d 1103 [3d Dept 2024] [the mother's motion for disqualification of the father's attorney should have been denied where the mother made no showing that the father's attorney's testimony would be prejudicial to the father]).

INTERVIEWS AND CONSENT

I. Other Represented Parties

During the course of representation of a child, an AFC is precluded from communications with a party where the AFC knows the party is represented by counsel, unless the AFC has the prior consent of the party's counsel (*see* Rule of Professional Conduct Rule 4.2 [22 NYCRR 1200.0]).

II. Situations Where the AFC's Consent Is Required to Interview the Child

Similarly, an AFC should advise the parties' attorneys at the outset of the proceeding that the child should not be interviewed or examined by such attorneys without the prior consent of the AFC (*see id.*).

In addition, in a custody case, the AFC must consent before the child is interviewed by a mental health expert. In *Campolongo v Campolongo*, 2 AD3d 476 (2d Dept 2003) the court determined that the absence of the AFC at an interview of the child by a psychiatrist, who was retained by the father on advice of the father's attorney, without the AFC's knowledge and consent, violated the child's right to due process. Similarly, in *Matter of Awan v Awan*, 75 AD3d 597 (2d Dept 2010) the court determined that Family Court did not err in striking the testimony of an expert retained by the father in a custody proceeding and in precluding further testimony by this expert. The father's attorney violated Rules of Professional Conduct (22 NYCRR 1200.0) Rule 4.2 by allowing a physician, whom the attorney retained or caused the father to retain, to interview and examine the subject child regarding the pending dispute and to prepare a report without the knowledge or consent of the AFC. The absence of the AFC at the subject examination and interview constituted a denial of the child's due process rights.

III. Situations Where the AFC's Consent Is Not Required to Interview the Child

In a child protective proceeding, DSS caseworkers may interview the client of an AFC without the AFC's consent. In *Matter of Cristella B.*, 77 AD3d 654 (2d Dept 2010) the court determined that Family Court properly denied a motion of the AFC to direct the County Department of Social Services (DSS) to refrain from interviewing his clients concerning any issues beyond those related to safety without 48 hours' notice to him. The child who was the subject of a neglect proceeding had a constitutional and statutory right to legal representation and Rule 4.2 of the Rules of Professional Conduct (22 NYCRR 1200.0), which prohibits an attorney representing another party in litigation from communicating with or causing another to communicate with a child without prior consent of the AFC, applied only to attorneys. DSS has constitutional and statutory obligations toward children in its custody and has a mandate to maintain regular communications with children in foster care on a broad range of issues that go beyond their immediate health and safety (s*ee also Matter of Tiajianna M.*, 55 AD3d 1321 [4th Dept 2008]).

STIPULATIONS

I. General Considerations

It is common practice for AFCs to participate in negotiations and consent to stipulations or approve consent orders on behalf of their child clients. Issues can arise when an AFC objects to a stipulation – either as not in the child's best interests or as not reflecting the child's wishes.

a. AFC Has the Right to Fully Participate in a Proceeding

An AFC must be afforded the same opportunity as any other party to fully participate in a proceeding (*see Matter of White v White,* 267 AD2d 888 [3d Dept 1999]). In *Matter of Figueroa v Lopez*, 48 AD3d 906 (3d Dept 2008), a stipulation was entered over the objection of the child's attorney. Family Court cut off the AFC when he attempted to explain his reasons (including possible domestic violence by the father) and characterized his objections as ridiculous, without allowing an explanation for his position to be placed on the record. The Appellate Division reversed. Having made the appointment, Family Court cannot thereafter relegate the AFC to a meaningless role.

b. Stipulation Can Be Accepted Over the AFC's Objections

Matter of McDermott v Bale, 94 AD3d 1542 (4th Dept 2012) made it clear that a stipulation can be accepted over the objections of the AFC. Prior to accepting the stipulation, Family Court provided the AFC with a full and fair opportunity to be heard, and some modifications to the stipulation were made to address the AFC's concerns. The Appellate Division affirmed. The AFC has the right to be heard and the right to object to a proposed settlement, but not "the right to preclude the court from approving the settlement in the event that the court determines that the terms of the settlement are in the children's best interests. Parents who wish to settle their disputes should not be required to engage in…litigation merely because their children…would prefer a different custodial arrangement."

REPORTS, HEARSAY, AND EX PARTE COMMUNICATION

I. AFC Shall Not Report to the Court

It is improper for a court to direct the AFC to prepare and file an "attorney for the child report" – the AFC is not an investigator, but an attorney – thus, the AFC should not submit any pretrial report to the court (*see Matter of Cobb v Cobb,* 4 AD3d 747 [4th Dept 2004], page 26 herein; *Matter of Graham v Graham*, 24 AD3d 1051 [3d Dept 2005] [It was improper for the court to direct the AFC to file a report and the AFC should not have made recommendations, but should have taken a position as did the parties' attorneys]; *Matter of William O. v Michele A.*, 119 AD3d 990 [3d Dept 2014] [an AFC cannot act as an arm of the court or serve as the court's "quarterback"]).

II. AFC Shall Not Relay Hearsay

It is also improper for the AFC to relay hearsay to the court (*see Matter of William O. v Michele A.,* 119 AD3d 990 [the court erred in relying upon AFC's "information" that the father was untreated sex offender]; *Matter of New v Sharma*, 91 AD3d 652 [2d Dept 2012] ["to the extent that Family Court relied on the detailed accounts provided by the AFC concerning her conversations with the child, it is inappropriate for an AFC to present reports containing facts which are not part of the record"]).

III. AFC Shall Not Engage in Ex Parte Communications

Section 7.2 of the Rules of the Chief Judge explicitly prohibits such ex parte communications. Moreover, the Advisory Committee on Judicial Ethics in opinion #95-29 has stated that a judge "may not discuss with a[n AFC] the position of the [AFC] with regard to the interests of the child outside the presence of the parties, the parents, or their attorneys, unless all parties consent."

DUTIES OF ATTORNEYS FOR CHILDREN RELATIVE TO APPEALS

I. Trial AFC Duties Relative to Appeals

After a trial court issues an appealable order, a trial AFC should carefully examine the decision/order to determine whether an appeal would have merit and whether the AFC's client has standing to appeal. Thereafter, a trial AFC has a duty to consult with that AFC's client to ascertain the child's position with regards to the filing of a notice of appeal. During the consultation, a trial AFC should advise the child, consistent with the child's capabilities, regarding the child's standing to appeal and the possibility of success on appeal (*see generally Matter of McDermott v Bale*, 94 AD3d 1542 (4th Dept 2012) herein at page 29; *Matter of Kessler v Fancher*, 112 AD3d 1323 [4th Dept 2013]; *Matter of Lawrence v Lawrence*, 151 AD3d 1879 [4th Dept 2017]; *Matter of Muriel v Muriel*, 228 AD3d 1345 [4th Dept 2024]).

Provided doing so is not frivolous and is in accordance with a child's position, a trial AFC shall timely file and properly serve a notice of appeal on behalf of the child. An AFC should also consider filing a notice of appeal if it appears that the child may change their position. Then, if an AFC does not wish to or is otherwise unable to represent a client on appeal, the AFC shall comply with the appeals section of Guidelines for AFCs in the Fourth Department to timely request substitution on appeal.

Upon serving or upon receipt of service of a notice of appeal, an AFC who does not wish to represent a client on appeal should request substitution as soon as is practicable and no more than 30 days after service of the notice of appeal.

II. Appellate AFC Duties Relative to Appeals

An AFC handling appeals, whether continuing from the trial level or having been substituted, shall meet with their client to ascertain the child's position on appeal. Failure to do so can constitute ineffective assistance of appellate counsel (*see Matter of Lamarcus E.*, 90 AD3d 1095 [3d Dept 2011] herein at page 17; *Matter of Mark T. v Joyanna U.*, 64 AD3d 1092 [3d Dept 2009], *lv denied* 15 NY3d 715 [2010] herein at page 17; *Matter of Jennifer V.V. v Lawrence W.W.*, 182 AD3d 652 [3d Dept 2020] herein at page 12).

An appellate AFC should be aware of and in compliance with all of the rules of practice of the Appellate Division Fourth Department and, when appropriate, the Court of Appeals. An AFC representing a child on an appeal shall comply with the appeals section of Guidelines for AFCs in the Fourth Department. An appellate AFC shall also engage in appropriate motion practice during the pendency of the appeal.

An AFC should file a brief unless otherwise ethically prevented from doing so (i.e., a child knowingly and intelligently choosing not to take a position on appeal). In the unlikely event the AFC decides not to file a brief, the AFC should notify the appellate court via letter of the AFC's intent and reasons not to do so.

If an AFC wishes to raise contentions in their brief that are in opposition to the order appealed from, a cross-notice of appeal on behalf of the child must be in the record (*see Matter of Jayden B.*, 91 AD3d 1344 [4th Dept 2012]). In such a case, if the trial AFC did not file a notice of appeal, an appellate AFC should consider filing a notice of appeal. Regardless, an AFC should still file a brief in the appeal as the Appellate Division may consider the contentions in an AFC's brief so long as those contentions also are raised by another party whose notice of appeal was timely filed (*see Matter of Dinoff v Knechtel*, 224 AD3d 1288 [4th Dept 2024]).

Finally, an appellate AFC should meet with their client again before oral argument to ensure that their client has not changed position and to be ready to update the appellate court regarding the child's current status. An AFC should not refer to the child by name during the oral argument, only as "my client(s)."

III. AFC May Raise New Facts on Appeal

An appellate court may take notice of new facts and allegations to the extent that the fact and/or allegation indicates that the record before the appellate court is no longer sufficient for determining issues (*see Matter of Michael B.*, 80 NY2d 299 [1992]). An AFC should meet with a child both at the commencement of an appeal and prior to oral argument to ascertain the client's current position and circumstances (*see Matter of Jennifer V.V. v Lawrence W.W.*, 182 AD3d 652 [3d Dept 2020] herein at page 12). Furthermore, if the appellate AFC is not the trial AFC, the appellate AFC should consult with the trial AFC to determine if there have been any subsequent proceedings which might change the posture of the appeal or of which the appellate court should be made aware.

IV. Ethical Requirements Regarding *Lincoln* Hearings

The transcript of a *Lincoln* hearing should be sealed and made available only to the appellate court unless the trial court in its discretion directs otherwise (*see Matter of Ladd v Bellavia*, 151 AD2d 1015 [4th Dept 1989], *Matter of Sellen v Wright*, 229 AD2d 680 [3d Dept 1996]). An appellate AFC should review the *Lincoln* hearing transcript before filing their brief; however, an AFC shall not refer to the contents of the *Lincoln* hearing in their brief or during oral argument (*see Matter of Ellen T.T. v Parvaz U.U.*, 178 AD3d 1294 [3d Dept 2019]). A trial AFC shall similarly be prohibited from referring to the contents of a *Lincoln* hearing during their summation or from disclosing the same to any party or attorney involved in the case.

SELECTED NEW YORK RULES OF PROFESSIONAL CONDUCT
22 NYCRR Part 1200

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 make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

RULE 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing

RULE 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related

matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

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.

RULE 3.7. Lawyer As Witness

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

RULE 4.2. Communication With Person Represented By Counsel

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

RULE 4.3. Communicating With Unrepresented Persons

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the

lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.