

**FLORIDA GUIDELINES of PRACTICE  
FOR ATTORNEYS WHO REPRESENT  
CHILDREN IN DELINQUENCY PROCEEDINGS**

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## **PREFACE**

All children charged with delinquent acts have a constitutional right to legal representation. In re Gault, 387 U.S. 1, 30-31, 41 (1967); State v. T.G., 800 So. 2d 204, 210 (Fla. 2001). These Delinquency Guidelines are meant to help attorneys fulfill this role by zealously representing children in Florida within the confines of the United States and Florida Constitutions and the Rules of Professional Conduct. The guidelines were promulgated by the Legal Needs of Children's Standing Committee of the Florida Bar after review of numerous national and state standards.

These guidelines address the specific roles and responsibilities of an attorney appointed or retained to defend a child in a delinquency case. They are intended to serve as a guide for an attorney's performance in delinquency proceedings and to contain a set of recommendations to assist attorneys in providing quality representation for children. The guidelines may also be used as a training tool. The recommendations covered in these guidelines are not to be undertaken automatically in every case. Instead, the advocacy used should be tailored to the requirements of a particular case. In deciding what is appropriate, an attorney should use his or her best professional judgment.

The guidelines were created by a subcommittee of the Legal Needs of Children's Standing Committee of the Florida Bar who sought the input of the Florida Public Defenders' Association, juvenile defenders and child advocates around the state. A group of advocates and defenders met by conference call every two weeks for over a year and a half to draft these guidelines. The guidelines were then approved by the full Legal Needs of Children's Standing Committee of the Florida Bar. The Florida Public Defender Association approved the guidelines on July 29, 2009.

It is hoped that the publication and widespread dissemination of these guidelines will give direction to both attorneys and judges on the appropriate role of delinquency attorneys who represent children in delinquency cases.

## **A. GENERAL PROVISIONS**

Attorneys representing children in delinquency proceedings shall provide services to all clients in a professional, skilled manner consistent with the minimum standards set forth by the American Bar Association; the Rules of Professional Conduct, comprising chapter 4 of the Rules Regulating the Florida Bar; case law and the applicable court rules defining the duties of counsel and the rights of children in delinquency cases.

### ***A-1 Role of the Attorney for the Child***

1. The paramount obligation of an attorney for the child is to provide zealous and quality representation to their clients at all stages of the delinquency

process. The attorney's personal opinion of the child's guilt is not relevant to the defense of the case.

2. The attorney who provides legal services for a child owes the same duties of undivided loyalty, confidentiality, and zealous representation to the child as is due to an adult client.
3. The child's attorney should communicate with the child in a manner that will be effective, considering the child's maturity, intellectual ability, language, educational level, special education needs, cultural background, gender, and physical, mental and emotional health. If appropriate, the attorney should file a motion to have a foreign language or sign language interpreter appointed by the court at all stages of the proceedings.

## **A-2 Expressed Preferences**

The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation. The attorney shall not substitute the parents'<sup>1</sup> wishes for the position of the child. In addition, the attorney has a responsibility to counsel the child and advise the child as to potential outcomes of various courses of action.

### **Commentary**

See R. Regulating Fla. Bar 4-1.3 (Diligence) Cmt. 1. "Failing to represent one's client zealously, failing to communicate effectively with one's client, and failing to provide competent representation are all serious deficiencies, even when there is no evidence of intentional misrepresentation or fraud." Fla. Bar v. Roberts, 689 So. 2d 1049, 1051 (Fla. 1997). See also Fla. Bar v. Cimbler, 840 So. 2d 955, 960 (Fla. 2002). If a child's ability to make adequately considered decisions in connection with the representation is impaired, an attorney should follow rule 4-1.14 of the Rules Regulating the Florida Bar.

The attorney's obligation to zealously advocate for the child's wishes does not change in a unified family court. Although there may be different procedures in a unified family court, the basic obligation of the child's attorney remains the same.

The attorney should counsel the child, present the child with comprehensible choices, help the child reach his or her own decisions and advocate the child's viewpoint and wishes (as determined by the child) to the Court.

The attorney may request the appointment of a guardian ad litem if there are concerns for the child's safety, well-being, or physical, mental, or emotional health and the attorney believes a guardian ad litem is necessary to advocate for the best interest of the child. Because the Legislature has determined that funds and positions for the Statewide Guardian ad Litem Program shall not be used for children involved in delinquency proceedings until all children in dependency proceedings are represented, it may be

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<sup>1</sup> The use of the word parent hereafter refers to the parent, guardian, custodial adult or person assuming legal responsibility for the child.

necessary to seek the assistance of a guardian ad litem independent of the Statewide GAL Program.

### ***A-3 Scope of Representation***

1. Certain decisions relating to the conduct of the case are ultimately for the child client and other decisions are ultimately for the child's attorney. The decisions which are to be made by the child after full consultation with the attorney are:
  - a. What pleas to enter;
  - b. Whether to accept a plea agreement;
  - c. Whether to participate in a diversionary program;
  - d. Whether to testify in his or her own behalf; and
  - e. Whether to appeal.
2. The attorney should explain that final decisions concerning trial strategy, after full consultation with the child and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The child should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is consideration of the child's input and full disclosure by the attorney to the child of the factors considered by the attorney in making the decisions.

## **B. GENERAL AUTHORITY AND DUTIES**

### ***B-1 Basic Competency in Juvenile Proceedings***

Before agreeing to defend a child, an attorney has an obligation to make sure that they have sufficient time, resources, knowledge and experience to offer quality representation to the child. Before an attorney defends a child, an attorney should observe juvenile court, including every stage of a delinquency proceeding, and have a working knowledge of juvenile law and practice.

#### **Commentary**

Representing children in delinquency proceedings requires specialized knowledge and training.

The child's attorney should accept the more serious and complex delinquency cases only after having had experience and/or training in less complex criminal/delinquency matters. Where appropriate, the child's attorney should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation, including information about the practices of judges, prosecutors, probation officers, and other court personnel.

There are special hearings for a child in which the attorney may not have the skills and resources to represent the child in such situations. In those proceedings an attorney may need to consult with or seek co-counsel with adequate competency in these matters.

- 1.** Prior to representing a child, at a minimum, an attorney should receive training or be knowledgeable in the following areas:
  - a.** Information about relevant federal and state statutes, court decisions and rules of court, including but not limited to:
    - i.** Florida Rules of Juvenile Procedure;
    - ii.** Chapter 985 of the Florida Statutes;
    - iii.** Florida statutes defining criminal offenses;
    - iv.** Constitutional criminal procedure; and
    - v.** Chapter 90 of the Florida Statutes, the Florida Evidence Code.
  - b.** Overview of the court process and key personnel in the delinquency process including the practices of the specific judge before whom a case is pending;
  - c.** Placement options for detention and disposition;
  - d.** Trial and appellate advocacy;
  - e.** Ethical obligations for child representation including these guidelines for representation and the special role played in Unified Family Courts; and
  - f.** Child development, needs, and abilities.
- 2.** An attorney representing children should annually complete four hours of Continuing Legal Education relevant to the representation of children. Additional legal education may include, but is not limited to:
  - a.** Adolescent mental health diagnoses and treatment including the use of psychotropic medications;
  - b.** How to read a psychological or psychiatric evaluation and how to use these in motions including but not limited to those involving issues of consent and competency relating to Miranda, search and waivers;
  - c.** Normal childhood development (including brain development), developmental delays and mental retardation;
  - d.** Information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony;
  - e.** Information on educational rights including special educational rights and services and how to access and interpret school records and how to use them in motions including but not limited to those related to consent and competency issues;
  - f.** IDEA and manifestation defense;
  - g.** School suspension and expulsion procedures;
  - h.** Communication with children skills;
  - i.** Information gathering and investigative techniques;

- j.** Use and application of the current assessment tool(s) used in your jurisdiction and possible challenges that can be used to protect the child clients;
- k.** Immigration issues regarding children;
- l.** Gang involvement and activity;
- m.** Factors leading children to delinquent behavior, signs of abuse and/or neglect, and issues pertaining to status offenses; and
- n.** Information on religious background and racial and ethnic heritage, and sensitivity to issues of cultural and socio-economic diversity.

### ***Commentary***

Children are a special class of clients and delinquency matters are special types of cases. Many courts and judicial organizations recognize that rapid changes occur because of new federal and state legislation, appellate court decisions, systemic reforms, and responses to professional literature. Continuing education opportunities are critical to maintain a high level of performance. These guidelines require these “advanced” or “periodic” training for attorneys who represent children in delinquency cases. Although this general training is necessary, the child’s attorney has a continuing obligation to become knowledgeable about the special issues that may arise in individual cases.

At a minimum, a child’s attorney should be familiar with Federal and Florida law relevant to his or her representation. In addition, the attorney should be aware that issues may arise that may require knowledge of other significant areas of the law. To become knowledgeable of these diverse sources of relevant law, an attorney may want to review books such as Florida Juvenile Law and Practice, published by the Florida Bar. Useful national sources of information or training include the Juvenile Defender Delinquency Notebook, published by the National Juvenile Defender Center in Washington.

- 3.** Mentorship. Individual attorneys who are new to child representation should take the opportunity to practice under the guidance of an experienced attorney mentor. Correspondingly, experienced attorneys are encouraged to provide mentoring to new attorneys, assist new attorneys in preparing cases, debrief following court hearings, and answer questions as they arise.

### ***Commentary***

In addition to training, particularly for attorneys who work as sole practitioners or in firms that do not specialize in child representation, more experienced advocates are a useful resource to help educate new attorneys for children. The attorneys are encouraged to join and participate in at least one professional group or organization that will be a resource for needed



information. Such groups include the National Juvenile Defender Center and the relevant committees of the Florida Bar (Public Interest Law Section).

## **B-2 Basic Obligations**

The child's attorney should:

1. Obtain copies of all pleadings and relevant notices;
2. Participate in all depositions, negotiations, discovery, pretrial conferences, and hearings;
3. Counsel the child concerning the subject matter of the litigation, the child's rights, the court system, the proceedings, the attorney's role, and what to expect in the legal process; and
4. Develop a theory and strategy of the case to implement at hearings, including factual and legal issues.

## **B-3 Conflicts of Interest**

A child's attorney must be alert to all potential and actual conflicts of interest that would impair their ability to represent a child. Loyalty and independent judgment are essential elements in the attorney's relationship to a child. Conflicts of interest can arise from the attorney's responsibilities to another client, a former client or a third person, or from the attorney's own interests. Each potential conflict must be evaluated with the particular facts and circumstances of the case and the child in mind. In Public Defender offices, assistant public defenders have to follow the approved conflict guidelines and seek written approval from the Public Defender or the Public Defender's designee.<sup>2</sup> Where appropriate, attorneys may be obligated to contact the Florida Bar to seek an advisory opinion on any potential conflicts.

1. Joint representation of co-defendants is not a *per se* violation of the constitutional guarantee of effective assistance of counsel. However, if an attorney must forbear from doing something on behalf of a child client because of responsibilities or obligations to another client, there is a conflict. Similarly, if by doing something for one client, another client is harmed, there is a conflict.

### ***Commentary***

An attorney should review Rules 4-1.7, 4-1.8, 4-1.9, and 4-1.10 of the Rules Regulating the Florida Bar. These rules provide guidance when determining whether there is a conflict of interest. An attorney will be put in a position of divided loyalty when he or she represents more than one child and one client is more culpable than the other(s), or the defense of one child will be antagonistic to the defense of other(s), or when there are differences in the

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<sup>2</sup> See § 27.5303, Fla. Stat. (2009).

background of the children that an argument can be made that one child should be treated differently.

2. Other miscellaneous conflicts of interest may exist and must be evaluated and resolved on a case-by-case basis in accordance with relevant ethical rules and Uniform Standards for Use in Conflict of Interest Cases<sup>3</sup>. For example, if a state witness against a present child client is also represented by the same attorney or law firm, a conflict exists. Similarly, a conflict may occur if the State solicits the testimony of one client against another client in a different matter or if a former client becomes a victim of a case in which a current client is charged and some aspect of the victim's character may be at issue. A conflict may also occur if an employee of the law firm or public defender's office is the victim or a State witness in a case.

### *Commentary*

If a conflict arises, an attorney should be cautious about permitting a child to waive the conflict. The waiver may have collateral consequences in other motions in the case regarding the child's competency to waive constitutional protections.

3. The attorney's obligation is to the child. An attorney should not permit a parent or custodian to direct the representation or share information unless disclosure of such information has been approved by the child client. With the child's permission, the attorney should maintain rapport with the child's parent or guardian, but should not allow that rapport to interfere with the attorney's duties to the child or the expressed interests of the child. Where there are conflicts of interests or opinions between the child client and the child's parent or custodian, the attorney need not discuss the case with parents or represent the views of a parent that are contrary to the child's wishes.

### *Commentary*

An attorney should always meet with their child client in private to avoid a breach of confidentiality and privilege. However, an attorney should discuss what disclosures the child may want the attorney to make to a judge, parent, custodian or other interested persons.

Under rule 4-1.8 of the Rules Regulating the Florida Bar, an attorney is required to maintain confidentiality even when the parent is paying for the services rendered by the attorney. The parent is also forbidden to interfere with the attorney's assessment of the case.

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<sup>3</sup> See Final Report of the Article V Indigent Services Advisory Board app. C (Jan. 6, 2004).

Especially when a parent is the alleged victim or has some other adverse interest, the attorney needs to ensure the confidentiality of the attorney-client communication and independence of the judgment made by the child.

#### ***B-4 Client Communications***

An attorney should keep the child informed of the developments in the case, and the progress of preparing the defense and should promptly comply with all reasonable requests for information.

#### ***B-5 Client Confidentiality***

1. An attorney should seek from the outset to establish a relationship of trust and confidence with the child. The attorney should explain the attorney's obligation of confidentiality thus making privileged the child's disclosures relating to the case.
2. An attorney should not be discussing the case or any confidential information when others are present and able to hear.
3. An attorney should not knowingly reveal a confidence or secret of a child client to another, including the parent or legal guardian of the child client. An attorney should not knowingly use a confidence or secret of a child client to the disadvantage of the client or, unless the attorney has secured the consent of the client after full disclosure, for the attorney's own advantage or that of a third person.
4. An attorney must exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical and social reports, tests or evaluations bearing on the child's history or condition. In general, the attorney should not disclose data or conclusions contained in such reports to the extent that, in the attorney's judgment based on knowledge of the child and the child's family, the revelation would be likely to affect adversely the child's well-being or relationships within the family and disclosure is not necessary to protect the child's interests in the proceeding.
5. An attorney should ensure that communications with a child in an institution including a detention center are confidential. One way to ensure confidentiality is to stamp all mail as legal and confidential.
6. Delinquency proceedings are public. An attorney should be mindful that medical, mental health or substance abuse information should not be discussed or disclosed in open court. It is particularly problematic when such information is disclosed in front of other children who are also securely detained due to stigmatization and possible harassment while detained. To protect the confidential and sometimes embarrassing information involved, the attorney in consultation with the child may move to close the proceedings or request the case to be called last on the docket when the courtroom is empty.
7. The media may report on certain delinquency cases. If a decision is made to speak to the media, the attorney should be cautious due to confidentiality,

other rules of professional conduct, the potential for inaccurate reporting and strategic considerations.

### ***B-6 Case Organization***

Attorneys shall maintain a client case file on each active case, and when appropriate, provide the case file to successor attorneys. The attorney for the child is expected to maintain all information about the case's history and future proceedings, deadlines, dates, etc., on or within the child's case file so that it is readily discernible. All case files must reflect the procedural history of the case, and all other information necessary to render effective representation, including copies of the charging documents, all discovery, pleadings, plea offers, notes and other communications to and from the child, the names and telephone numbers of the prosecutor and other parties, and the judge, as well as information about how to locate the child. The attorney has an obligation to keep and maintain a thorough, organized, and current file on each child. As part of the child representation, an attorney should maintain relevant updated notes that record information such as information obtained during all interviews of the child; interviews of witnesses, interviews of family members, friends and employers; child's background and history; court dates and events; contact with investigators and results of investigations; conversations with the prosecutor regarding discovery, dispositional issues including plea offers, trial issues; conversations with the probation officer; conversations with police officers or investigators; telephone conversations regarding the case; conversations, consultation and evaluation by experts.

### ***B-7 Continuity of Representation***

Attorneys initially retained or appointed should continue their representation through all stages of the proceedings. Unless otherwise ordered by the court, the attorney of record shall continue to represent the child from the point of the initial court proceedings through disposition, post-disposition review hearings, and any other related proceedings until the case is closed.

### ***B-8 Duty of Stand-In Counsel***

Any attorney appointed to stand in for another at any delinquency must (1) represent the child zealously as if it is his or her own client; (2) ensure that the child knows how to contact stand-in counsel in case he or she does not hear from the attorney of record, (3) immediately communicate with the attorney of record regarding upcoming dates/hearings, how to contact the child, placement of child, nature of charges, and other timely issues that the attorney of record may need to know or address, and (4) immediately or within a reasonable time thereafter provide to the child's attorney of record all notes, documents, and any discovery received.

## **B-9 Caseloads**

An attorney should not have such a large number of cases that he or she is unable to comply with these guidelines and the rules of professional conduct. Before agreeing to act as the attorney, or accepting appointment by a court, the child's attorney has an obligation to make sure that he or she has sufficient time, resources, knowledge, and experience to offer quality legal services in a particular matter. If, after accepting an appointment, it later appears that the child's attorney is unable to offer effective representation, the attorney for the child should consider appropriate case law and ethical standards in deciding whether to move to withdraw or take other appropriate action.

### ***Commentary***

Caseloads must not be exceeded where to do so would compel attorneys to forego fact investigation, or to be less than scrupulously careful in the preparation for trial, or to forego legal research necessary to develop a theory of representation. See R. Regulating Fla. Bar 4-1.1 (Competence), 4-1.3 (Diligence). In calculating an appropriate caseload, one should consider whether the attorney has sufficient support services and physical resources to allow for quality representation including access to investigators and social workers. The American Bar Association and the Florida Public Defender Association recommends that a full time juvenile delinquency attorney handle no more than 250 cases per year. If an attorney in a public defender's office has an unreasonable caseload, the attorney should consult with the elected public defender and consider litigation or other strategies to address the problem.

An attorney shall not accept appointment of any case for which he or she cannot devote the requisite amount of time.

## **C. INITIAL OBLIGATIONS**

### ***C-1 Prompt Action to Protect the Child***

Many important rights of the child in juvenile court proceedings can be protected only by prompt advice and action. Attorneys should immediately inform the child clients of their rights and pursue any investigatory or procedural steps necessary to protect the child's interests.

### ***C-2 Advocate for Release from Detention***

1. The child's attorney has an obligation to attempt to secure the pretrial release of the child under the conditions most favorable and acceptable to the child unless contrary to the expressed wishes of the child.
2. If the child is detained, the attorney should try to ensure, prior to any initial court hearing, that the child does not appear before the judge in inappropriate clothing, shackles or handcuffs.

3. An attorney should be prepared to present to the juvenile judge a statement of the factual circumstances and the legal criteria supporting release including challenges to probable cause or the accuracy of the risk assessment instrument and, where appropriate, to make a proposal concerning conditions of release.
4. An attorney should determine whether a parent or other adult is able and willing to assume custody of the child. An attorney should be aware that most juvenile courts will not release a juvenile without a responsible adult in court willing to take custody. Every effort should be made to locate and contact such a responsible adult if none are present.
5. An attorney should arrange to have witnesses to support release and have anyone the child wishes to have present at any hearing. This may include a minister or spiritual advisor, teacher, relative, other mentor or other person who is willing to provide guidance, supervision and positive activities for the youth during release.
6. If the juvenile is released, the attorney should fully explain the conditions of release to the child and advise him or her of the potential consequences of a violation of those conditions.
7. The child's attorney should know the detention facilities, community placements and other services available for placement.
8. Where the child is detained and unable to obtain pretrial release, an attorney should be aware of any special medical, mental health, educational and security needs of the child and in consultation with the child request that the appropriate officials including the court take steps to meet those special needs.
9. Following the detention hearing, an attorney should continue to advocate for release of a child or expeditious placement. If a child is not released, he or she should be advised of the right to have the placement decision reviewed or appealed.
10. Whenever a child client is held in some form of detention, the attorney should periodically visit the child client and personally review his or her well-being, the conditions of the facility, and the opportunities to obtain release.
11. Whenever a child client is held in some form of detention, the attorney should be prepared for an expedited adjudicatory hearing.

### *Commentary*

The child's attorney should be aware of the limited use of detention care and the time restrictions for the use of detention care. Detention care includes secure detention, home detention and non-secure detention. See § 985.03(19), Fla. Stat. (2009). Even after an adverse ruling in a detention hearing, an attorney should pursue a writ of habeas corpus if he or she believes the detention is illegal or exceeds statutory limitations.

### **C-3 Meet with Child**

The child's attorney should conduct a client interview as soon as possible but no later than 72 hours after being retained or appointed by the court, in order to obtain the information necessary to provide quality representation at the early stages of the case and

to provide the child with information concerning the representation and the case proceedings. A meeting or conversation conducted in a hallway or holding cell at the courthouse is not a substitute for a thorough interview conducted in private. Furthermore, establishing and maintaining a relationship with a child is the foundation of quality representation. Therefore, irrespective of the child's age, the attorney should consult with the child prior to every court hearing. An attorney shall promptly comply with child client's requests for contact and assistance.

### ***Commentary***

This standard minimally requires consultations with the child at certain specific times in the proceedings. These communications can be conducted by the attorney or his/her staff. An attorney should conduct the initial interview with the child as soon as possible and sufficiently before any court proceeding so as to be prepared for that proceeding.

Complying with a child's request for information is mandated by rule 4-1.4 of the Rules Regulating the Florida Bar. An attorney should ensure that a child client has the ability to contact an attorney without interference by a custodian or others.

- 1.** Prior to conducting the initial interview the attorney should, where possible:
  - a.** Be familiar with the elements of the offense and the potential punishment where the charges against the child are already known;
  - b.** Obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by and for the Department of Juvenile Justice concerning pretrial release, and law enforcement reports that might be available;
  - c.** Request mental health, juvenile assessment center, detention center or educational records that may help in the initial interview with the child;
  - d.** Be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions; and
  - e.** Be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the child upon release.
- 2.** The first purpose of the initial interview is to determine whether there is a competency issue. A child may be incompetent to proceed due to developmental age, immaturity, autism, mental health or mental retardation and/or other disabilities. School information, prior evaluations, prior programs, information and interaction with child and/or guardian, and other sources, can cause an attorney to have concern that the client may not be legally competent to proceed or legally competent to waive constitutional rights. If an attorney suspects there is a competency issue, the attorney should have the client evaluated. (See section D-4). If competency is not an issue, then the purposes of the initial interview are to

acquire information. The purposes of the initial interview are to acquire information from the child concerning the facts of the case and to provide the child with information concerning the case. The child's attorney should specifically:

- a.** Explain the nature of the attorney-client relationship to the child including the requirements of confidentiality;
- b.** Explain the attorney-client privilege and instruct the child not to talk to anyone about the facts of the case without first consulting with the attorney;
- c.** Explain the nature of the allegations, what the government must prove, and the likely and maximum potential consequences;
- d.** Explain a general procedural overview of the progression of the case;
- e.** Explain how and when to contact the child's attorney
- f.** Ensure the child understands that he or she has the right to speak with their attorney;
- g.** Explain the role of each player in the system;
- h.** Collect information including but not limited to:
  - 1)** The child's current living arrangements, family relationships, and ties to the community, including the length of time his or her family has lived at the current and former addresses, as well as the juvenile's supervision when at home;
  - 2)** The immigration status of the child and his or her family members, if applicable;
  - 3)** The child's educational history, including current grade level, attendance and any disciplinary history;
  - 4)** The child's physical and mental health, including any impairing conditions such as substance abuse or learning disabilities, and any prescribed medications and other immediate needs;
  - 5)** The child's delinquency history, if any, including arrests, detentions, diversions, adjudications, and failures to appear in court;
  - 6)** Whether there are any other pending charges against the child and the identity of any other appointed or retained counsel;
  - 7)** Whether the child is on probation or post-release supervision and, if so, the name of his or her probation officer or counselor and the child's past or present performance under supervision;
  - 8)** The options available to the child for release if the child is in secure custody; and
  - 9)** The names of individuals or other sources that the attorney can contact to verify the information provided by the child, and the permission of the child to contact those sources.
- i.** Obtain informed assent and a signed release authorizing the attorney and/or his/her agent to obtain official records related to the child



- including medical and mental health records, school records, employment records, etc;
- j.** Discuss arrangements to address the child’s most critical needs; e.g., medical or mental health attention, request for separation during detention or contact with family or employers; and
  - k.** Assess whether the child is competent to proceed or has a disability that would impact a possible defense or mitigation.
- 3.** At the initial meeting and thereafter as appropriate, the child’s attorney should gather information relevant to the preparation of the defense. Such information may include, but is not limited to:
- a.** The facts surrounding the charges against the child;
  - b.** Any evidence of improper police investigative practices or prosecutorial conduct which affects the child’s rights;
  - c.** Any possible witnesses or other potential sources of information;
  - d.** Any evidence that should be preserved;
  - e.** Where appropriate, evidence of the child’s competence to stand trial and/or mental state at the time of the offense;
  - f.** Consistent with the child’s wishes, the child’s attorney should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities; and
  - g.** With the child’s consent, ascertain the parent(s)’ willingness to take custody and supervise the child upon release (in situations where the child has been detained) and obtain useful social information from the parents, such as: the child’s home behavior, school performance, involvement with special education services, past or present part-time employment, prior delinquency records, whether the child is on probation or pending adjudication in another case.

### ***Commentary***

It is important to ensure that the child clients with special needs are having those needs met especially if the child is detained. The child’s attorney should be familiar with these other services and how to assure their availability for the child. See generally Thomas A. Jacobs, *Children and the Law: Rights & Obligations* (West 2009) (three-volume binder); Donald T. Kramer, *Legal Rights of Children 2d* (rev. ed., West 2005).

- 4.** At the initial meeting and thereafter as appropriate, the child’s attorney should advise the child about the case including:
- a.** Providing candid advice to the child concerning all aspects of the case, including the attorney’s opinion of the probable outcome;

### ***Commentary***

It is unprofessional conduct for an attorney to intentionally understate or overstate the risks of the case in order to unduly influence the child's decision.

- b.** Cautioning the child to avoid communication about the case with witnesses where such communication could be used against the child or would constitute, apparently or in reality, improper activity;
  - c.** The consequences of non-compliance with court orders;
  - d.** Explain the nature of psychological or psychiatric evaluations, the procedures for such evaluations and the potential lack of confidentiality of disclosures to the evaluator when they are ordered by the court or arranged by the attorney for the child; and
  - e.** Explain the law governing the prosecution's power within constitutional limitations to request a court order to direct a juvenile to provide non-testimonial evidence (such as participation in an in-person lineup, handwriting exemplars, and physical specimens), the potential consequences if a child refuses to comply with a non-testimonial identification order, and the extent to which the child's attorney may participate in or observe the proceedings.
- 5.** Throughout the delinquency process, the attorney should take the time to:
- a.** Keep the child informed of the nature and status of the proceedings on an ongoing basis;
  - b.** Maintain regular contact with the child during the course of the case, and especially before court hearings;
  - c.** Review all discovery with the child as part of the case theory development;
  - d.** Promptly respond to telephone calls and other types of contact from his or her clients, where possible, within one business day or a reasonable time thereafter;
  - e.** Counsel the child on options and related consequences and decisions to be made; and
  - f.** Seek the lawful objectives of the child and not substitute the attorney's judgment for that of the child in those case decisions that are the responsibility of the child. Where an attorney believes that the child's desires are not in his or her best interest, the attorney should discuss the consequences of the child's position. If the child maintains his or her position, the attorney should defend the child vigorously within the bounds of the law.
- 6.** Where the attorney is unable to communicate with the child or his or her guardian because of language differences, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the child and that the child is able to communicate his/her understanding of the proceedings. Such steps could include obtaining funds for an interpreter to

assist with pre-trial preparation, interviews, and investigation, as well as in-court proceedings.

*Commentary*

It is inappropriate to use anyone who is not a court certified interpreter to provide translation services. Using an amateur translator does not guarantee an accurate translation or protect confidentiality.

## **D. PRE-ADJUDICATION**

### ***D-1 Diversion/Alternatives***

An attorney should be familiar with diversionary programs and alternative solutions available in the community. Such programs may include diversion, mediation, or other alternatives that could result in a child's case being dismissed or handled informally. When appropriate and available, the attorney shall advocate for the use of informal mechanisms that could divert the child's case from the formal court process with an understanding that the state attorney has the ultimate authority to divert cases.

*Commentary*

Although children may be diverted before an attorney is assigned the case, an attorney can ask for cases that were not diverted to be considered for diversion after a petition has been filed. In addition to formal diversionary programs, sometimes an assistant state attorney may agree to continue the case because a child is referred to a non-delinquent treatment program or sanction such as a residential mental health treatment program or is participating in some other rehabilitative program. Once a child has completed this alternative program, the state attorney would dismiss the case.

### ***D-2 Direct File and Transfer to Adult Proceedings***

- 1.** An attorney should be aware when charges can be filed directly in adult court by a state attorney and take actions to prevent such a filing including:
  - a.** Promptly investigating all circumstances of the case bearing on the appropriateness of filing the case in adult court and seeking disclosure of any reports or other evidence that the state attorney is using in his or her consideration of a direct filing; and
  - b.** The attorney should promptly move for appointment of an investigator or expert witness to aid in the preparation of the defense when circumstances warrant.

2. Upon learning that a state attorney may elect to transfer the case to adult court, the attorney should fully explain the nature of the proceeding and the consequences of transfer to the child and the child's parents.
3. Upon learning that a state attorney may elect to transfer the case to adult court, the child's attorney should present all facts and mitigating evidence to convince the state attorney to keep a child in juvenile court.

### **Commentary**

Because the state attorney has broad discretion to directly file an information in many cases, it is rare that the state will pursue charges in adult court through transfer hearings. If the state attorney transfers through a motion and waiver hearing, the child has a right to counsel, a right to a hearing affording the right to cross examine witnesses and a right to call witnesses on the child's behalf. Additionally, the court must weigh all of the testimony and make written findings of fact weighing each criterion. A fill in the blank order is insufficient.

4. If the attorney who represented the child in the delinquency court will not represent the child in the adult proceeding, the delinquency attorney should ensure the new attorney has all the information acquired to help in the adult proceedings.
5. If a child is transferred to adult court, the attorney should pursue the imposition of juvenile sanctions by the adult court.

## **D-3 Mental Health Examinations**

Preserve Rights in Mental Health Examinations. The child's attorney should try to obtain informed assent before referring the child for a mental health or psychological evaluation. Throughout a delinquency proceeding, the State may request or the judge may order a mental health examination of the child. Admissions made during such examinations are not protected from disclosure. The child's attorney has a right to be present during mental health evaluations. See Fla. R. Juv. P. 8.095 (c)(1). The child's attorney should ensure the child understands the consequences of admissions during such examinations and advise the child on the lack of confidentiality and that personal information about the child or the child's family will be revealed to the court or other personnel.

## **D-4 Competency and Insanity**

1. Competency
  - a. The first thing the attorney when meeting or interviewing the child is to determine whether the child is competent. When the child is developmentally 12 years old or younger, the attorney should presume that

the child is not competent. The attorney should be familiar with procedures for a determination of mental incompetence under Florida Rule of Juvenile Procedure 8.095 and section 985.19 of the Florida Statutes.

- b.** Although the child's expressed interests ordinarily control, an attorney may question capacity to proceed without the child's approval or over the child's objection, if necessary. See R. Regulating Fla. Bar 4-1.14 (Client under a disability).
- c.** A child can be found incompetent due to age or immaturity, mental illness, mental retardation or autism. If at any time, the child's behavior or mental ability indicates that he or she may be incompetent, or may be mentally retarded, the attorney for the child should retain a mental health expert to have the child evaluated confidentially.
  - i.** Prior to the evaluation by the experts, the attorney should obtain and provide to the experts all relevant documents including but not limited to the arrest report, prior psychological/psychiatric evaluations, school records and any other important medical records.
  - ii.** The attorney has a right to attend and observe the evaluation. See Fla. R. Juv. P. 8.095 (c)(1).
  - iii.** Once the child has been evaluated confidentially and deemed incompetent, the attorney should consider whether to file a motion to adopt the competency evaluation.
  - iv.** If the attorney does not have sufficient funds for a confidential competency evaluation, then the child's attorney should make a motion for competency evaluation.
- d.** The attorney should prepare for and participate fully in the competency hearing, which may include the attorney attending the expert's evaluation of the child.
- e.** The attorney should be aware that the burden of proof is on the child to prove incompetency and that the standard of proof is a preponderance of the evidence.
- f.** If the child is found incompetent, the attorney should participate, to the extent possible, in the development of the mental competency plan and in any subsequent meetings or hearings regarding the child's mental competency. Once a child has been found incompetent to proceed, that child is presumed to remain incompetent until a court enters an order finding him or her competent.

### **Commentary**

An attorney should maintain confidentiality at all costs. The attorney should hire his or her own competency experts to evaluate the child and maintain the evaluations as work product unless the attorney has reason to believe that the child is incompetent. Often times the child is competent and with a confidential evaluation, the child's admissions are still kept confidential thus preventing additional prejudice by the state or delinquency judge.

## 2. Defense of Insanity

- a. The attorney should be familiar with the procedures and notice requirements under Florida Rule of Juvenile Procedure 8.095 when proceeding with an insanity defense.
- b. If the attorney believes that the child did not appreciate the consequences of his/her actions at the time of the offense, the attorney should discuss with the child the possibility of an insanity defense.
- c. Before raising the issue of insanity in open court, the attorney should consider retaining its own mental health professional to evaluate whether the child appreciated the consequences of his or her actions at the time of the offense. Prior to the evaluation by the expert, the attorney should obtain and provide to the experts all relevant documents including but not limited to the arrest report, prior psychological/psychiatric evaluations, school records and any other important medical records.
- d. The attorney must fully prepare the witnesses to testify on the child's behalf in regard to their sanity at the time of the offense.
- e. When insanity is an issue, the State has the ultimate burden of proving beyond a reasonable doubt that the child was sane at the time of the offense.
- f. The attorney must advise the child that if he/she is found not guilty by reason of insanity, the court may involuntarily commit the child to the Department of Children and Families for treatment.
- g. The attorney must be prepared to advocate on behalf of the child against involuntary commitment and provide other treatment options such as outpatient counseling or services.

### Commentary

Similar to the issue of competency, the attorney should maintain confidentiality at all costs. The attorney should hire its own expert on insanity to evaluate the child and maintain the evaluations as work product until a final decision on the use of the defense is made.

## **D-5 Disability**

Some delinquency cases involve children whose actions are the result of a manifestation of a disability. The attorney for the child could argue that the disability prevented the child from having the mental capacity or specific intent to commit the crime. For school based offenses, another argument that may be made is that the school did not follow the child's Individual Education Plan which could have prevented the child's actions. These arguments could result in the granting of a judgment of dismissal or a finding of not delinquent. This information may also be used for mitigation at the time of disposition following a plea or a finding of delinquency.

## ***D-6 Arraignment***

The child's attorney should preserve the child's rights at the initial appearance on the charges by requesting a speedy trial, preserving the right to file motions, demanding discovery and entering a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so. Pleas at arraignment or at any time before the attorney establishes the attorney-client relationship, without discovery and without conducting an independent investigation, carry a strong presumption of ineffective assistance of counsel.

A child has a right to plead guilty at any time and may decide to resolve his case at arraignment. If he decides to do so, the attorney's obligation is to ensure that the forfeiture of the defendant's constitutional rights is voluntary and intelligent. This means that the child has not been subject to coercion from any source. The use of handcuffs and shackles increase the pressure on children to plead at arraignment and call into question the voluntary nature of the plea. Plea discussions while the child is handcuffed, chained or shackled to other children violate the child's right to confer with counsel, as well as the attorney's ethical obligations of conducting confidential communications with the client.

In conveying a plea offer to a client at arraignment, the attorney is generally merely acting as a conduit and is seldom in a position to offer meaningful advice or counsel. In many instances, the child is required to decide whether to accept a plea at arraignment, after a brief discussion with the attorney in a public area. It is essential that attorney-client consultations be held in private. The attorney must insist to be allowed sufficient time to have a meaningful consultation with the child. As is the case with adults in criminal court, no child should be required to accept a plea until he has had a reasonable time within which to deliberate. For guidelines on the information that should be conveyed to the child, please refer to Attachment A, which are incorporated by reference.

In order to ensure that the plea at arraignment is not improperly used for sentencing purposes in the future, the attorney should make a record indicating the circumstances of the plea and his inability to give meaningful advice to the client.

### ***Commentary***

Attorneys should familiarize themselves with the particular arraignment practices of each court in which they appears. For example, some courts, possibly in violation of Florida law, routinely obtain school attendance records at arraignment.

Normally an attorney would not have enough information to adequately advise the child client about entering a plea at arraignment. Thus, the normal practice should be to preserve all of the child's options until the child's attorney has conducted adequate independent investigation, discovery and legal research can be completed. In most instances, the child's attorney is in no position to, and should not, recommend to a child to plea at arraignment. However, in exceptional circumstances where the attorney knows sufficient information about the child and the charges, has spoken to the child and/or has

conducted adequate independent investigation prior to the arraignment, there may be reasons to enter a plea at arraignment such as to benefit from a concurrent sentence, or to avoid a potential direct file in adult court.

A child has an absolute right to counsel in delinquency proceedings. A child must have a meaningful opportunity to confer with counsel before the waiver of counsel. An attorney in the courtroom representing delinquent children is required to explain to the child the consequences of waiving counsel and the collateral consequences of a plea entered. The attorney should also explain the advantage of having an attorney represent the child through each stage of the proceedings. Additionally, an attorney must attempt to determine any issues in relation to competency or sanity during the consultation with the child.

### ***D-7 Speedy Trial***

Attorneys should be aware of and protect the child's right to a speedy trial, unless strategic considerations warrant otherwise. Requests or agreements to continue a contested hearing date shall not be made without consultation with the child. The attorney shall diligently work to complete the independent investigation and preparation in order to be fully prepared for all court proceedings. In the event an attorney finds it necessary to seek additional time to adequately prepare for a proceeding, the attorney should consult with the child and discuss seeking a continuance of the upcoming proceeding. Whenever possible, written motions for continuance made in advance of the proceeding are preferable to oral requests for continuance. All requests for a continuance should be supported by well-articulated reasons on the record in the event it becomes an appealable issue.

### ***D-8 Ensure Official Recording of Court Proceedings***

The attorney should take all necessary steps to ensure a full official recording of all aspects of the court proceedings. Because many courtrooms are wired for electronic recording of courtroom proceedings, the child's attorney must be mindful of location of microphones to ensure the confidentiality of communications with the client while in the courtroom.

### ***D-9 Investigation***

Defense investigation is an essential aspect of competent representation. It is through investigation that the attorney may learn necessary and relevant information about the case and preserve the child's rights. As such, the child's attorney has an absolute duty to conduct a prompt and diligent independent case investigation. The duty to independently investigate exists regardless of the child's admissions or statements of facts constituting guilt or the child's stated desire to plead guilty. To support the child's position, the child's attorney or defense investigators should conduct thorough, continuing, and independent investigations and discovery.



1. Review the court file and any prior court records of the child, and other relevant records;

*Commentary*

An aspect of representing children is the review of documents submitted to the court as well as other relevant records. Other relevant records that may be necessary to adequately represent the child include those concerning child protective services, developmental disabilities, juvenile dependency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child. Information in these files may suggest additional professionals and lay witnesses who should be contacted and may assist with potential defenses and mitigation.

2. Examine all charging documents to determine the specific charges that have been brought against the child. The relevant statutes and precedents should be examined to identify: the elements of the offense(s) with which the child is charged; both the ordinary and affirmative defenses that may be available; any lesser included offenses that may be available; and any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.
3. Determine and interview any potential defense witness;

*Commentary*

If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, an attorney should have an investigator conduct such interviews. An attorney shall not contact or interview represented parties without permission from the attorney(s). State witnesses are not parties to delinquency proceedings.

4. Depose or interview any state witnesses;

*Commentary*

Whether to interview or depose a state's witness is a strategic decision. As with defense witnesses, an attorney would want a third person present during in an interview of a state's witness. The procedures on the depositions of witnesses are delineated in Rule 8.060(d) of the Florida Rules of Juvenile Procedure and are usually unavailable without a showing of good cause for misdemeanors or traffic offenses. See Fla. R. Juv. P. 8.060(d)(2)(I).

5. Review relevant evidence including but not limited to objects to be used in trial by the state; photographs; video, audio or 911 tapes; client, victim or witness records, such as school, mental health, drug and alcohol test results,

police reports and state and defense witnesses' criminal records. Where appropriate, the attorney should request court orders for preservation of evidence, e.g., "911" or police tape recordings, notes of investigation by the police officers, and biological/forensic evidence. The attorney should be aware of the potential for loss or destruction of evidence by forensic examination or testing and take appropriate steps to prevent or minimize it.

### *Commentary*

It is essential that the attorney review the evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of the evidence.

6. Where appropriate, visit and investigate the scene of the alleged delinquent act. The attorney should consider obtaining photographs, maps and measurements of the area.

### *Commentary*

The attorney should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions). Such visits help prepare for witness examination and prepare possible defenses.

7. Seek investigators and experts, as needed, to assist the attorney in the preparation of a defense, in the understanding of the prosecution's case or in the rebuttal of the prosecution's case.

### *Commentary*

Section 29.007 of the Florida Statutes provides, when a private attorney is appointed by the court to handle a case where the child is indigent or where the court determines that a juvenile client of a private attorney is indigent for costs, that the Justice Administrative Commission ([http://justiceadmin.org/ind\\_for\\_cost/index.aspx](http://justiceadmin.org/ind_for_cost/index.aspx)) should be consulted for the appropriate forms and motions that need to be made to procure payment of "due process costs," pertaining to witnesses, including expert witnesses, investigators, mental health professionals, reasonable pretrial consultation fees, transportation expenses, and costs associated with court reporting and transcription services, including foreign language and sign-language interpreters and translators. Public Defender offices, per section 29.006 of the Florida Statutes, are afforded payment for these same due process costs.

## ***D-10 Participate in Discovery***

1. The child's attorney should pursue discovery pursuant to the Florida Rules of Juvenile Procedure in all but the most extraordinary circumstances including filing a demand for discovery and taking appropriate depositions.

### ***Commentary***

It is important for the child's attorney to pursue discovery and review the response to this quickly to determine what additional investigation or discovery needs to be conducted or obtained. There are circumstances in which an attorney would choose not to participate in discovery to avoid reciprocal discovery obligations. However, this would be a rare circumstance.

The child's attorney should not allow the state's failure to comply with discovery to delay the child's release from detention or negatively impact other rights of the child.

2. An attorney must be familiar with the rules regarding reciprocal discovery. The attorney must be aware of any potential obligations and time limits regarding reciprocal discovery and a notice of alibi defense.

### ***Commentary***

Once the child's attorney has pursued formal discovery, the defense has obligations for reciprocal discovery under Florida Rule of Juvenile Procedure 8.060(b).

If a child's attorney is using an alibi defense and the state attorney makes a demand in writing for information about the alibi, specific disclosures and procedures must be followed. See Fla.R.Juv. P. 8.065.

3. An attorney must monitor the dates to ensure the State complies with their discovery obligations. If discovery violations occur, an attorney should seek prompt compliance and/or sanctions for failure to comply.

## ***D-11 Develop a Theory of the Case***

During the investigation and trial preparation, the child's attorney should develop and continually reassess a theory of the case. A theory of the case is one central theory that organizes the facts, emotions, and legal basis for a finding of not guilty or adjudication of a lesser offense, while also telling the child's story of innocence, reduced culpability, or unfairness. The theory of the case furnishes the basic position from which an attorney determines all actions in a case.

## ***D-12 File Motions***

The child's attorney should file petitions, motions, responses or objections as necessary to zealously represent the child. The attorney should file motions as soon as possible due to the time constraints of juvenile court.

### ***Commentary***

Filing and arguing necessary motions is an essential part of the role of a child's attorney. The attorney should file appropriate pleadings on behalf of the child, including responses to the pleadings filed by the State. Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon in the case. When a hearing on a motion requires the taking of evidence, the attorney's preparation for the evidentiary hearing should include: investigation, discovery and research relevant to the claim advanced; the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses; and full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the child testify.

The attorney should decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, an attorney should remember that a motion may have many objectives in addition to the ultimate relief requested by the motion. The child's attorney should consider whether: the time deadline for filing pretrial motions warrants filing a motion to preserve the child's rights, pending the results of further investigation; changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted; and later changes in the strategic and tactical posture of the defense case may occur which affect the significance of potential pretrial motions.

An attorney should be prepared to raise during a subsequent proceeding any issue which is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, the attorney for the child should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

Relief requested may include, but is not limited to:

1. In consultation with the child, a mental or physical examination of the child;

### ***Commentary***

The issue of mental examinations of the child client is complex. A non-confidential examination may lead to consequences detrimental to the child's position or defense. The attorney must pay close attention to those rights which are protected by law and defend those rights as one would for an adult client. Furthermore, the attorney should be prepared to make independent use

of experts for the child and be cognizant of the attorney's right to shield from disclosure the reports of such experts, unless and until they may be submitted as evidence or otherwise disclosed in the legal interest of the child. Mental health professionals can often provide cogent assistance to the child's attorney in understanding the child's needs and abilities.

2. Relief due to mental incapacity, incompetency, mental retardation or mental illness;
3. The constitutionality of the implicated statute or statutes;
4. The sufficiency of the charging document;
5. The propriety and prejudice of any joinder or severance of charges or respondents in the petition or adjudicatory hearing;
6. The discovery obligations of the state;
7. The suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, state constitutional provisions or statutes, including;
  - a. The fruits of illegal searches or seizures;
  - b. Involuntary statements or confessions;
  - c. Statements or confessions obtained in violation of the child's right to an attorney, or privilege against self-incrimination;
  - d. Unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.
8. Suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;
9. Access to resources which or experts who may be denied to an accused because of his or her indigence;
10. The child's right to a speedy trial;
11. The child's right to a continuance in order to adequately prepare his or her case;
12. Matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
13. Motion for judgment of dismissal; or
14. Matters of trial or courtroom procedures, including inappropriate clothing or restraints of the child.

### ***D-13 Plea Negotiations***

Attorneys should participate in plea negotiations to seek the best result possible for the child consistent with the child's interests and directions to his or her attorney. The child's attorney should consider narrowing contested issues or reaching global resolution of multiple pending cases. Prior to entering into any negotiations, the attorney shall have sufficient knowledge of the strengths and weaknesses of the child's case, or of the issue under negotiation enabling the attorney to advise the child of the risks and benefits of settlement.

The attorney should keep the child fully informed of any continued plea discussion and negotiations and convey to the child any offers made by the prosecution for a negotiated

settlement. Attorneys should not accept any plea agreement without the child's express authorization. The decision to enter a plea rests solely with the child client and an attorney should not attempt to unduly influence that decision or let a parent or other adult unduly influence whether a child enters a plea.

Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, the attorney should continue to prepare and investigate the case in the same manner as if it were going to proceed to trial.

### *Commentary*

The child's attorney shall consult with the child, in a developmentally appropriate way, prior to any settlement becoming binding. Rule 4-1.2(a) of the Rules Regulating the Florida Bar states, in part, "A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify."

The attorney should be sensitive to the propensity of some child clients to consent to a plea to appease adults including the attorney. Parents may be unduly influencing a child's decision. Thus, an attorney needs to take steps to ensure a decision regarding a plea is solely the child's decision.

1. In developing the negotiations strategy, the child's attorney should be aware of and make sure the child is fully aware of the risks and benefits of either proceeding to trial or entering a plea. Additionally, an attorney should be aware of and make sure the child is fully aware of the collateral consequences of plea negotiations. Some possible collateral consequences of various plea agreements include drivers' license suspension, sexual offender registration requirements, potential civil commitment as a sexual offender, potential deportation, loss of participation in extra-curricular activities, potential suspension or expulsion from school, inability to be employed in certain occupations including the military, loss of firearm rights, loss of college scholarships, submitting to a DNA sample, loss of public benefits including housing benefits and future enhancement on charges, dispositions or sentencing. The attorney should explain that juvenile law enforcement records are public and there are limitations on sealing or expungement of records. Lastly, the attorney should explain the consequences regarding any minimum mandatory conditions of disposition.

### *Commentary*

In addition to the statutory and rule based plea colloquy, the child's attorney should advise the child client about the disposition discretion of the court and all possible disposition options including the possibility that a child placed on probation may be committed to a residential program if he or she violates probation.

2. In conducting plea negotiations, the attorney should be familiar with the practices and policies of the particular judge and particular assistant state attorney which may affect the content and likely results of negotiated plea bargains.
3. In preparing to enter a plea before the court, the child's attorney must explain to the child the nature of the plea hearing and prepare the child for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense and the appropriate disposition. Specifically, the attorney should:
  - a. Be satisfied there is a factual basis for the plea or admission;
  - b. Make certain that the child understands the rights he or she will waive by entering the plea and that the child's decision to waive those rights is knowing, voluntary and intelligent;
  - c. Be satisfied that the plea is voluntary and that the child understands the nature of the charges.
  - d. Make certain that the child fully and completely understands the conditions and limits of the plea agreement and the maximum punishment in juvenile court, sanctions and other consequences the child will be exposed to by entering a plea;

### *Commentary*

Children are often surprised to be asked questions by the court regarding the offense or possible disposition. It is the attorney's job to be aware of the particular judge's practice regarding inquiries of the child and prepare their clients for such inquiries. In addition, attorneys should be prepared to respond to anticipated parental positions that are in conflict with the child client's wishes.

4. When entering the plea, the attorney for the child should make sure that the full content and conditions of the plea agreement and factual basis for the admission are placed on the record before the court. The attorney should ensure the court conducts a full and appropriate verbal colloquy with the child regarding every right waived prior to accepting a plea.
5. When the plea is against the advice of the attorney or without adequate time to investigate, the attorney should indicate this on the record.
6. Where the child is detained prior to the entry of the plea, the attorney should, where practicable, advocate for and present to the court all reasons warranting the child's release.

## **E. ADJUDICATORY HEARINGS**

### ***E-1 Court Appearances***

The child's attorney should attend all hearings.

### ***E-2 Client Explanation***

The child's attorney should explain to the child, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing. The attorney should advise the child as to suitable courtroom dress and demeanor. If the child is detained, the attorney should ensure the child's right to appear unshackled and unchained. The attorney should also be alert to the possible prejudicial effects of the child appearing before the court in clothing issued by the detention center or other inappropriate clothing. The attorney should plan with the child the most convenient system for conferring throughout the trial.

### ***E-3 Materials Available***

Where appropriate, the attorney for the child should have the following materials available at the time of trial:

1. Copies of all relevant documents filed in the case;
2. Relevant documents prepared by investigators;
3. Deposition transcripts;
4. Outline or draft of opening statement;
5. Cross-examination plans for all possible prosecution witnesses;
6. Direct examination plans for all prospective defense witnesses;
7. Copies of defense subpoenas;
8. Prior statements of all prosecution witnesses (e.g. police reports);
9. Prior statements of all defense witnesses;
10. Reports from all experts;
11. A list of all defense exhibits, and the witnesses through whom they will be introduced;
12. Originals and copies of all documentary exhibits;
13. Elements of the offenses with supporting case citations (see jury instructions);
14. Copies of all relevant statutes and cases;
15. Outline or draft of closing argument.

### ***E-4 Motions and Objections***

The child's attorney should make appropriate motions, including motions in limine and evidentiary and other objections, to advance the child's position at trial or during other hearings. The child's attorney should be aware of the burdens of proof, evidentiary principles and court procedures applying to the motion hearing. The attorney has the continuing duty to file pretrial motions as issues arise or new evidence is discovered. If



necessary, the child's attorney should file briefs in support of evidentiary issues. Further, during all hearings, the child's attorney should preserve legal issues for appeal, as appropriate.

### ***E-5 Sequestration of Witnesses***

Prior to delivering an opening statement, the child's attorney should ask for the rule of sequestration of witnesses to be invoked, unless a strategic reason exists for not doing so.

### ***E-6 Opening Statements***

An attorney should be familiar with the law and the individual trial judge's rules regarding the permissible content of an opening statement. The attorney should consider the strategic advantages and disadvantages of disclosure of particular information during the opening statement and of deferring the opening statement until the beginning of the defense case. The objective in making an opening statement may include the following:

1. To provide an overview of the defense case;
2. To identify the weaknesses of the prosecution's case;
3. To emphasize the prosecution's burden of proof;
4. To summarize the testimony of witnesses, and the role of each in relationship to the entire case;
5. Describe the exhibits which will be introduced and the role of each in relationship to the entire case;
6. To state the ultimate inferences which the attorney wishes to draw.

Whenever the prosecutor oversteps the bounds of a proper opening statement, the child's attorney should consider objecting or requesting a mistrial unless tactical considerations weigh against any such objections or requests.

### ***E-7 Confronting the Prosecutor's Case***

An attorney should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of dismissal. The attorney should systematically analyze all potential prosecution evidence, including physical evidence for evidentiary problems.

### ***E-8 Stipulations***

The attorney for the child should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

### ***E-9 Cross Examination***

In preparing for cross-examination, the child's attorney should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of

witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, the attorney should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

In preparing for cross-examination, the attorney should:

1. Obtain the prior records of all state and defense witnesses;
2. Be prepared to examine any witness;
3. Consider the need to integrate cross-examination, the theory of the defense and closing argument;
4. Consider whether cross-examination of each individual witness is likely to generate helpful information;
5. Anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
6. Consider a cross-examination plan for each of the anticipated witnesses;
7. Be alert to inconsistencies in a witnesses' prior trial or deposition testimony;
8. Be alert to possible variations in witnesses' testimony;
9. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
10. Where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
11. Be alert to issues relating to witness credibility, including bias and motive for testifying.

### ***Commentary***

The attorney for the child should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. The attorney should be aware of the law of competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

Before beginning cross-examination, the attorney should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by law. If the child's attorney does not receive prior statements of prosecution witnesses until they have completed direct examination, the attorney should request adequate time to review these documents before commencing cross-examination.

## ***E-10 Conclusion of Prosecution's Evidence***

Upon conclusion of the state's evidence, the child's attorney should move for judgment of dismissal, make appropriate argument, and present appropriate case law. If the motion for dismissal is denied, the attorney for the child should make a closing argument addressing the findings of fact and conclusions of law.

## ***Commentary***

The basis for much of the arguments in support of the judgment for dismissal or later for a closing argument comes from standard jury instructions. The attorney should have the jury instructions in preparation for these arguments in court and use them in preparation along with any changes to such instructions one would argue if this case were heard before a jury.

### ***E-11 Defense Strategy***

The child's attorney should develop, in consultation with the child, an overall defense strategy. In deciding on a defense strategy, an attorney should consider whether the child's legal interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt. In developing and presenting the defense case, the child's attorney should consider the implications it may have for a rebuttal by the prosecutor.

### ***E-12 Affirmative Defenses***

The child's attorney should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the child bears the burden of persuasion or a burden of production.

### ***E-13 Direct Examination***

1. In preparing for presentation of a defense case, the attorney should, where appropriate:
  - a. Develop a plan for direct examination of each potential defense witness;
  - b. Determine the implications that the order of witnesses may have on the defense case;
  - c. Consider the possible use of character witnesses;
  - d. Consider the need for expert witnesses;
  - e. After the state's presentation of evidence and a discussion with the child, make the decision whether to call any witnesses.

The attorney should conduct redirect examination as appropriate.

The child's attorney should prepare all witnesses for direct and possible cross-examination. Where appropriate, the attorney for the child should also advise witnesses of suitable courtroom dress and demeanor.

### ***E-14 Preservation of Appellate Record***

Throughout the trial process the attorney should endeavor to establish a proper record for appellate review.

### ***E-15 Child's Right to Testify***

1. It is the child's right to decide whether to testify.
2. The attorney should discuss with the child all of the considerations relevant to the child's decision to testify. However, it is the attorney's obligation to advise the child on the advantages and disadvantages of testifying. This advice should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination.
3. The attorney should be familiar with his or her ethical responsibilities that may be applicable if the child insists on testifying untruthfully. The attorney should maintain a record of the advice provided to the child and the child's decision concerning whether to testify.

### ***E-16 Preparation of Child to Testify***

The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination. Often the decision whether to testify may change at trial. Thus, it is beneficial to prepare all clients in case the child chooses to testify.

### ***E-17 Questioning the Child***

The child's attorney should seek to ensure that questions to the child are phrased in a developmentally appropriate manner. The attorney should object to any inappropriately phrased questions by the court or an opposing attorney.

#### ***Commentary***

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory, and suggestibility. See generally Sherrie Bourg Carter, *Children in the Courtroom: Challenges for Lawyers and Judges* (National Institute for Trial Advocacy 2005); John E.B. Meyers & Nancy W. Perry, *Child Witness Law and Practice* (Wiley 2000).

The information a child gives in interviews and during testimony is often misleading because the adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. See Nancy Walker Perry & Lawrence S. Wrightsman, *The Child Witness: Legal Issues and Dilemmas* (Sage Publ'ns 1991). The child's attorney must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

## ***E-18 Renew Motion for Judgment of Dismissal***

At the close of the defense case, the attorney should renew the motion for judgment of dismissal on each charged count, renew all prior objections and motions and if appropriate submit further argument to the court.

## ***E-19 Closing Arguments***

The child's attorney should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.

In developing closing argument, the attorney should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

1. Highlighting the weaknesses in the prosecution's case;
2. Describing favorable inferences to be drawn from the evidence;
3. Helpful testimony from direct and cross-examinations;
4. Responses to anticipated prosecution arguments;
5. The effects of the defense argument on the prosecutor's rebuttal argument.

Whenever the prosecutor exceeds the scope of permissible argument, the attorney for the child should consider objecting, requesting a mistrial, unless tactical considerations suggest otherwise.

## ***E-20 Post Adjudication Detention***

Following the entry of an adjudication, the child may be held in secure, non-secure or home detention. In order for the child to be detained in secure detention, the child still must meet the detention criteria.

The child can also be detained for up to seventy-two hours for a comprehensive evaluation if commitment is anticipated. The attorney should be prepared to argue against the appropriateness of this detention order and provide other means for the child to undergo this evaluation.

## ***E-21 Motion for Rehearing***

An attorney for the child should be familiar with the rules regarding a Motion for Rehearing and the grounds on which one can seek a rehearing. An attorney should file for such a hearing when appropriate. However, the motion for rehearing does not toll the time limits for the notice of appeal.

## **F. DISPOSITION**

### ***F-1 Active Participation***

The active participation of the child's attorney at disposition is essential. In many cases, the attorney's most valuable service to their child clients will be rendered at this stage of the proceeding. An important part of representation in a juvenile case is planning for disposition. The attorney or attorney's representative should not make or agree to a specific dispositional recommendation without the child's consent.

Prior to disposition there may be non-court meetings, collateral court hearings and staffings which can affect the child's placement or liberty interest. A child's attorney should attend or participate in these, particularly DJJ staffings.

#### ***Commentary***

In many jurisdictions, the disposition decision by the court is a ratification of the recommendation made by the Department of Juvenile Justice. DJJ makes its decisions on recommendations to the court at a meeting which may be called a commitment or predisposition staffing. The court is required to consider the DJJ commitment level recommendation during disposition. See § 985.433(7)(a), Fla. Stat. (2009). If the court deviates from DJJ's recommendation, it must preserve on the record its reasons for disregarding the restrictiveness level recommended and support them by substantial evidence. See § 985.433(7)(b), Fla. Stat. (2009). Several districts have further required that the court's reasons must reference how the modified level of restrictiveness will better meet the needs of the child. See, e.g., L.R. v. State, 948 So. 2d 827, 829-30 (Fla. 2d DCA 2007). Because DJJ's recommendations carry a presumption of correctness, the court is likely to follow them. An attorney who skips the DJJ meeting will appear in court for the disposition hearing finding that the disposition has already been decided.

Often collateral proceedings relating to the child may disclose facts important to the defense of the child such as a companion dependency case where the delinquency arises in the midst of family conflicts or school disciplinary proceeding where the delinquency arises in a school conflict. Those jurisdictions which already have unified family court may already have defense attorneys participating in companion family court hearings.

### ***F-2 Preparation***

An attorney should promptly investigate all sources of evidence including any reports or other information that will be brought to the court's attention and interview all material witnesses. The attorney has a duty to independently investigate the child's circumstances, including such factors as previous history, family relations, economic conditions and any other information relevant to disposition.

In preparation for a disposition hearing, a child's attorney should prepare as the attorney would for any other evidentiary hearing including the consideration of calling appropriate

witnesses, the preparation of evidence in mitigation of or support of the recommended disposition. Among an attorney's obligations in the disposition process are:

1. To ensure the child is not harmed by inaccurate information or information that is not properly before the court in determining the disposition to be imposed;
2. To ensure all reasonably available mitigating and favorable information, which is likely to benefit the child, is presented to the court;
3. To develop a plan which seeks to achieve the least restrictive and burdensome disposition alternative that is most acceptable to the child, and which can reasonably be obtained based on the facts and circumstances of the offense, and the child's background;
4. To ensure all information presented to the court which may harm the child and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the predisposition investigation report before distribution of the report.
5. To consider the need for and availability of disposition specialists, and to seek the assistance of such specialists whenever possible and warranted.
6. To consider preparing a letter or memorandum to the judge or juvenile probation officer that highlights the child's strengths and the appropriateness of the disposition plan proposed by the defense.

### *Commentary*

When advocating for a departure from the recommendation of the Department of Juvenile Justice, the attorney for the child should assist the court in the creation of the written or oral reasons for the downward departure. The reasons given must be adequate and grounded in evidence. The court must also state why the court recommendation is more appropriate and meets the needs of the child.

### **F-3 More Preparation**

In preparing for disposition, the child's attorney should:

1. Explain to the child the nature of the disposition hearing, the issues involved and the alternatives open to the court;
2. Explain fully and candidly to the child the nature, obligations, and consequences of any proposed dispositional plan, including the meaning of conditions of probation or conditional release, the characteristics of any institution to which commitment is possible, and the probable duration of the child's responsibilities under the proposed dispositional plan;
3. Prepare the child to be interviewed by the official preparing the predisposition report including informing the child of the effects that admissions and other statements may have upon an appeal, retrial or other judicial proceedings, such as forfeiture or restitution proceedings;

4. When psychological or psychiatric evaluations are ordered by the court or arranged by the attorney prior to disposition, the attorney should explain the nature of the procedure to the child and the potential lack of confidentiality of disclosures to the evaluator.
5. Maintain regular contact with the child prior to the disposition hearing, and inform the child of the steps being taken in preparation for disposition;
6. Obtain from the child relevant information concerning such subjects as his or her background and personal history, prior criminal or delinquency record, employment history and skills, education, and medical history and condition, and obtain from the child sources through which the information provided can be corroborated;
7. Access social, psychological, psychiatric or other reports and if not provided voluntarily or promptly, the attorney should seek their timely disclosure through formal measures. The attorney must exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical or social reports, tests or evaluations bearing on the child's history or condition. In general, an attorney should not disclose data or conclusions if the disclosure would adversely affect the child's interest in the proceedings. If helpful or necessary, the attorney should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel to evaluate, consult, or testify to aid the child at disposition;
8. Ensure the child has adequate time to examine the predisposition report;
9. Inform the child of his or her right to speak at the disposition hearing and assist the child in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal, subsequent retrial or trial on other offenses;
10. Collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the disposition hearing; and
11. Consider a change of venue to the county where the child resides. The attorney may make a motion for change of venue based upon tactical considerations.

#### ***F-4 Disposition Options***

A child's attorney should be familiar with the disposition options applicable to the case, including:

1. Deferred disposition, judgment without a finding of guilt, and diversionary programs;
2. Probation or suspension of disposition and permissible conditions of probation;
3. Restitution;
4. Fines;
5. Court costs; or
6. Commitment to the Department of Juvenile Justice at a residential or non-residential program.



### *Commentary*

Before a child can be committed there is a requirement for a comprehensive assessment. See §§ 985.185(1), 985.43(2), Fla. Stat. (2009); K.D. v. State, 911 So. 2d 885 (Fla. 1st DCA 2005).

## **F-5 Predisposition Report**

The child's attorney should be familiar with the procedures concerning the preparation, submission, and verification of the predisposition report or similar document. In addition, the attorney should:

1. Determine whether it is advantageous for a predisposition report to be ordered and to advise the child of his or her right to waive such a report;
2. Provide to the official preparing the report relevant information favorable to the child, including, where appropriate, the child's version of the offense;
3. Review the completed report prior to the disposition hearing;
4. Take appropriate steps to ensure that erroneous or misleading information which may harm the child is deleted from the report;
5. Take appropriate steps to preserve and protect the child's interests including requesting that a new report be prepared with the challenged or unproven information deleted before the report or memorandum is distributed to DJJ or treatment officials.
6. In preparation for a disposition hearing, the child's attorney should ensure receipt of the disposition report no later than 48 hours prior to the disposition hearing. Upon receipt of this report, the attorney should review the report with the child, ensure of its accuracy and prepare a response to the report.

### *Commentary*

The attorney for the child should meet with the child and begin to create a proposed treatment plan as soon as they are appointed to represent the child. Then, when a plea is entered on behalf of the child or the child is found to have committed a delinquent act and the court orders a pre-disposition report, the attorney for the child, the child and parent should make immediate contact with the probation officer to create a treatment plan that best meets the child and families' needs. Not only can the court require a predisposition report, the Court has the power to order a comprehensive evaluation for physical or mental health problems, for academic or educational issues, for vocational assistance or substance abuse problems. Further, the court has the authority to order additional evaluations and studies to be performed by the Department of Juvenile Justice, the local school system or any relevant social, psychological or psychiatric agency. The attorney should use these documents as part of their pre-disposition report. Additionally, the probation officers and the court often welcome any suggestions given by the attorney on behalf of the child so the attorney can be creative and involved in the process.

## ***F-6 The Prosecution's Disposition Position***

The attorney should attempt to determine whether the state attorney will advocate that a particular type or length of disposition be imposed and persuade the state attorney to support the child's requested disposition.

## ***F-7 Disposition Hearing***

1. The child's attorney should be prepared at the disposition hearing to take the steps necessary to advocate fully for the requested disposition and to protect the child's interest.
2. Where a disposition hearing will be held, an attorney should be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the child.
3. Where information favorable to the child will be disputed or challenged, the attorney should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the child.
4. Where appropriate, the attorney should prepare the child to personally address the court.
5. During the hearing if the Court is indicating a commitment is likely, the attorney should attempt to ensure that the child is placed in the most appropriate, least restrictive placement available.

## ***F-8 Counseling after Disposition***

When a disposition order has been entered, it is the attorney's duty to explain the nature, obligations and consequences of the disposition to the child and his or her family. The child should also understand the consequences of a violation of probation, commitment, conditional release or new law offense.

## ***F-9 Monitor Probation***

The child's attorney needs to monitor probation orders to ensure they do not contain provisions that the court did not impose.

# **G. POST-HEARING**

## ***G-1 Review or Draft Order***

The child's attorney should review all written orders or when necessary draft orders to ensure that the child's interests are protected, to ensure the orders are clear and specific, and to ensure the order accurately reflects the court's oral pronouncement and complies with the applicable law.

### *Commentary*

Typically in delinquency proceedings, form orders are used to expedite the process. When the order specifically addresses issues affecting the child's welfare, the attorney should carefully review or draft the order.

## **G-2 Motion for a New Trial**

When a judgment of guilt has been entered against the child after trial, the attorney should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors the attorney for the child should consider include:

1. The likelihood of success of the motion, given the nature of the error or errors that can be raised;
2. The effect that such a motion might have upon the child's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the child's right to raise on appeal the issues that might be raised in the new trial motion.

## **G-3 Post Representation Communication**

Even after an attorney's representation in a case is complete, the attorney should comply with a child's reasonable requests for information and materials.

## **G-4 Expungement or Sealing of Record**

The attorney should inform the child of any procedures available for requesting that the record of conviction be expunged or sealed.

### *Commentary*

For an excellent explanation of the juvenile law in relation to having the child's charges sealed or expunged, please see the Miami Dade Public Defender handout, [http://www.pdmiami.com/FAQs\\_Seal\\_and\\_Expunge.pdf](http://www.pdmiami.com/FAQs_Seal_and_Expunge.pdf).

## **H. POST DISPOSITION MONITORING**

### **H-1 Monitor the Child's Post Disposition Detention**

The child's attorney needs to monitor the child's post-disposition detention status and ensure that the child is timely placed in a commitment program as provided by law.

### *Commentary*

Commitment facilities often have significant waiting lists. An attorney for the child should be prepared in the event that the child is not placed within the fifteen days to seek a release from detention. The attorney for the child may request a placement review hearing to guarantee that the child is either placed in a commitment facility or released from the detention center.

## ***H-2 Attorney Contact Information***

When a child is committed to a program, the child should have information on how to contact the attorney to discuss concerns.

## ***H-3 DJJ Transfer Staffing or Decision***

When a child is committed to a program and the attorney receives notice of a DJJ transfer staffing or decision, the attorney should review and challenge the decision and if appropriate bring the matter to the trial court.

### ***Commentary***

If the attorney receives the notice of the transfer staffing to determine whether the child should remain at the present placement or be moved, the attorney for the child should plan to attend the staffing. Before taking action, the attorney should confer with the child first to make sure the child would like to stay at the commitment program because oftentimes the child is not happy with the placement and would like to be moved even at the cost of starting all over again.

Prior to the staffing, the attorney should contact the commitment program to determine the basis for the transfer and see if there are ways to accommodate the child's wishes.

## **I. APPEAL**

### ***I-1 Decision to Appeal***

The child's attorney has an obligation to discuss the right to appeal with the child. This discussion should include the details of the appellate process including the time frames of decisions, the child's obligations pending appeal, and the possibility of success on appeal. If after such consultation and if the child wishes to appeal the order, the attorney must take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

### ***I-2 Participation in Appeal***

If the trial attorney will not be handling the appeal, the attorney should take steps to protect the child's rights to an appeal and seek an appointment of an appellate attorney to

represent the child's position in the appeal. The child's attorney or appellate counsel should participate in an appeal filed by another party unless discharged.

### ***I-3 Expediting an Appeal***

Recognizing a child's need for resolution, the child's attorney should use all means available to expedite matters on appeal and encourage all parties to do likewise.

### ***I-4 Conclusion of Appeal***

When the appellate decision is received, the child's attorney or substitute appellate counsel should explain the outcome of the case to the child.

#### ***Commentary***

As with other court decisions, the attorney should explain in terms the child can understand the nature and consequences of the appellate decision. In addition, the attorney should explain whether there are further appellate remedies and what more, if anything will be done in the trial court following the decision.

## **J. PROBATION REVOCATION**

### ***J-1 Preparation***

An attorney appointed to represent a child charged with a violation of probation should prepare in the same way and with as much care as for a trial. An attorney should:

1. Conduct an in-person interview with the child;
2. Review the probation department file;
3. Identify, locate and interview exculpatory or mitigating witnesses;
4. Consider reviewing the child's participation in mandated programs;
5. Consider obtaining expert assistance to test the validity of relevant scientific evidence (e.g. urinalysis results).

### ***J-2 Procedural Protections***

In preparing for a probation revocation, the attorney for the child must be familiar with all the procedural protections available to the child including but not limited to discovery, cross examination, compelling witnesses and timely filing of violations.

### ***J-3 Uncounseled Pleas to Probation***

When representing a child in a revocation of probation hearing, the attorney must find out if the child was represented by an attorney in the underlying offense that the child was

placed on probation. The attorney may have an argument if the child pled without counsel and was not given a proper waiver of counsel by the trial court.

### ***Commentary***

Under the case of Alabama v. Shelton, 535 U.S. 654 (2002), the child cannot be committed for a violation of probation when the child was not represented by counsel at the time of the plea and did not give a valid waiver of counsel. The attorney should request the transcript of the plea colloquy and the disposition placing the child on probation in order to attack the validity of the waiver of counsel. Then if the attorney determines that the plea was entered without a valid waiver of counsel, the attorney should then file a Motion to Determine the Child's Uncounseled Plea Was Not Knowingly and Intelligently Entered, Therefore Prohibiting the Imposition of a Sentence to Commitment.

### ***J-4 Prepare the Child***

The attorney for the child should prepare the child for the probation revocation hearing including the possibility of the child or parent being called as witnesses by the State. The attorney should also prepare the child for all possible consequences of a decision to enter a plea or the consequences of a probation revocation.

### ***J-5 Alternative Dispositions***

In preparing for the probation revocation, the attorney for the child should prepare alternative dispositions including the possibility of negotiated alternatives such as a pre-hearing contempt proceeding or an additional disposition short of revocation.