At the Intersection of Family Court and Criminal Law

Legal and Ethical Considerations for the Practitioner

Speakers:

Timothy S. Davis, Esq.
Family Court Bureau, Monroe County Public Defender

Adele M. Fine, Esq.
Bureau Chief, Family Court Bureau, Monroe County Public Defender

Seana L. Sartori, Esq.
Family Court Bureau, Monroe County Public Defender

Sonya Zoghlin, Esq.
Senior Assistant, Violent Felony Bureau, Monroe County Public Defender

Sponsored by the:
Oneida County Bar Association
In Cooperation with:
New York State Defenders Association, Inc.
Oneida County Public Defender, Criminal Division
Oneida County Supplemental Assigned Counsel Program
New York State Office of Indigent Legal Services

Chair: **Frank J. Nebush, Jr., Esq.**, *Oneida County Public Defender, Criminal Division*

Saturday, October 3, 2015
9:00 a.m. – 12:00 p.m.

Mohawk Valley Community College
1101 Sherman Drive
Utica, NY
IT Building, Room 225

MCLE Credits: 1.5 Skills and 1.5 Ethics

The Criminal Track Series

The Criminal Track Series is presented each Spring and Fall by the Oneida County Bar Association in cooperation with the Criminal Division of the Oneida County Public Defender's Office, the Oneida County Supplemental Assigned Counsel Program, the New York State Defenders Association, Inc., and the New York State Office of Indigent Legal Service as a regional effort to provide low and reduced cost training programs for public defenders and assigned counsel. A major part of the Series is the annual Criminal Law Academy that is presented in the Fall. The Criminal Law Academy was designed to provide fundamental knowledge of the practice of criminal defense law to newly-admitted attorneys, those attorneys who occasionally practice criminal law and more experienced criminal defense attorneys. The faculty is comprised of some of the most preeminent and experienced criminal law practitioners from across New York State. The two full-day course provides continuing legal education credits in skills, professional practice and ethics.

Again this year, under a grant from the New York State Office of Indigent Legal Services, the Oneida County Supplemental Assigned Counsel Program sponsored an Assigned Counsel School in conjunction with the Criminal and Civil Divisions of the Oneida County Public Defenders' offices. There were two, full day sessions this spring – one on criminal trial practice and one on family law. All programs were held on Fridays at Mohawk Valley Community College, IT Building, Room 225 from 9 a.m. – 4 p.m. The fee for ***each session*** is nominal.

The Oneida County Bar Association also offers a number of Saturday morning 3-hour Criminal Track programs focusing on various aspects of criminal defense. Past seminars included computer forensics, trial practice, appeals from local criminal court, immigration consequences of criminal convictions, alternative sentencing, motion practice, competency and the affirmative defense of not responsible by reason of mental disease or defect. These supplemental programs are available free to Oneida County Bar Association members who have purchased a Sempass. A $25 registration fee is charged to non-members who are public defenders, assigned counsel or government attorneys. This fee is available only for the Criminal Track Series. All programs are posted on the Oneida County Public Defender, Criminal Division's website at *http://www.ocgov.net/oneida/pdcriminal/training* and the Oneida County Bar Association's website at *www.oneidacountybar.org*. Also, the Oneida County Public Defender, Criminal Division makes several of the materials from our Criminal Track Series and the Academy available at our website.

The Oneida County Bar Association offers a wide range of CLE programs throughout the year. A full calendar of programs is available at their website. The New York State Defenders Association, Inc. is also a valuable resource for criminal law practitioners through their website http://www.nysda.org/. Their two-day training conference in Saratoga in July is unsurpassed in the depth and experience of the faculty and the relevant topics presented every year. Our special thanks to Mohawk Valley Community College for continuing to offer their first class facilities for our use. Welcome to today's program. I hope you find the presentation informative and valuable to your practice. As always, we welcome your comments and suggestions for future programs.

Frank J. Nebush, Jr., Esq.
Oneida County Public Defender, Criminal Division

CRIMINAL TRACK PROGRAMS OFFERED THIS FALL

<u>Saturday, October 17, 2015</u>

Immigration Statuses and Adjustments of Statuses

Joanne Macri, Esq., Director of Regional Initiatives, NYS Office of Indigent Legal Services

Carla Hengerer, Esq., Deputy Chief Counsel, Immigration & Customs Enforcement
Department of Homeland Security

<u>Saturday, November 7, 2015</u>

Mental Health Defenses in Criminal Law

Frank J. Nebush, Jr., Esq., Chief Oneida County Public Defender, Criminal Division

Dr. Norman J. Lesswing, Forensic Psychologist, Syracuse, NY

<u>Saturday, November 21, 2015</u>

Representing Veterans in Criminal Court

Gary Horton, Esq., Director, Veterans Defense Program, New York State Defenders Assn

Art Cody, Esq., Legal Director, Veterans Defense Program, New York State Defenders Assn

2015 Criminal Law Academy

Day One - Saturday, October 24, 2015
A Symposium on Criminal Defense Ethics

CLE Credits: 7 Ethics

8:30 a.m. - 9:00 a.m.	*REGISTRATION*
9:00 a.m. - 10:15 a.m.	**Ethical Issues in Witness Preparation** *Jill Paperno, Esq, Second Asst. Monroe County Public Defender*
10:15 a.m. - 10:30 a.m.	*BREAK*
10:30 a.m. - 11:45 a.m.	**The Ethical Boundaries of Negotiating With the Prosecution** *Erik Teifke, Esq., Asst. Monroe County Public Defender*
11:45 a.m. - 12:45 p.m.	*LUNCH*
12:45 p.m. - 2 p.m.	**Ethical Limits of Discrediting the Truthful Witness on Cross-Examination and Closing Arguments** *Prof. Todd Berger, Director, Criminal Defense Clinic* *Syracuse University College of Law*
2 p.m. - 2:15 p.m.	*BREAK*
2:15 p.m. - 3:30 p.m.	**The Ethics of Dealing with Mentally Ill Clients in the Context of Criminal Defense Representation** *Peter Williams, Esq., Capital Habeas Corpus Unit* *Federal Community Defender Office* *Eastern District of Pennsylvania*
3:30 p.m. - 4:30 p.m.	*ROUNDTABLE: Common Ethical Issues Facing the Criminal Defense Lawyer*

DAY TWO - Saturday, October 31, 2015
Fundamentals of Criminal Practice

CLE Credits: 3.5 Professional Practice, 3.5 Skills

8:30 a.m. - 9:00 a.m.	*REGISTRATION*
9 a.m. - 10:15 a.m.	**Analyzing and Litigating the Sufficiency of Accusatory Instruments** *Cory A. Zennamo, Esq., First Asst. Oneida County Public Defender*
10:15 a.m. - 10:25 a.m.	*BREAK*
10:25 a.m. - 11:15 a.m.	**Sentencing Strategies in Local Criminal Courts** *Jonathan B. Stroble, Esq., Asst. Oneida County Public Defender*
11:15 a.m. - 12:30 p.m.	**Voir Dire: Asking the Right Questions in the Right Way** *Kurt D. Schultz, Esq., First Asst. Oneida County Public Defender*
12:30 p.m. - 1:15 p.m.	*LUNCH*
1:15 p.m. - 2:30 p.m.	**The Misdemeanor Battlefield: Identifying and Challenging Systemic Problems Through Individual Litigation** *Matthew Alpern, Esq., Director of Quality Enhancement for Criminal Defense Trials, NYS Office of Indigent Legal Services*
2:30 p.m. - 2:45 p.m.	*BREAK*
2:45 p.m. - 4:00 p.m.	*Preliminary Hearings: Issues, Strategies and Tactics* *Matthew Alpern, Esq., Director of Quality Enhancement for Criminal Defense Trials, Criminal Defense Trials, NYS Office of Indigent Legal Services*

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Saturday, October 3, 2015
9:00 a.m. – 12:00 p.m.

Mohawk Valley Community College
1101 Sherman Drive
Utica, NY
IT Building, Room 225

8:30 a.m. – 9:00 a.m.	**REGISTRATION**
9:00 a.m. – 10:30 a.m.	***The Collateral Consequence of Criminal Proceedings on Family Relationships*** **Seana L. Sartori, Esq. and Sonya Zoghlin, Esq.** **Monroe County Public Defender's Office**
10:30 a.m. – 10:45 a.m.	**BREAK**
10:45 a.m. – 12:00 p.m.	***The Impact of People v. Salinas on Document Sharing Between Family Court and Criminal Court Attorneys OR Yet Another Good Reason Not to Practice Law in the Bronx*** **Adele Fine, Esq. *and Timothy Davis, Esq.,*** **Monroe County Public Defender's Office**

SPEAKERS

Timothy S. Davis, Esq., ***Family Court Bureau, Monroe County Public Defender***

Mr. Davis received his B.A. in Foreign Affairs from the University of Virginia in 1989 and J.D. from the College of William & Mary in 1992. He joined the Monroe County Public Defender's office in 1993. For thirteen years he represented clients on criminal matters at the trial level. He joined the Appeals Bureau of the Monroe County Public Defender in 2006 and for seven hears handled both criminal and Family Court appeals. He has been with the office's Family Court Bureau since 2013.

Adele M. Fine, Esq., ***Bureau Chief, Family Court Bureau, Monroe County Public Defender***

Ms. Fine's office represents indigent litigants in all Family Court matters for which assigned counsel is statutorily mandated, including custody/visitation, family offenses, paternity/child support violations, and child abuse and neglect matters. Ms. Fine received her J.D. degree from the University of Montana in 1987. She became managing attorney of the Montana Legal Services office in Havre, Montana where she practiced poverty, family and Indian law. Upon admission to the New York bar in 1990, she worked in a small firm doing plaintiff's personal injury, small business and discrimination law. In 1995 she became the executive director of a not-for-profit law firm providing legal services to low-income clients in family and matrimonial matters. She oversaw the merger of the firm with the Legal Aid Society of Rochester in 1998. She then joined the Family Court Bureau of the Monroe County Public Defender's office in 2000.

Seana L. Sartori, Esq., ***Family Court Bureau, Monroe County Public Defender***

Ms. Sartori received her J.D. from the University of Buffalo School of Law in June, 1993 where she was the recipient of the Robert J. Connelly award for excellence in trial advocacy. During law school and after, she worked in the Family Law Unit of Neighborhood Legal Services in Buffalo representing low-income clients in various types of Family Court cases: prosecuting family offense cases, custody/visitation, child support and matrimonial actions. In 1994, she continued this same work at a non-profit agency in Rochester, New York primarily representing victims in family offense matters. Ms. Sartori joined the criminal bureau of the Monroe County Public Defender in 1998 where she handled both misdemeanor and felony cases. In 2008, Seana transferred to the Family Court section where she currently represents both petitioners and respondents in family offense cases, and handles custody/visitation, child support, abuse/neglect and termination of parental rights matters.

Sonya Zoghlin, Esq., ***Senior Assistant, Violent Felony Bureau, Monroe County Public Defender***

Ms. Zoghlin is a 1987 graduate of New York University School of Law and a Senior Assistant Public Defender with the Monroe County Public Defender's office. Before moving to the Violent Felony Bureau, she spent a year assigned to the Integrated Domestic Violence part in Monroe County Court. Before joining the Monroe County Public Defender in 2008, she spent ten years at the Capital Defender Office representing individuals charged with potentially capital crimes throughout New York State. Sonya began her career at the Legal Aid Society in New York City, where she worked as a public defender in Brooklyn.

The Collateral Consequence of Criminal Proceedings on Family Relationships

Seana L. Sartori, Esq.
Family Court Bureau, Monroe County Public Defender's Office

Sonya Zoghlin, Esq.
Senior Assistant, Violent Felony Bureau
Monroe County Public Defender's Office

THE INTERSECTION OF CRIMINAL AND FAMILY COURT: THE COLLATERAL CONSEQUENCE OF CRIMINAL PROCEEDINGS ON FAMILY RELATIONSHIPS

The Purpose of Family Court

Family Court is a civil proceeding for the purpose of attempting to stop the violence, end family disruption and obtain protection. The goal in Family Court is to reunite families, based upon best interests of the child (BIC) test.

One exception to this principle is FCA §846-a, which authorizes up to 6 months incarceration for a violation of a court order, including an order of protection (O/P)

The Purpose of Criminal Court

A proceeding in Criminal Court is for the purpose of prosecuting of the offender.

Article 8: Family Offenses

Concurrent Jurisdiction

CPL §100.07, FCA 812(1): Criminal Court and Family Court have concurrent jurisdiction over cognizable family offenses and/or crimes as defined in FCA §812 (1) and CPL §530.11(1), notwithstanding a petition or accusatory instrument containing substantially the same allegations in the other forum.

These offenses are:

acts which would constitute disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of section 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree or coercion in the second degree as set forth in subdivisions one, two and three of section 135.60 of the penal law between spouses or former spouses, or between parent and child or between members of the same family or household.

Note: In Family Court, FCA §812 Disorderly Conduct: need not be in a public place.

In Criminal Court, critical to the charge of disorderly conduct per PL §240.20 is a finding that the disruptive statements and behavior were of a **public** rather than individual nature. In Family Court, for purposes of a family offense, however, FCA §812 provides that disorderly conduct need not *occur* in a public place. (FCA §812 was intended to prevent Family Court from denying family offense petitions charging disorderly conduct merely because the conduct occurred in a private residence). The plain language of FCA §812, however, pertains only to the *actus reus* of the offense, specifically the place where it was committed. It does not relieve the Respondent of the burden to prove the requisite *mens rea,* i.e., the intent to cause *public* inconvenience or alarm. Cassie v Cassie, 109 A.D.3d 337 (2d Dept. 2013); Matter of Brazie v. Zenisek, 99 A.D.3d 1258 (4th Dept. 2012).

A member of the same family or household is defined as follows:

(a) persons related by consanguinity or affinity; (b) persons legally married to one another; (c) persons formerly married to one another regardless of whether they still reside in the same household ; (d) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and (e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

The law requires the petitioner or complainant be advised that there is concurrent jurisdiction with respect to family offenses in both Family Court and Criminal Court. It also requires that s/he be advised, *inter alia*:

- That a Family Court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end family disruption and obtain protection. That referrals for counseling, or counseling services, are available through probation for this purpose; and
- That a Criminal Court proceeding is for the purpose of prosecution of the offender and can result in a criminal conviction of the offender.

See CPL 530.11 (2); FCA §812 (2).

Keep in mind the constitutional challenges to the Aggravated Harassment statute, which underlies many Family Offense petitions. *See* People v. Golb, 23 NY 3d 455 (2014).

Concurrent Orders of Protection in Family and Criminal Court

Orders of protection are easily obtained, difficult to vacate, and may have profound consequences in both Criminal and Family Court.

To obtain an Order or Protection from Family Court:

A person who meets the appropriate jurisdictional requirements per FCA §§812 & 822, and seeks to obtain an O/P in Family Court, simply meets with a probation service employee who prepares a petition alleging one or more family offenses (FCA §812). The Petitioner signs the petition under oath, appears before a DV Referee and gives *ex parte* testimony under oath, which is recorded on disc. Based on the testimony, the Referee may grant a temporary Order of Protection (NCOOP or NOCOOP) or deny the application entirely and not issue an O/P.

To obtain an Order of Protection from Criminal Court:

The issuance of an O/P in Criminal Court is governed by CPL §530.12 (family offenses) and §530.13 (non-family offenses).

The O/P may be issued "when a criminal action is pending." The order may be *ex parte* upon the filing of an accusatory instrument and for "good cause shown."

A family offense O/P may be issued in favor of any family or household member when an action is pending "involving a complaint charging any crime or violation between" the defendant and the family member. It may also be issued in favor of a designated witness. Unlike §530.13, there does not appear to be a requirement of good cause before the order is issued.

A non-family offense O/P may be issued, for good cause shown, in favor of the "victims of the alleged offense" or a "designated witness" when any criminal action is pending. A stay-away order is limited to "victims" and witnesses, while the "refrain from" section expands the definition to "members of the family or household" of such victims or witnesses.

Duration of Final Orders of Protection issued by a Criminal Court:

The duration of an O/P shall be set by the court and *shall not exceed*:

For a felony -- the greater of: (i) eight years from the date of sentencing or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed;

For an A misdemeanor – the greater of: (i) five years from the date of sentencing, or (ii) five years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed;

For any other offense -- the greater of: (i) two years from the date of sentencing, or (ii) two years from the date of the expiration of the maximum term of a definite or intermittent term actually imposed.

New legislation for victims of sexual assault: Gov. Cuomo signed a bill on September 22, 2015 extending the term of O/P's for victims of sexual assault through the length of the offender's probation, i.e., 10 years for a felony and 6 years for a misdemeanor.

Note: there is no requirement that an O/P be issued for the maximum term!

Duration of orders of protection issued by Family Court:

The duration of an O/P based on a family offense can be up to two (2) years, (but is often negotiated without a finding to one (1) year or less). Under certain "aggravating circumstances," as defined in FCA §827(a)(vii), an O/P may be up to 5 years in duration.

Note to criminal attorneys: the length of Criminal Court O/P (which is generally longer than those issued in Family Court) suggests to the Family Court that the offense must be very serious…even when it's not.

Where Conflicting O/P's are issued in Family Court and Criminal Court

On an abuse/neglect case, an O/P will often be issued. The O/P generally allows for visitation between the child and Respondent (supervised or otherwise). HOWEVER, if a Criminal Court Judge in a companion case has issued an O/P that prohibits contact between Defendant/Respondent and child, Family Court has ***no*** authority to order visits, unless and until the Criminal Court O/P is modified to allow for such contact. Typically, including language that states ***"subject to any future order of Supreme or Family Court regarding custody and visitation"*** is sufficient.

Thus, for Criminal Court attorneys, it is critical to determine whether the Defendant and Complainant have children in common, or if there is a parental relationship between the Defendant and Complainant. If so, any Criminal Court O/P ***must*** contain that language in order for Family Court to authorize visits.

In practice, however, the reality is where the child in question is the protected party in a Criminal Court O/P that is lengthy in duration, even where said O/P contains the magic language ["subject to any future order…"], Family Court judges may be very reluctant to allow contact between the child and the Defendant/Respondent. *Family court cannot change the terms or duration of a criminal court O/P.*

In addition, a NCOOP between the parents generally precludes Family Court from granting parties joint custody.

Matter of Samantha WW v. Gerald XX, 107 A.D.3d 1313 (3d Dept. 2013)

Prior to the child's conception, father pled guilty to assault 3rd degree, arising from a DV incident against the mother. Criminal Court issued a NCOOP against father through 2017. Notwithstanding the O/P, in 2000, mother & father conceived a child. By the time the child was born in Jan. 2010, father was back in custody on a criminal contempt charge for violating the O/P. In March 2011, mother filed a paternity petition and a petition seeking sole custody of the minor child. Father, still incarcerated, admitted paternity and filed a visitation petition seeking visits in prison.

After a 2011 Family Court trial, mother was granted sole custody and father was awarded bi-monthly visits until he was released from state custody. Mother was further ordered to send father updates and photographs of the child every two weeks until he was released from state prison. Father was also allowed to send written communication to the child, through counsel, which mother was required to present to the child as appropriate. Father was released in April 2013, then subsequently arrested and incarcerated again.

The Court concluded that the portion of the Family Court order that directed mother to screen and read father's correspondence to the child is in direct conflict with the Criminal Court O/P which ordered that father was to have no contact at all with mother through 2017. The Criminal Court O/P did not exempt communications by the father relating to the child (who was born after the order was issued) or provide that it was subject to any subsequent Family Court order. *Family Court does not have jurisdiction to countermand the provisions of a Criminal Court O/P*.

Matter of Mary GG v. Alicia GG. 106 AD3d 1410 (3rd Dept., 2013)

Incarcerated father in a custody action appealed an order granting custody to maternal grandmother without a hearing, where mother consented to order and father was prohibited from any contact with the child until 2018 by O/P issued by County Court in a criminal proceeding. Appellate affirmed lower court order, finding that Family Court had no jurisdiction to modify County Court O/P, and that while a hearing is generally necessary to determine a custody petition, none was required given that Family Court

has sufficient uncontroverted information before it to rule on petition and child's best interest, and there were no factual issues to resolve.

Matter of Brianna L., 103 A.D.3d 181 (2d Dept. 2012):

Mother was arrested and charged with assault 2nd for beating her 6 year old son. A Family Court neglect petition was filed. Criminal Court entered an O/P barring mother from having any contact with her son until 2017. Mother pled guilty to EWOC in Criminal Court and a finding of neglect was entered against her in Family Court. Family Court determined it could not modify the Criminal Court O/P and released the child to the custody of his father. Subsequently, an amended Criminal Court O/P was issued allowing future modification by Family Court. The issue presented is whether Family Court is authorized to release a child to a parent when the Criminal Court O/P bars contact between that parent and that child, but includes the language "subject to Family Court."

The Court held that where a Criminal Court O/P barring contact between a parent and a child includes a provision indicating that the order is subject to subsequent Family Court orders of custody and visitation, the Family Court **is** permitted to release the child to the custody of that parent (mother) as *the Family Court is best able to determine the best interest of the child and its authority to do so should not be circumscribed by a Criminal Court O/P which expressly contemplates future amendment by a subsequent Family Court order*.

Matter of Colon v. Sawyer, 107 A.D.3d 794 (2nd Dept., 2013)

Father was incarcerated for his conviction of CSA 1st and Criminal Court issued a NCOOP which prohibited contact between father and child through 2033. O/P did, however, include the language "subject to Family Court orders of visitation." Father filed a visitation petition in Family Court. Family Court dismissed father's petition without a hearing holding that the circumstances that gave rise to the O/P provided sufficient information for Family Court to render an informed determination that dismissing father's petition without a hearing was consistent with the best interests of the child.

Matter of Shaw v. Katie May Seals-Owens, 111 A.D.3d 1284 (App Div. 4th Dept. 2013)

Family Court dismissed father's visitation petition, with prejudice, where there was an existing O/P prohibiting him from having any contact with his daughter until 2018.

Priority of Conflicting Orders of Protection

Generally, the most restrictive order controls. For example, in January, Criminal Court issues a NCOOP between the parties. Subsequently, in February, Family Court issues a NOCOOP concerning the same parties. Neither order has expired, and the

terms within the two orders conflict with one another. The Criminal Court NCOOP controls as it is more restrictive. To some extent, jurisdiction granted to IDV Court was created to address this type of issue with a One Judge/One Court model.

A Criminal Conviction Jeopardizes Custody/Visitation and Parental Rights

Neglect Definition: FCA §1012(f)

- Child under the age of 18
- Physical, mental, emotional condition is impaired or is in imminent danger of becoming impaired as a result of the failure of his/her parents or other person legally responsible for his/her care to provide a minimal degree of care in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporeal punishment. Eg/ inadequate food, clothing, shelter; inadequate medical care; failure to educate; misusing drugs/alcohol, excessive corporeal punishment; or "any other acts" of a similarly serious nature (domestic violence, leave alone)

Abuse Definition: FCA §1012(e)

- Child under the age of 18
- Whose parent or other person legally responsible for his/her care, (i) inflicts or allow to be inflicted upon such child, physical injury by other than accidental means which causes or creates a substantial risk of death, disfigurement, protracted impairment of physical or emotional health, protracted loss or impairment of use of a bodily organ or (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ.

Severe Abuse Definition: FCA §1012 & SSL §384(b)(4)(e)& (8)(a)

A severely abused child is one who has been determined to be abused by a parent or another person legally responsible for the child's care, as the result of:

- reckless or intentional acts committed under circumstances evincing depraved indifference to human life, which results in serious physical injury to the child (defined in PL §10.00(10): physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ) OR

- Convicted of committing, or knowingly allowed to be committed, a felony sex offense defined in PL §130 against the subject child (corroboration requirements under PL do not apply); OR

- Convicted of specified criminal offenses (murder 1st, murder 2nd, manslaughter 1st, or manslaughter 2nd, criminal solicitation, conspiracy, or criminal facilitation for any of the forgoing crimes, assault 1st, assault 2nd, aggravated assault upon a person less than 11years old, [or attempt thereof])...and the victim of such crime was…a child of the parent…or another parent of the child…unless the convicted parent was a victim of physical, sexual or psychological abuse by the decedent parent and such abuse was a factor in causing the homicide.

- "aggravating circumstances" exist if a child is deemed to be severely abused, FCA §1012(j).

- severe or repeated abuse is grounds for TPR (termination of parental rights), SSL §384-b.

<u>Derivative Neglect/Abuse FCA §1046(a)(i)</u>

- "Proof of abuse or neglect of one child shall be admissible evidence on the issue of abuse or neglect of any other child of, or the legal responsibility of, the Respondent…"

- Often associated with physical and/or sexual abuse cases (STD, skull fractures etc.)

Factors to consider:

- The proximity of time between the conduct that formed the basis for original abuse/neglect as to one child and the derivative claim on other children;

- The nature/duration of the neglect/abuse act(s) as indicative of overall parenting ability;

- Whether the condition/conduct that existed when the original neglect/abuse act(s) is still present or is likely to be present in the near future;

- Where a parent suffers from a chronic condition, such as mental illness, mental retardation, substance abuse, previous findings of neglect/abuse will often be cited on new petitions for after-born children;

- Whether the child(ren) alleged to have been derivatively neglected/abused witnessed or are aware of or have been impacted by the original conduct constituting the neglect/abuse.

Termination of Parental Rights Based on Severe or Repeated Abuse, SSL §384-b(4)(e):

An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one or more of the following grounds:

(e) "The parent or parents, whose consent to the adoption of the child would otherwise be required …severely or repeatedly abused such child. Where a court has determined that reasonable efforts to reunite the child with his or her parent are not required, pursuant to the Family Court Act or this chapter, a petition to terminate parental rights on the ground of severe abuse…may be filed immediately upon such determination."

Generally speaking, in an Art 10 case, before parental rights may be terminated, petitioner must show that diligent efforts have been made to reunite the family, *see, e.g.,* SSL §384-b(7)(c).

There are circumstances, however, where diligent efforts are not required:

Termination of Reasonable Efforts, FCA § 1039-b:

Reasonable efforts to make it possible for the child to return safely to his or her home shall not be required where the court determines that:

(1) the parent of such child has subjected the child to aggravated circumstances, as defined in subdivision (j) of section ten hundred twelve of this article

(2) the parent of such child has been convicted of (i) murder in the first degree as defined in section 125.27 or murder in the second degree as defined in section 125.25 of the penal law and the victim was another child of the parent; or (ii) manslaughter in the first degree as defined in section 125.20 or manslaughter in the second degree as defined in section 125.15 of the penal law and the victim was another child of the parent, provided, however, that the parent must have acted voluntarily in committing such crime;

(3) the parent of such child has been convicted of an attempt to commit any of the foregoing crimes, and the victim or intended victim was the child or another child of the parent; or has been convicted of criminal solicitation as defined in article one hundred, conspiracy as defined in article one hundred five or criminal facilitation as defined in article one hundred fifteen of the penal law for conspiring, soliciting or facilitating any of the foregoing crimes, and the victim or intended victim was the child or another child of the parent;

(4) the parent of such child has been convicted of assault in the second degree as defined in section 120.05, assault in the first degree as defined in section 120.10 or aggravated assault upon a person less than eleven years old as defined in section

120.12 of the penal law, and the commission of one of the foregoing crimes resulted in serious physical injury to the child or another child of the parent;
(5) the parent of such child has been convicted in any other jurisdiction of an offense which includes all of the essential elements of any crime specified in paragraph two, three or four of this subdivision, and the victim of such offense was the child or another child of the parent; or

(6) the parental rights of the parent to a sibling of such child have been involuntarily terminated.

In conclusion, a criminal conviction for one of the enumerated felonies set forth in the Family Court Act may lead to a finding of severe or repeated abuse, which could result in a "fast track" to the termination of the client's parental rights. Criminal counsel representing a parent charged with a crime related to a child should never permit the client to plead to the enumerated offenses without understanding the civil consequences to the client of such a plea and consulting with the Family Court attorney where possible.

In re Marino S., 100 NY2d 361 (2003)

Respondent father convicted of rape in the first degree regarding respondent mother's 8-year-old child. Both are biological parents of two younger children. Mother convicted of reckless endangerment in the first degree based on her failure to seek help for the child victim and making false statements about the cause of her injuries. Both served prison sentences.

Court upheld termination of parental rights as to all three children, without requiring showing of diligent efforts to reunite respondents with their children. All three children were found to be severely abused based upon parents' convictions; the older child by the acts themselves, and the younger children on a theory of derivative severe abuse. ("Over the years, courts have consistently sustained derivative findings where a respondent's abuse of the subject child is so closely connected with the care of another child as to indicate that the second child is equally at risk.")

Matter of Amirah L., 118 AD3d 792 (2d Dept. 2014)

Respondent mother's 19-month-old daughter died from "multiple non-accidental traumas," presumably inflicted by the mother or her boyfriend. Evidence also showed the child suffered multiple fractures in the weeks preceding her death. At best, mother failed to seek appropriate medical care for the child on any of these occasions. She also provided false information to medical staff concerning the nature and circumstances of her daughter's injuries, and instructed the older, subject child to lie about these circumstances. These facts established, not only that mother had severely abused the deceased child, but also that she had derivatively severely abused the subject child. Under these circumstances, no finding of diligent efforts to reunite mother and child was required. Derivative abuse may be "predicated upon the common understanding that a

parent whose judgment and impulse control are so defective as to harm one child in his or her care is likely to harm others as well, " *quoting* Marino S., *supra*.

Double Jeopardy, Collateral Estoppel, Res Judicata

Double Jeopardy

People v. Wood, 95 N.Y.2d 509 (2000):

NCOOP's were issued against Defendant/Respondent in both Criminal Court and Family Court. The victim filed a contempt petition in Family Court after receiving a series of threatening telephone calls. Family Court, after a hearing, found Respondent in contempt and sentenced him to 6 months jail. Thereafter, Defendant was indicted on CC1 and AH2 based on a violation of the Criminal Court O/P based on the same telephone calls. The trial court denied Defendant's motion to dismiss the indictment on double jeopardy grounds and convicted Defendant. The Appellate Division reversed the trial court and held that Defendant's prosecution for CC1 under PL §215.51(c) is barred because he was previously prosecuted for contempt under FCA Art. 8. Contempt per Art 8 is punitive in nature, which triggers double jeopardy protections. Comparing the *elements*, the Court concluded that the contempt provisions of FCA Art. 8 is a lesser included offense of CC1. The Court of Appeals affirmed the order of the Appellate Division. That is, the Court of Appeals determined that double jeopardy attaches when a Respondent/Defendant is prosecuted for contempt of an O/P in both Family Court and Criminal Court.

"Same elements" test: A court must compare the *elements* of contempt in the most literal sense and not the terms of the particular order involved. Contempt of court will always compare the following two elements: 1) a court order made known to the Defendant/Respondent and 2) willful violation of that order.

Thus, if convicted of CC2 in a Criminal Court, based on the elements of contempt as defined in PL §215.51(3) ("intentional disobedience or resistance to the lawful process or other mandate of a court…) a Family Court proceeding for violation per FCA §846(a) where Respondent is brought before the court for failure to obey any lawful order issued under this article of an O/P or TOP issued pursuant to this act…and, after a hearing, the court is satisfied that Respondent has wilfully failed to obey any such order, and Petitioner seeks incarceration, double jeopardy would be triggered. Similarly, a dismissal/acquittal in Criminal Court would bar a Family Court Art. 8 violation proceeding with the elements of CC2.

Res Judicata and Collateral Estoppel

Collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same.

If a Criminal Court based on the same underlying allegations as a Family Court case results in a plea or conviction, the Defendant/Respondent is at risk for summary judgment in Family Court under the collateral estoppel doctrine, where the two cases involve the same issues/conduct between the parties. See CPLR §3212 where there is no triable issue of fact. Suffolk County Dept. of Social Services obo Michael V. v. James M., 83 N.Y.2d 178 (1004); Grayes v. DiStasio, 166 A.D.2d 261 (1st Dept. 1990); Colby v. Crocitto, 207 A.D.2d 764 (2nd Dept. 1994).

Collateral estoppel is frequently applied where the Family Court and Criminal Court case involves sex abuse of a child. In order for criminal convictions to have collateral estoppel effect in FCA Art.10 cases, 3 elements must be satisfied: 1) conduct that provides the basis for the criminal action must be the same conduct alleged in the neglect petition 2) full and fair opportunity to litigate in criminal proceeding & 3) the criminal conviction must provide proof of actual or imminent danger of physical, emotional or mental impairment to the child.

A Criminal Court conviction may be res judicata on issue of neglect or abuse and result in an automatic finding of neglect or abuse against Respondent: summary judgment motion ends the Family Court case given the higher burden of proof in Criminal Court.

However, this issue may depend upon what is admitted by Defendant in the Criminal Court colloquy; a carefully worded colloquy in the criminal case could minimize the damage.

Note: A dismissal of the Criminal Court case does NOT end the Family court case because the burden of proof is lower in Family Court (preponderance of the evidence).

Res judicata effect of certain criminal convictions may accelerate a TPR in Family Court (felony sex offenses, murder, manslaughter, assault 1st and assault 2nd)

Matter of Elizeo C, 19 Misc. 3d 1112(a) (Kings County, 2007):

CPS in Article 10 proceeding moved for summary judgment based on Respondent's colloquy and criminal conviction for EWOC and submitted a transcript of the colloquy wherein she states she hit the child with an open hand causing a bruise or black eye, but no injury. Family Court finds that these admissions are insufficient, without more, to establish the requisite elements of neglect (that Respondent failed to exercise a

minimum degree of care and that her failure resulted in the child's condition "becoming impaired" or in being in "imminent danger of becoming impaired"). In order for the Respondent's conviction and/or allocution to establish neglect per se, the danger created by her failure to exercise reasonable care must be "near or impending, not merely possible" (See Nicholson v Scoppetta, 3 NY3d 357).

Matter of Allen Children, 20 Misc. 3d 634 (Oswego County, 2010):

CPS filed a motion under FCA §1061 to have the court reopen an Article 10 trial to offer into evidence a certificate of conviction for EWOC that was entered after a criminal nonjury trial, which was commenced after the conclusion of the Article 10 trial, but before Family Court rendered its decision. Respondent opposed.

Family Court dismissed the neglect petition without consideration of the offer of proof. The court noted that as to a good cause showing, no significant delay would result in reopening the trial and Respondent would not be prejudiced but, after a careful analysis of the elements of Penal Law §260.10, the court determined the criminal conviction would not have a collateral estoppel effect because it did not provide proof of actual or imminent danger of physical, emotional, or mental impairment to the child, and, as the certificate of conviction would not provide any new evidence or add anything to the record, the CPS motion was denied.

Matter of P./R. Children, 14 Misc. 3d 1132(A) (Kings County, 2007):

CPS in Article 10 abuse action moved for summary judgment based on Respondent's admission in criminal case to Attempted Sexual Abuse 1st concerning daughter less than 11 years of age. Respondent opposed, arguing that collateral estoppel does not apply, because he pled guilty to Attempted Sexual Abuse 1st, and there is no identity of issues between his criminal plea and the allegations in the abuse petition; that allegations of actual sexual conduct with the subject child were not fully and fairly litigated; and that regardless of his admissions during colloquy, the Criminal Court only convicted him of attempted sex crime.

Family Court granted CPS's motion, finding that "the allegations of sexual abuse in the petition and the actions that the Respondent testified he committed, which were the subject matter of the guilty plea, arose out of the same incidents, with the same victim…and Respondent is collaterally estopped from denying that allegation" in the Family Court petition; his guilty plea to a sex crime pursuant to PL Article 130 meets the statutory definition of abuse, pursuant to FCA § 1012(e)(iii).

Matter of Brittany B., 13 Misc. 3d 1225(A) (King's County, 2006):

CPS filed abuse petition against father for having sexual intercourse with his daughter, who was under the age of 17. Father convicted on EWOC in Criminal Court; colloquy

that he placed his endangered his daughter's physical and moral welfare by having sexual intercourse with her and that she was less than 17 years old. CPS moved for summary judgment in Family Court and attached criminal colloquy to its motion. Family Court found that the statutory requirements for an abused child under FCA §1012 (e)(iii) were satisfied by Respondent's criminal conviction and colloquy and granted CPS's motion for summary judgment for a finding of sexual abuse by Respondent.

Matter of Allison C., 2014 NY Slip Op 51194(U)(Kings County, 2014):

Over course of several weeks, mother severely beat her 5 year old child with a broomstick, burned her hand and yanked out some hair etc. and failed to get the child any medical attention. Co-Respondent Father stood by and watched the abuse but failed to intervene in any way. Mother pled guilty in Criminal Court to Assault 1st & EWOC & was sentenced to 10 years DOCS. Father pled guilty to Assault 2nd & EWOC and was sentenced to 3 years DOCS with 3 years PRS. A NCOOP was issued through 2030 for mother and 2023 for father. Summary judgment findings of abuse and neglect were entered against Respondents in Family Court and court determined that per FCA §1039(b), reasonable efforts to return the children were no longer required given the criminal conviction. Other children were found to be derivatively abused.

Upon release to parole, father made a motion in Supreme Court to modify the O/P to include "subject to Family Court order of custody/visitation." Father then filed to re-instate visitation. Family Court denied the request without a hearing stating that visits were not consistent with the children's best interest; the FCA §1039(b) order was the law of the case and that such orders trump FCA §1055 orders "to encourage and strengthen the parent-child relationship" and that Respondent failed to show "good cause" under FCA § 1061 for modification.

Sex Offender Status And Its Legal Effect On Respondent's Family Relationships

FCA §651(e)(3)(ii) [and the identical provisions in DRL §240], requires the Court, before making any order of temporary or permanent custody, to review, "reports of the sex offender registry established and maintained" pursuant to Section 168-b of the Corrections Law.

Obligations of the Criminal Lawyer

Generally speaking, counsel will not be considered ineffective for failing to advise a client of the "collateral consequences" of a conviction.

New York courts have held that the consequences on one's family relations of a criminal conviction, e.g., the effect on child custody of pleading guilty to a sex offense, are collateral consequences.

People v. McDonald, 1 NY3d 109 (2003)

If attorney provides advice about the collateral consequences of a conviction, and that advice is wrong, counsel's performance may be considered deficient, leading to a finding of ineffective assistance of counsel if the second prong of the *Strickland* analysis, i.e., prejudice to the defense has also been met.

People v. Gravino and People v. Ellsworth, 14 NY3d 546 (2010)

Trial Court's failure to advise defendants of requirement to register as sex offender under SORA, or the conditions of sex offender probation, *which may include prohibition on having any contact with his own children*, does not render a guilty plea involuntary. These consequences are considered "collateral", rather than "direct." A defendant may, however, be permitted to withdraw a plea of guilty if he can show that, but for his ignorance of these collateral consequences, he would not have taken the plea, i.e., that his decision was not knowing, intelligent and voluntary.

People v Harnett, 16 N.Y.3d 200 (N.Y. 2011)

Failing to warn a defendant who pleads guilty to a sex offense that he may be subject to the Sex Offender Management and Treatment Act (SOMTA, i.e., civil confinement) does not automatically invalidate the guilty plea.

People v. Sahm, 111 AD3d 1293 (4th Dept. 2013)

County Court was not required to advise defendant, at the time of his plea, of SORA requirements or potential for termination of parental rights to his biological children as a consequence of being convicted of a sex offense or being required to register as a sex offender.

HOWEVER: a sex-offense related conviction (*even where the crime is not necessarily classified as a sex offense and occurred before the subject children were born*) may have devastating consequences on a defendant's future family relationships.

Ineffective Assistance in Family Court:

Matter of William O. v. Michele A., 119 AD3d 990 (3D Dept. 2014)

Father denied effective assistance of counsel (in petition for modification of a prior order of custody and visitation), where counsel failed to object or request an evidentiary hearing in response to Court's reliance on the attorney for the children's assertion that father was an untreated sex offender. Father was entitled to a hearing regarding both the initial assertion of his status (which was based on a 1994 EWOC conviction in New Jersey), as well as whether a lack of treatment would be detrimental to the children.

Consequences of Sex Offense Related Convictions on Findings of Abuse or Neglect: Article 10 Proceedings

Matter of Afton C., 17 NY3d 1 (2011)

There is no presumption that an “untreated” sex offender residing with his or her children is guilty of neglect, even where father’s prior crimes involve victims younger than 18.

Father, a disbarred attorney, paid a 13 year old, a 15 year old and their mother for sex. He pled guilty to rape 2nd, engaging in sexual intercourse with a person less than 15 years of age, and patronizing a prostitute 3rd degree. He was sentenced to one year imprisonment and is adjudicated a Level 3 sex offender. He was not ordered to attend sex offender treatment. He returned home to his wife and 5 biological children (ranging in age from 4 to 14). A neglect petition is filed against father and his wife, alleging he is an untreated sex offender and his crimes involved victims between 13 and 15 years old.

DSS failed to prove neglect against father or his wife (who permitted father to return home). Law requires particularized evidence of imminent harm to these specific children by the respondent; imminent harm will not be presumed based on sex offender status. SORA was not designed to predict likely parental neglect and is not directly relevant to whether children are in imminent danger.

Neglect may be established where sex offenders are convicted of abusing young relatives or other children in their care, or where offender refused sex offender treatment after being directed to do so or when other evidence showed treatment was necessary.

Matter of Cashmere S. (Rinell S.), 125 AD23d 543 (1st Dept. 2015)

Family Court erred in dismissing neglect petition against father where he was convicted of attempted sodomy in the first degree (regarding his 6-year-old son and 9-year-old niece), 10 years before the neglect petition was filed and after his release from prison. Father denied committing the sex offenses; he attended sex offender treatment, but only as a condition of parole. Court found father’s failure to accept responsibility demonstrated an imminent risk to the subject child (presumably not the child victim of the sex offense) and, despite the passage of time, father failed to demonstrate his “proclivity for abusing children has changed.”

Court also erred in dismissing neglect petition against the mother, who was aware of the father’s sex offense conviction and sex offender status, but nevertheless allowed him to act as child’s sole caretaker and to have unsupervised access to the child.

Matter of Giana O. (Donald P.), 123 AD3d 1168 (3d Dept. 2014)

Father's status as an "untreated sex offender" (regarding incident unrelated to the subject children), combined with allegations of domestic violence, were sufficient to establish neglect.

Matter of Lillian SS. (Brian SS.), 1198 AD3d 1079 (3d Dept. 2014)

Neglect finding upheld where father was a Level 3 sex offender previously convicted of sexually abusing two young girls (in 1996 and 1997) and had failed to complete sex offender treatment. Despite subject children (his biological daughter and his wife's son), being born after these alleged events, sex offender risk assessment expert found he should not be allowed unsupervised contact with the children, who were similar in age to the victims. Though expert acknowledged there was minimal risk of the father abusing the boy, he should not be in the presence of either child without appropriate supervision. Neglect also found against mother who was aware of father's status and permitted unsupervised contact with children.

Matter of Michael JJ. (Gerald JJ.), 104 AD3d 1069 (3d Dept. 2012)

Finding of permanent neglect and termination of parental rights upheld (against both mother and father of young, special needs children) where, *inter alia*, father refused caseworker's request that he get a sex offender evaluation and where mother refused to establish separate residence from her paramour, also a sex offender.

Matter of Makayla L. P., 92 AD3d 1248 (4th Dept. 2012)

Neglect finding upheld where father was previously convicted of attempted sodomy in the first degree and designated a Level 2 sex offender for abusing his 12-year-old, mentally challenged step-sister while he was baby-sitting. Father also failed to engage in sex offender treatment and was re-arrested for subsequent reckless offenses. Court distinguished Afton C. because "other factors" supported the finding, including prior conviction arising from abuse of a young relative in the parent's care.

Matter of Hannah U., 97 A.D.3d 908 (3d Dept. 2012)

Neglect finding upon petition filed by children's attorney, which had been opposed by parents and CPS, reversed and dismissed. No presumption that father's status as a Level 2 sex offender placed his children in imminent risk of harm. Evidence showed father had attended sex offender therapy and had benefited from it according to his counselor's testimony.

Matter of Destiny EE., 90 A.D.3d1437 (3d Dept. 2011)
Mother's motion to dismiss neglect petition denied where evidence showed that after

she had consented to neglect finding based on husband's sex abuse of older son, she filed a custody petition stating she had let younger son visit the husband in Mississippi and he was drinking, drugging, etc. The trial court also found he was using excessive corporal punishment on the child, and having the boy help him look for a gun he had lost in the house. Mother also knew the nature of sex abuse he was found to have done to older boy, and knew there was a warrant for his arrest. Case deals mainly with UCCJEA as it applies to this case, but case distinguishes Afton C. by noting in this case there was evidence of actual imminent harm to the child.

Matter of Anastacia L., 90 A.D.3d 452 (1st Dept. 2011)

Neglect finding affirmed against a Level 3 sex offender who had committed sex offenses against children in past and had been recommended to complete sex offender treatment as part of prior neglect proceeding, but had failed to do so.

Matter of Anthony Y. v. Kelly AA., 72 AD3d 1419 (3d Dept. 2010)

Neglect finding upheld, against mother and grandparents, where grandfather was a Level 2 Sex Offender, having previously been convicted of sexually abusing two of his own children (resulting in termination of his parental rights), and both mother and grandmother permitted unsupervised contact between him and the children: having a known sex offender have unsupervised access to one's children generally evinces a flawed understanding of the parental duty to protect children from harm.

In re Iris Shawntell Marie C., 22 AD3d 328 (1st Dept. 2005)

Termination of parental rights upheld based on permanent neglect where respondent mother repeatedly refused to attend sex offender counseling and, when she did, her treatment plan required no unsupervised contact with her child, as well as notifying the child's school and friends' families about her sex offender status. Child has also developed strong, positive bond with foster parent.

The Consequences of Sex Offense Related Convictions on Child Custody and Visitation: Article 6 Proceedings

Matter of Michaellica Lee W., 106 AD3d 639 (2013)

Finding of "extraordinary circumstances" resulting in denial of custody to the father upheld, in favor of foster mother, where Family Court did not rely, exclusively, on father's 30 year old conviction for rape in the first degree against four children and resulting Level 3 sex offender status. Father was also very "excitable", and became unreasonably "enraged" in child's presence. The child, now 6, had been living with foster mother since she was 7 weeks old.

Matter of Cardwell V. Mighells, 122 AD3d 1293 (4th Dept. 2014)

Denial of visitation upheld where father previously convicted of Rape in the Third Degree and adjudicated Level 1 sex offender based on having sex with the then underage mother, resulting in the birth of the subject child. Father failed to complete court-ordered sex offender risk assessment or accept "fault" for the "rape" of the mother. Court granted leave to re-apply after assessment was completed.

Matter of Knight v. Knight, 92 AD3d 1090 (3d Dept. 2012)

Father's conviction for sexual abuse in the 2nd degree (an A misd.) regarding his girlfriend's 8-year-old daughter constituted a change in circumstances supporting modification of custody agreement of his own three children from joint legal custody with primary physical custody to the mother and visitation to the father, to sole legal and physical custody to the mother with supervised visitation to the father. Court noted father minimized the effect of his conviction on the victim and his own children, characterizing the father as "an untreated sex offender."

Matter of Christopher T. v. Jessica U., 90 AD3d 1092 (3d Dept. 2011)

Father petitioned for modification of custody agreement prohibiting the mother's now live-in boyfriend (who had previously pleaded guilty to EWOC, reduced from rape in the third degree, for having sex with a 15-year-old girl when he was 22), from having any contact with the subject children; Family Court granted the petition. The Appellate Division held that the petition alleged a sufficient change in circumstances based on the mother's new living arrangement. That conviction did not, however, did not warrant a modification prohibiting all contact between the boyfriend and the children where the mother and boyfriend were fully cooperative with DSS, engaged in all recommended services, and where mental health evaluation of the boyfriend found no evidence of any risk of harm to the children.

Matter of Carl v. McEver, 88 AD3d 1089 (3d Dept. 2011)

Mother's motion to terminate father's visitation based, *inter alia*, on his 1999 conviction for sexual battery in Florida, and his status as a Level 1 Sex Offender who was not engaged in sex offender treatment was improperly granted without a hearing. The record did not establish that the father was ever ordered to complete sex offender treatment or required such treatment, or that visitation with the father would be detrimental to the children's welfare. Lower court erred in granting mother's petition without an evidentiary hearing.

Incarcerated Parents

The well-established principle is that visitation with a non-custodial parent, including an incarcerated parent, is presumed to be in the best interest of the child. The presumption is rebuttable and thus may be overcome upon a showing, by a preponderance of the evidence that visitation would be harmful to the child's welfare or that the right to visitation has been forfeited or that such visits are not in the child's best interest. Paramount concern is always the best interest of the child. The frequency of visitation is subject to consideration of the child's best interest in view of the "totality of the circumstances."

Presumption in favor of visitation (or custody) is statutorily prohibited where a parent is convicted of murdering the other parent. Although the presumption is rebuttable, no visitation shall be awarded to the murdering parent unless and until the murdering parent proves the specific elements of FCA §1085 AND that Family Court finds that visitation would be in the child's best interest.

The relevant sections of FCA §1085 states:

1. No visitation or custody order shall be enforceable …by a person who has been convicted of murder in the first or second degree…of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of the child unless:
   (i)(A) such child is of suitable age to signify assent and such child assents to such visitation or custody; or
   (B) if such child is not of suitable age to signify assent the child's custodian or legal guardian assents to such order; or
   (C) the person who has been convicted of murder in the 1st or 2nd degree…can prove by a preponderance of the evidence that
   (1) he or she, or a family or household member of either party, was a victim of domestic violence by the victim of such murder; and
   (2) the domestic violence was casually related to the commission of such murder; and
   (ii) the court finds that such visitation or custody is in the best interest of the child.

Visits Ordered

Matter of Granger v. Misercola, 21 N.Y.3d 86, Court of Appeals:

Family Court granted incarcerated father periodic visits at the prison with his child. Appellate division affirmed; Respondent-mother challenged the order. Court of Appeals affirmed. There is a rebuttable presumption in favor of visitation where the parent seeking visitation is incarcerated. Visitation shall be denied where it is demonstrated that under all the circumstances such visitation would be harmful to the child's welfare

or that the right to visitation has been forfeited.

Matter of Torres v. Pascuzzi-Corniel, 125 A.D.3d 675 (2nd Dept. 2015):

Family Court, after a hearing, ordered “visitation” with incarcerated father by means of letters, cards, gifts and telephone calls but effectively denied him actual in-person visits with the child. Father appealed. The evidence showed that father had a relationship with the child prior to his incarceration, that father made some efforts to maintain contact with the child after his incarceration (despite resistance by mother) and that the prison where father is housed is less than a one hour drive away. At the hearing mother and AFC did not show how periodic visitation with father in prison would be harmful to the child’s welfare, thus case was remitted back to Family Court to establish an appropriate visitation schedule between child and incarcerated father.

Crowell v Livziey, 20 A.D.3d (4th Dept. 2005)

Appeal from an order of Family Court granting incarcerated father limited telephone contact with his child and suspending in person visitation. Appellate Division reversed unanimously on the law and remitted the matter to Family Court for an evaluation by a mental health professional stating “the record is not sufficient to determine whether visitation would be detrimental to the child’s welfare” and that there was no testimony regarding the psychological health of the child and whether the child would be harmed by prison visitation.

Matter of Kadio v Volino, 126 A.D.3d 1253 (3rd Dept. 2015):

Parties met while mother was visiting her brother, an inmate at the same correctional facility where father was incarcerated. Father was released, child was conceived, and father was again incarcerated. Child was born and mother brought child to DOCS to visit father. Father was again released and the parties and the child lived together for a period of time. A consent custody and visitation order was entered granting mother sole custody and father unsupervised visits on alternating weekends as well as mid-week visits. Father was again incarcerated and received a 16 year bid. Mother since married another man and told the subject child that her new husband was child’s father. Father filed petition seeking visits while in custody; mother strenuously opposes stating that it would be too traumatic for the child to find out who his real father is and to visit him in DOCS. AFC supports mother’s position.

Family Court held a hearing where a psychologist hired by mother testified that visits would be detrimental to the child, that the child had no attachment to father, and that the child would be traumatized by being told that his step-father is not his real father. Father established that the mother did not provide the psychologist with an accurate

history of his relationship with the child. Father further established that his ability to see the child was often thwarted by mother with her repeated unfounded claims to CPS, her filing of criminal charges against father, which were later dismissed. Father testified that he was afraid to send cards to the child because he believed mother had forged a threatening letter with offensive content in his name and sent it to herself and then reported the forged letter to police in an effort to further aggravate father's legal troubles.

Family Court concluded that although visitation may be difficult at first, it is in the child's best interest and fashioned a schedule requiring the child to receive counseling before beginning weekly telephone contact and in-person visits. Mother's strong opposition to visits is an insufficient basis to deny father's request and the AFC position is just one factor to be considered, but it is not determinative. Mother to transport the child to DOCS for visits.

<u>Matter of Cormier v Clarke</u>, 107 A.D.3d 1410 (4th Dept. 2013):

PGM, the primary physical custodian of subject child, filed a petition seeking to modify a prior order of custody and visitation seeking to suspend visits with incarcerated bio mother. Family Court refused to suspend visitation concluding that visitation with incarcerated mother is in the child's best interest, that PGM failed to establish that visits would be detrimental to the child (thus PGM did not overcome the presumption). Family Court did however reduce the frequency of the visitation.

<u>Matter of Lapham v Senecal</u>, 125 A.D.3d 1210 (3rd Dept. 2015):

Prior to father's incarceration, a custody and visitation order granted mother sole custody and supervised visits to father. Father was later incarcerated and filed a petition seeking monthly visits at DOCS. After a trial, father was granted one supervised visits every four months for as long as he remained at Bare Hill Correctional Facility, which was a one hour drive by car. The court reasoned that while it would not be affirmatively harmful for the child to visit the father, there was also little benefit given the father's "poor character and poor criminal behavior" and cited the lack of an established relationship between the father and the child.

<u>Thomas v Thomas</u>, 715 N.Y.S.2d 818 (4th Dept. 2000):

Family Court denied visitation for incarcerated father without a hearing. Appellate court reversed and remanded the matter for an evidentiary hearing on the BIC where no sworn testimony was presented and the court did not conduct an in camera interview with the children. Appellate court noted that the children had visited with incarcerated father in the past and that the older daughter advised the AFC that she did wish to visit her father.

Matter of Mark C. v Patricia B., 41 A.D.3d 1317 (4th Dept. 2007):

Family court erred in dismissing incarcerated father's petition for visitation and deeming his release from prison a condition precedent to the filing of a visitation petition.

Matter of Culver v. Culver, 82 AD3d 1296 (3d Dept. 2011)

Court did not abuse its discretion in ordering visits, monitored phone contact and letters between child and her father, who was serving 12-year sentence for sexually molesting a number of boys in his elementary school classroom. Court erred, however, in requiring mother to bear the costs of the phone calls and required counseling for the child and her escorts (paternal relatives).

Visits Denied

Matter of Van Orman v Van Orman, 19 A.D3d 1167 (2005)

Family Court granted mother sole custody of the parties' two children and dismissed incarcerated father's petition for custody/visitation, without prejudice to refile when he is released from incarceration, and without a hearing. By virtue of being incarcerated, father was incapable of fulfilling the obligations of a custodial parent. No hearing is required upon a custody petition where the court possesses sufficient information to make a comprehensive assessment of BIC.

Matter of Brown v Terwillinger,108 A.D.3d 1047 (4th Dept. 2013):

Incarcerated father was denied visitation with his children where said visits would be harmful to the children. Presumption is rebutted where father never met the children, thus he is "essentially a stranger to the children." Further, a child counselor testified in detail as to how visitation would be detrimental to the children's welfare, and mother testified that he child is afraid of seeing father and had been placed in therapy since he learned of the court proceedings. A father's failure to seek visitation with a child for a prolonged period of time is a relevant factor in determining whether visitation is warranted.

Matter of McIntosh v Clary, 129 A.D.3d 1392 (3rd Dept. 2015):

Prior order granted incarcerated father telephone contact with children. After a fact-finding and a Lincoln hearing, Family Court concluded that the telephone calls were emotionally disturbing to the children thus mother's petition limiting father's contact to monthly, monitored written communication was granted. Ten months later, father filed a petition seeking prison visitation and reinstating telephone contact alleging that he received a certificate for attending substance abuse meetings and positive inmate progress reports and completed vocational training and that his request for the children to participate in a prison program had been denied. Court concluded that these

allegations are not a change in circumstance that would allow the court to modify the order.

Matter of Rumpel v Powell, 129 A.D.3d 1344 (3rd Dept. 2015):

Father convicted of murdering mother and is serving life sentence without parole, thus statutory presumption that neither custody nor visitation is appropriate or in the child's best interest applies. Although this is a rebuttable presumption, no visitation may be awarded to the murdering parent unless and until the murdering parent pleads and proves the specific elements of FCA §1085 and a Family Court concluded that visitation would be in the child's best interest, which was not proven here.

Matter of Fewell v Ratzel, 131 A.D.3d 1542 (4th Dept. 2014):

Father sentenced to 20 years DOCS for a rape 1st and CSA 1st conviction. Father failed to establish a meaningful relationship with the child as he had been incarcerated since the child was in utero, he has never met the child and the child indicated that he did not want to visit father. The child's psychologist testified that visitation would be detrimental to the child and that father was "a total stranger" to the child, thus visitation denied.

Matter of Joshua SS v Amy RR, 112 A.D.3d 1159 (3rd Dept. 2013):

Custody and visitation order granted parties joint custody and mother primary physical residency of parties' child. Thereafter, Father convicted of manslaughter 2nd degree and sentenced to 5 – 15 years DOCS for causing severe injuries and death to mother's older daughter while in father's care. Father also adjudicated to have derivatively neglected the subject child and temporary O/P issued in child's favor barring all contact by father. Father sought to modify court's prior order of visitation. Following a hearing, Family Court found that communication between father and child was not in child's best interest but granted the petition to the extent of ordering mother to provide a current picture of the child to father on an annual basis. Neither father nor members of his family made any attempt to maintain a relationship with the child (after TOP expired). The child had no knowledge of the father or the circumstances surrounding her sister's death. The record established that the child is happy and well-adjusted and of her own volition calls the mother's new husband "daddy."

Matter of Carroll v Carroll, 125 A.D.3d 1485 (4th Dept. 2015):

Parties married while father was in prison and he was still incarcerated at the time of the child's birth. Father did not seek to establish paternity until the child was almost 5 years old. Father admitted that he did not have a relationship with the child; there was a history of domestic violence against mother (fist fights, father choked mother when she was pregnant); father admits violating a NCOOP in favor of mother. Family Court found

no evidence that visits would be harmful to the child and that visits were necessary and appropriate. Appellate Court reversed stating that Family Court's decision lacks a sound and substantial basis in the record and thus Appellate Court denied visits.

Matter of Rulinsky v West, 107 A.D3d 1507 (4th Dept. 2013):

Order required mother to bring the parties' 10 year old child to DOCS to visit father twice per year. As the child matured, the child developed a strong desire not to visit father. Court conducted a full evidentiary hearing and a Lincoln hearing. There was testimony that during the visits, father was using the time to attempt to reconcile with mother rather than interact with the child. Court concluded that there was a sufficient change in circumstance to warrant an inquiry into whether the BIC warranted a change in the original order. While not dispositive, the express wishes of older and more mature children can support the finding of a change in circumstance. In a BIC analysis, visitation need not always include contact visitation at the prison. Court determined that based on all the evidence, terminating visitation with the child is in the child's best interest.

Evidentiary Issues

One big difference between Family and Criminal Court: out-of-court hearsay statements of children involving allegations of abuse/neglect of a child are admissible in custody/visitation cases as well as abuse/neglect cases per FCA §1046(a)(vi) provided there is sufficient corroboration by "any other evidence tending to support their reliability." Thus, the child may not testify in a Family Court case.

Typically, a multidisciplinary team approach is used in child abuse cases (police, DA, CPS, REACH/Bivona, medical providers, victim advocates), *see* SSL §§423(6), 424(5-a), (5-b). Information obtained may require disclosure in a criminal case.

Criminal Practitioners Beware: Despite being represented on a related criminal matter, there is no legally recognized prohibition on a CPS worker interviewing your client about the underlying matter of both the criminal and child abuse/neglect investigation. A client is well-advised to politely decline this interview, which may encompass far-ranging topics, at least until there has been an attorney assigned in Family Court with whom the criminal attorney has consulted.

Is a CPS Investigator an "agent" of police for purposes of law enforcement investigation?

- If "yes," statement to caseworker may violate right to counsel or be otherwise subject to suppression or preclusion. People v. Wilhelm, 34 A.D.3d 40 (3rd Dept. 2006)

In Wilhelm, Defendant was convicted of murder 2nd and attempted murder 2nd for drowning her 4 year old son and attempting to drown her five year old son. After speaking briefly to the police, she invoked her right to counsel. Defendant was later interviewed by CPS investigators and made certain admissions about drowning her children and knowing it was wrong. Prosecution did not provide CPL §710.30 notice for statements made to the CPS worker. These statements were admitted at trial. The Appellate Division held the statements were obtained in violation of defendant's right to counsel and were subject to the CPL §710.30 notice requirement. Under the circumstances of this case, in which the caseworkers conduct was so "pervaded by governmental involvement", CPS was acting as an agent of law enforcement.

Note: under ordinary circumstances, a social worker would not be considered an agent of the police.

- If "no," right to counsel is not implicated and statement to caseworker may be admissible in criminal prosecution. People v Jackson, 4 A.D.3d 848 (4th Dept. 2004)

In Jackson, Defendant was convicted of 47 counts of various crimes (rape, sodomy, incest etc.) A Family Court abuse petition was filed and Defendant made statements to a CPS caseworker. CPS was not required to give Defendant Miranda warnings before speaking with him because CPS was not engaged in law enforcement activity. Moreover, the filing of the abuse petition did not trigger the right to counsel.

The Admissibility of CPS Investigations in Legal Proceedings

Unfounded CPS report may be admissible in Civil Proceeding

In a civil proceeding, any CPS report, whether it is indicated or unfounded, is hearsay. An unfounded report is inadmissible in evidence. SSL §422(5), EXCEPT that an unfounded report in a civil proceeding may be admissible "by the subject of the report where such subject…is a plaintiff or petitioner in a civil action or proceeding alleging the false reporting of child abuse or maltreatment." SSL §422(5)(b)(ii). A subpoena for CPS records must contain the appropriate language that the Court has found the disclosure necessary for any issue before it per SSL §422 (4)(A)(e). See Youngok Lim v. Sangbom Lyi, 299 A.D.2d 763 (3rd Dept. 2002), J.H. v. K.H., 7 Misc.3d 1030(A)(Fam. Ct. 2005).

In J.H. v K.H., in a family offense proceeding, Petitioner alleges that on two occasions, Respondent made false allegations to CPS stating that Petitioner and her son were abusing child M. and that the reports were deemed "unfounded." Petitioner sought to introduce CPS records at trial stating she was the "subject of the report" by virtue of being the parent against whom the allegations were made. The Court agreed and further stated that the information sought is relevant and material to an issue raised in the petition.

Unfounded CPS report may be admissible in a Criminal Proceeding

A defendant may be entitled to information from prior unfounded CPS reports or other information if this information would aid in the defense. See Matter of Danielle G., 155 A.D.2d 731 (3rd Dept. 1989), In re Damien H., 268 A.D.2d 475 (2nd Dept. 2000), People v McFadden, 178 Misc. 2d 343 (Sup. Ct. Mon. Co. 1998).

In McFadden, Defendant was charged with Sodomy 1st, & 3rd, Rape 3rd, Sex Abuse 3rd & EWOC. Defendant sought to obtain records from DSS, specifically, foster care records as well as records concerning the complainant's prior allegations of sexual conduct claiming that the records involve the same time frame as the crimes charged in the indictment. Supreme Court Judge Donald Mark found these otherwise confidential records must yield to the rights of Defendant and shall be disclosed (*in camera*) as the material may be necessary to his defense.

Other Issues Arising From Concurrent Family and Criminal Court proceedings

5th Amendment privilege against self-incrimination is not violated if Family Court proceeding goes forward while criminal case is pending. Any admission made in the Family Court case may be used in the concurrent Criminal Court case. Also, in Family Court, a Petitioner may call a Respondent/Defendant as his/her direct exam witness in the Petitioner's case in chief. While Respondent does have a right to remain silent where the answer might incriminate him/her in future criminal proceeding, Family Court can take an adverse inference from Respondent's refusal to testify. Lefkowitz v. Turley, 414 U.S. 70 (1973).

The Impact of *People v. Salinas* on Document Sharing Between Family Court and Criminal Court Attorneys

OR

Yet Another Good Reason Not to Practice Law in the Bronx

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Yet Another Good Reason Not to Practice Law in the Bronx

Presented by Adele Fine, Esq. and Timothy Davis, Esq.
Monroe County Public Defender's Office
October 3, 2015

I. The Case: *People v. Salinas*, 48 Misc 3d 791 (Sup Ct, Bronx County 2015)

A. The Facts

1. Defendant was charged with sexual abuse of his 11 year old stepdaughter in an Article 10 proceeding filed in Bronx County Family Court. The only proof that the alleged sex abuse took place was the testimony of the child herself. ACS hired a sex abuse validator to conduct interviews of the child and prepare an expert report for use at trial. This was shared with Defendant's Family Court counsel, the Bronx Defenders, through pretrial discovery [probably FCA § 1038(c)].

2. A few days after the filing of the Article 10 case, the Defendant was indicted in Bronx County Supreme Court on charges of Rape 1 based on the same allegations. The Bronx Defenders was again assigned to represent the Defendant, albeit an attorney from the criminal defense side of the office.

3. During the Family Court proceeding, Bronx Defenders asked that an attorney from its criminal defense practice be assigned as co-counsel in the Family Court matter. The Family Court judge denied that request, and asked whether the criminal attorney had in his possession any discovery documents from the Family Court matter. He told the Court he had a copy of the validator's report, whereupon the Court ordered him to return it to the Court and issued a protective order prohibiting the disclosure of any Family Court records to any person other than those directly involved in representing the Defendant in Family Court. The judge claimed such disclosure violated state and federal law. A copy of that decision, *Matter of Wendy P. and Valeria S.*, Docket No. NA 27180/2013 [July 21, 2014] has never been published.

4. Fast forward to 2015 in the criminal case, and Defendant's defense attorney at the Bronx Defenders makes a motion for the issuance of a subpoena *duces tecum* to ACS for an *in camera* inspection of the validator's report. The Court ultimately grants the motion, but only because the validator had already testified in Family Court about her report. Had that not been the case, the Supreme Court stated it would have denied the motion based on the criminal attorney having received the report in violation of the Family Court Act.

B. The Findings and Holdings

1. The Court found that, even in the absence of a protective order, the Family Court Act and rules "restrict discovery materials obtained in Article 10 proceedings to use exclusively in those proceedings."

2. The Court rejected defense counsel's "sweeping interpretations" of constitutional rights to counsel, free speech, and due process to justify the Family Court attorney's disclosure of the validator's report to criminal defense counsel." The constitutional arguments do not trump the Family Court attorney's violation of the Family Court Act.

3. The Court rejected defense counsel's argument that he was "participating in the representation" of the defendant in the Article 10 case. That was news to the Family Court judge as he didn't file a notice of appearance; he didn't tell the Family Court he wanted to "participate" in the case.

4. Although criminal defense counsel has the right to confer and consult with Family Court counsel, that alone did not give him a right of access to the Family Court records.

5. The Court rejected defense counsel's argument that The Bronx Defenders, as an institutional provider, was appointed to represent the defendant, and therefore the Family Court Act cannot be read to prohibit the sharing of discovery documents between attorneys from the same law firm. The Court ruled that the Family Court attorneys are obligated to abide by the "very restrictive" confidentiality provisions of the Family Court Act and rules, and because of this the Bronx Defenders as an office was required to erect a firewall to prevent the dissemination of the Family Court records to other attorneys in the office.

6. The Court rejected defense counsel's constitutional right to counsel argument, especially where the Bronx Defenders is representing the client in both the criminal and Family Court proceedings. According to the Court, it knows that the Bronx Defenders Family Court attorneys have not acted within this self-limitation. They've given discovery documents, ACS records, medical records, etc. to 18-b counsel and private counsel in other cases where they and other counsel are representing the same parties "in complete disregard" of the confidentiality provisions of the FCA, Social Services Law, HIPPA, etc.

7. The Court rejected defense counsel's argument that his Sixth Amendment right to compulsory process (right to Rosario and Brady material) trumped the confidentiality provisions of the Family Court Act. Defense counsel is required to make the showing that his due process rights trump the confidentiality provisions.

9. The Court has "serious concerns" about defense counsel having access to confidential Family Court and agency records, without the Family Court attorneys seeking judicial authority to disclose the documents. This "zealous advocacy need not and should not involve an abandonment of an attorney's ethical obligations to follow the law, whether that attorney agrees with the law or not." If you think I'm wrong, appeal me, or go to the legislature.

10. As a notice to counsel in future cases, the Court stated that attorneys practicing before it are "on notice" that:

> In any case before it where the defendant is a respondent in a concurrent Article 10 Family Court proceeding, the court will be making on-the-record inquiries. The court expects to be informed as to the status of any Article 10 proceeding, and whether defense counsel is in possession of any records that were produced as discovery in that proceeding and who provided them. If this court determines that a defense attorney is in possession of confidential Family Court records that were obtained without judicial authorization, this court will require the return of the documents, and prohibit their use in the criminal proceeding. Defense counsel are obligated to seek those confidential records, if there is a basis for doing so, by making the appropriate application before this court. *People v. Salinas*, 48 Misc 3d at 788.

II. False Premises and Other Legal Mischief

A. False premise number 1: Family Court records are "strictly confidential"

1. FCA § 166 states in pertinent part: "The records of any proceeding in the family court *shall not be open to indiscriminate public inspection*. However, the court in its discretion *in any case* may permit the inspection of *any papers or records*."

a. This does not translate into the "strict" confidentiality that is accorded to mental health, HIV and substance abuse treatment records per state and federal law as the Court in *Salinas* seems to be saying

b. The provision is meant to prevent people who have no connection with the Family Court matters at hand to have indiscriminate access to other people's private litigation involving their families and children.

c. But such records are subject to disclosure for use in other matters upon a showing of good cause and in the discretion of the court

People v Malaty, 4 Misc 3d 525 [Sup Ct, Kings County 2004](Prosecutor was entitled to review family court and matrimonial records for possible impeachment evidence related to defendant's purported defense that he was the owner of property in question)

People v Price, 100 Misc 2d 372 [Sup Ct, Bronx County 1979](Motion to quash judicial subpoena duces tecum for Family Court probation records denied where records may contain exculpatory information)

Chow v. Boonyam, 240 A.D.2d 737 [2d Dept 1997](Parents of a murder victim were entitled to an in camera inspection of the killer's juvenile records because the records might have contained evidence regarding the culpability of the killer's parents)

People v Harder, 146 AD2d 286 [3rd Dept 1989](Defendant entitled to review Family Court juvenile court records of co-defendants for exculpatory information)

Gray v State, 130 Misc 2d 65 [Fam Ct 1985](In a wrongful death action against the State, decedent's estate entitled to review decedent's Family Court juvenile records)

Harris v. City of Buffalo, 197 A.D.2d 918[4th Dept 1993] (Trial court improperly denied city's request to inspect estate administrator's family court paternity petition because administrator waived any Family Court Act privilege by putting matter into litigation about decedent's death)

Schwahl v Grant, 47 AD3d 698 [2nd Dept 2008](trial court properly granted motion for Family Court records as they were material and relevant to medical malpractice action, and implemented proper protective provisions to prevent further disclosure)

B. False premise number 2: 22 NYCRR 205.5, the Court rule implementing FCA §166, renders Family Court records "strictly confidential," and limits access to specific attorneys and specific documents.

1. In pertinent part, 22 NYCRR 205.5 reads:

Subject to limitations and procedures set by statute and case law, the following *shall* be permitted access to the pleadings, legal papers formally filed in a proceeding, findings, decisions and orders and, subject to the provisions of CPLR 8002, transcribed minutes of any hearing held in the proceeding:

(a) the petitioner, presentment agency and *adult respondent in the Family Court proceeding and their attorneys*; [this covers Article 10 cases]

(b) when a child is either a party to, or the child's custody may be affected by the proceeding:

(1) *the parents or persons legally responsible for the care of that child and their attorneys*; [this covers every other Family Court case]

2. How this Rule translates into local court practice:

a. The parents and his or her attorney of record in the Family Court proceeding are entitled to access to the records as of right

b. If the attorney seeking access to the records is not the attorney of record in the proceeding, he or she must go with the client to the Family Court Clerk's

office and gain access by virtue of the client's right of access, or submit a statement signed by the client giving the attorney permission to have access to the records

i. Does your Clerk's office practice follow this Rule?

3. False premise number 3: The client's unassailable right of access to his or her own Family Court records, and consequent authority to disclose the records to whomever the client wishes, should be ignored

a. Very few cases on this subject specifically, most likely because it is so obvious.

In re Ulster County Dep't of Social Servs. ex rel. Jane, 163 Misc 2d 373 [Fam Ct 1993] – Mother, a respondent in an Article 10 case, was in the middle of the trial of her neglect case, when a reporter showed up in the courtroom at her invitation. The Court learned at that time that she had given 191 pages of the trial transcript of the first two days of trial to the reporter. The petitioning agency and AFC were "outraged." They objected to the presence of the reporter in the courtroom, and also claimed that the respondent mother had violated the Family Court Act and rules by rereleasing the transcripts to the reporter.

The AFC, joined by the agency, requested that the Court make the reporter turn over all transcripts in his possession to the Court, that he be directed not to use any information he obtained from the transcripts, that the Court order the mother not to give the reporter any further transcripts, and that the mother be ordered not to give the reporter any pleadings from the case. They also asked that the reporter be barred from the courtroom.

The Court denied all of their requests regarding Respondent mother. The Court noted that "No statutory restriction, regulation or requirement in case law exists restricting the persons with whom she [mother] can share the transcript and pleadings." The documents were legitimately obtained by the mother as a party to the neglect case, and therefore she has the right to rerelease them to whomever she wishes.

In making this ruling, the Court noted that the statutes and cases cited by the AFC and agency deal with access requests from people to whom the Family Court "may release its records, not to whom a party entitled to access may further release the records. In the absence of specific statute or court order, the adult respondent may rerelease court records legitimately obtained."

4. False premise number 4: The plain language of FCA § 1038 (discovery in Article 10 cases) limits the use of that discovery to that proceeding alone.

a. Yes, FCA § 1038, found in Article 10 of the Family Court Act, states that its provisions apply to Article 10 proceedings in Family Court, but the statute nowhere states by its "plain language" that discovery obtained under it is confidential and that its use is limited exclusively to Article 10 proceedings.

b. If anything, the reason that Article 10 addresses discovery rights and responsibilities at all is to differentiate this type of proceeding from every other type of Family Court proceeding in which discovery, except for notices to admit, is not permitted except by court order.

i. Family Court proceedings are special proceedings as defined in Article 4 of the CPLR, that is, proceedings in which a "petitioner" files a petition against a "respondent." CPLR §§ 401-402.

ii. In general, a Notice to Admit pursuant to CPLR § 3123 is the only discovery device available without Court permission in a special proceeding. See CPLR § 408

iii. Family Court Act (FCA) § 165 specifically incorporates the CPLR into Family Court proceedings, including liberal discovery pursuant to Article 31, "to the extent that they are appropriate to the proceedings involved."

c. FCA § 1038 is a special discovery statute that "pre-authorizes" liberal discovery in child protective cases:

i. Hospital records shall be made available upon receipt of a judicial subpoena

ii. Case record, photos or other documentary evidence per CPLR 3120 demand

iii. Physical or mental examination of child by motion

iv. Catch-all: any other discovery permitted under Article 31

v. The legislative policy underlying FCA § 1038 is that full due process rights, including full discovery, must be accorded before a family is separated by court order. Broad disclosure ensures that decisions concerning whether to separate children from their parents are based on the most complete record possible.

vi. *Matter of Ameillia RR*, 112 AD3d 1083 (3d Dept. 2013) supports the argument that leave of court to conduct discovery is not required in Article 10 cases. "This Court has previously held that, although Family Ct Act article 10 proceedings are special proceedings, the specific provisions of that article 'override the general discovery limitations placed on special proceedings under CPLR 408. [citing *Matter of John H.*, 56 AD3d 1024, 1026 (3d Dept. 2008).]"

d. Pursuant to FCA §1038(c), which specifically addresses the procedures to be followed with respect to discovery of a sex abuse validator's report and

video interviews of the child, access to the report is specifically granted to the parties and by extension, their attorneys.

i. "Any examination or interview, other than a physical examination, of a child who is the subject of a proceeding under this article, for the purposes of offering expert testimony to a court regarding the sexual abuse of the child, ...may, in the discretion of the court, be videotaped in its entirety *with access to be provided to the court, the child's attorney and all parties*."

e. The rule implementing FCA §1038(c) is the only place where a Family Court attorney's duties to maintain confidentiality may arguably prohibit the attorney from indiscriminately disclosing a sex abuse validator's report, but the rule on its face applies to videotapes only, not the expert's written reports:

ii. 22 NYCRR 205.86 sets forth the procedures for disclosure and storage of videotapes of children who are alleged sex abuse victims. 22 NYCRR 205.86(c)(3) states in pertinent part:

A person borrowing the duplicate video recording as provided in paragraph (2) of this subdivision *shall not lend it or otherwise surrender custody thereof to any person other than the custodian*, and upon returning such video recording to the custodian, such person shall certify, by affidavit filed with the court, that he or she has complied with the provisions of this subdivision.

(4) Subject to court order otherwise, *the duplicate video recording may not be viewed by any person other than a party or his or her counsel or prospective expert witnesses.* No copy of the duplicate video recording may be made.

(d) Failure to comply with the provisions of this rule shall be punishable by contempt of court.

f. The rule is basically a ready-made protective order for the videotapes at issue. In this respect, the video of a child interview produced in discovery is more akin to the production of mental health, substance abuse, and CPS records as part of pretrial discovery. The latter requests must be made by motion, on notice to the provider holding the records, and produced only upon the Court making the appropriate findings. Courts routinely impose conditions on the parties' ability to further disseminate such confidential information.

g. Local practice side issue: disclosure of mental health records and substance abuse records as part of the CPS case record – does CPS violate HIPPA by making such records available to all parties and their counsel, or have all parties waived any right to confidentiality they have in the records by virtue of signing releases and allowing CPS to include written evaluations and other material in the case record?

i. What is the practice in your jurisdiction?

5. False premise number 5: How is improper "use" of the documents defined?

a. It appears that in the *Salinas* case "use" means possessing the documents and analyzing their contents to determine how they might help or hurt the criminal case. But isn't this part of the process of case analysis and trial strategy?

b. Information that is informally shared, or disclosed by virtue of releases signed by the client, must still be obtained by whatever formal means are required in the criminal case if defense counsel plans to submit the information at trial as evidence, or oppose its admission at trial.

III. The *Salinas* decision as a violation of the client's 6th Amendment right to counsel and as an inappropriate restriction on the lawyer's ethical duties to the client

A. Effective assistance of counsel includes the duty to undertake a reasonable investigation of the charges against the defendant.

People v Jones, 45 Misc 3d 1201[A] [Sup Ct, Queens County 2014], gives an excellent overview of the case law pertinent to failure to investigate as a basis for a claim of ineffective assistance of counsel

B. Unnecessary and unauthorized burden on defense counsel to file motions and seek judicial permission before engaging in any meaningful trial strategy and investigation, and to manufacture a defense out of whole cloth even though a concurrent proceeding involving the same client and the same witnesses and the same facts already provides an opportunity for appropriate investigation and trial strategy

C. Unnecessary intrusion into the attorney-client relationship – the client has an unfettered right to the documents, but the attorney is deemed to have some separate and independent duty to maintain the confidentiality of those same documents. This causes the attorney to not be able to represent the client to the attorney's full capacity.

D. Think of all the situations in which this case could be used to impede the attorney's ability to represent his or her client

1. Matrimonial attorney needing access to the family court file

2. Family Court attorney, or criminal attorney, sharing records with appellate counsel as a means of devising appellate strategy while case is being tried

3. Client demands, pursuant to his access rights, that the records be shared with co-counsel

E. Unnecessary burden placed on indigent legal services providers to erect firewalls to prevent any alleged "violations" of perceived confidentiality rules

IV. **Disclosure of CPS records and SSL § 422**

A. My humble opinion – the statute does not apply to Family Court attorneys sharing CPS records with criminal defense counsel representing the same person on the same facts in a concurrent criminal case.

1. Check with your local county law department and see what their position is. Ours at this time does not believe that SSL 422 applies in the scenario above.

B. SSL 422(12) is the section everyone worries about because it states that "any person who willfully permits and any person who encourages the release of any data and information contained in the central register to persons or agencies not permitted by this title shall be guilty of a class A misdemeanor."

1. Provision assumes the "person" at issue has access to information in the SCR, which certainly does not include defense attorneys

2. In no way does the language suggest that the CPS case record obtained through discovery in an Article 10 case is identical to whatever information is included in the SCR

3. Keep in mind the purpose of Title 6 of the Social Services Law, which is to establish child protective services in each county and to establish a statewide central register for child abuse and maltreatment

4. Although section 422(4)(A) states that reports made to the SCR and any documents related to the report "shall be confidential," the statute also delineates no less than 27 (!) categories of persons to whom such information shall be made available upon request, including the subject (your client) and any other person named in the report. See SSL §422(4)(A)(1)(d)

5. SSL 422-a contemplates that one of the scenarios under which a child protective agency may release information in the SCR is when the subject of the report has made a "prior knowing, voluntary, public disclosure" of the information

IV. **My recommendation (for what it's worth)** – ignore *People v. Salinas* while you can

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People v Salinas

Supreme Court of New York, Bronx County

May 22, 2015, Decided

03751-2013

Reporter
2015 N.Y. Misc. LEXIS 1872; 2015 NY Slip Op 25174; 12 N.Y.S.3d 775; 48 Misc. 3d 791

[**1] The People of the State of New York I against Edwin Salinas, Defendant.

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Prior History: Matter of Wendy P. (Edwin S.), 47 Misc. 3d 1202[A], 2015 NY Slip Op 50365[U], 2015 N.Y. Misc. LEXIS 853 (2015)

Core Terms

records, protective order, confidential, defense counsel, proceedings, documents, criminal defense counsel, attorneys, discovery, interviews, disclosure, parties, judicial subpoena, discovery documents, subpoena, issuing, confidentiality provision, criminal proceeding, obligated, possessed, recorded interview, authorization, interim, argues, copies, notice, mental health records, criminal defense, criminal court, sexual abuse

Counsel: [*1] Erin Yavener, Esq., Assistant District Attorney, Bronx County District Attorney's Office, Bronx, NY.

For Defendant: Mark Loudon-Brown, Esq., The Bronx Defenders, Bronx, NY; Tiffany Wichman, Esq., Attorney for the Administration for Children's Services, Bronx, NY.

Judges: Margaret L. Clancy, JUDGE.

Opinion by: Margaret L. Clancy

Opinion

[***777] Margaret L. Clancy, J.

Defendant is indicted for allegedly raping and sexually abusing his eleven-year-old stepdaughter on October 13, 2013. Defendant is represented by an attorney from The Bronx Defenders' Criminal Defense Practice in this criminal proceeding. Defendant is also a respondent in an Article 10 abuse and neglect proceeding in Bronx County Family Court. The Administration for Children's Services ("ACS") initiated those proceedings based on the same allegations. Separate counsel from The Bronx Defenders' Family Defense Practice represent him in that matter.

At the request of ACS, and for the purpose of providing expert testimony in the [**2] Family Court proceeding, Dr. Eileen Treacy, a psychologist, video-recorded two interviews with the child-complainant, and prepared a written Sexual Abuse Assessment — Summary Report ("validator's report"). Pursuant to Family Court rules, Dr. [*2] Treacy provided the report and the recorded interviews to ACS. As obligated under the provisions of the Family Court Act, ACS provided copies of these discovery materials to defendant's Family Court attorney for exclusive use in the abuse and neglect proceeding. Subsequently, defendant's Family Court attorney, without seeking court permission, unilaterally provided the report to defendant's criminal attorney. When the presiding Family Court judge learned of this, she ordered the return of the report and issued a protective order prohibiting, *inter alia*, disclosure of the validator's records to defendant's criminal defense attorney. (*Matter of Wendy P. and Valeria S.*, Docket No. NA 27180/2013 [July 21, 2014] [Sherman, J.]). By notice of motion, defendant now seeks a judicial subpoena *duces tecum* for an *in camera* inspection of the validator's report and the recorded interviews of the complainant. ACS opposes this motion; the People take no position.

The court is granting defendant's motion for a subpoena. The court does so based, not on information obtained in violation of the Family Court Act, but based on Dr. Treacy having now testified publicly in the Article 10 proceeding in Family [*3] Court.

The Issues Presented

This request for a judicial subpoena presents a number of issues that the court must resolve: first, whether service of the motion on ACS was appropriate and legal service; second, whether defendant has [***778] made the requisite legal showing to support the issuance of this subpoena; third, whether the criminal attorney's possession of the validator's report prior to the issuance of the Family Court judge's protective order violated the Family Court Act; fourth, if it did, whether such violation should bar the issuance of the subpoena; and fifth, whether the public testimony in Family Court provides an independent legal basis for issuance of the subpoena.

Family Court Proceeding Background

The facts concerning the proceedings in Bronx Family Court are largely undisputed. On October 21, 2013, ACS initiated an abuse and neglect proceeding against defendant in Bronx Family Court pursuant to Family Court Act Article 10, based on the eleven-year-old complainant's allegations that she was sexually abused by defendant, her stepfather.[1] Defendant was appointed counsel from The Bronx Defenders, and he has been represented continuously in the Family Court case by several attorneys from its Family Defense [*4] Practice. Three days after ACS commenced the Article 10 civil proceedings, on October 24, 2013, defendant was arrested for Rape in the First Degree based on the same allegations. The Bronx Defenders was appointed to represent defendant in the criminal proceeding and a different attorney, from its Criminal Defense Practice, has represented him in the criminal case ever [**3] since.[2] Defendant was subsequently indicted.

In preparation for the Article 10 proceeding, ACS retained the services of Dr. Eileen Treacy for the purpose of conducting an assessment of the complainant and her allegations of sexual abuse.[3] Dr. Treacy recorded two interviews with the complainant. She also prepared a written report, which she provided to ACS. ACS informed defendant's Family Court attorney of its intention to call Dr. Treacy as an expert witness. Pursuant to its Family Court discovery obligations, ACS gave that attorney copies of Dr. Treacy's report as well as the complainant's recorded interviews.

Prior to June 24, 2014, without seeking permission from the Family Court judge, Family [*6] Court counsel gave criminal defense counsel a copy of Dr. Treacy's report. On June 24, 2014, criminal defense counsel attempted to enter an appearance in the Family Court proceeding. The Honorable Carol Sherman, the presiding judge in the Article 10 proceeding, denied [***779] his application to appear. The judge also asked whether criminal counsel was in possession of any of the discovery documents from the Family Court matter. Defense counsel admitted he had a copy of Dr. Treacy's report. Judge Sherman immediately ordered him to return all Family Court discovery documents to the court. Judge Sherman subsequently issued a qualified protective order, dated July 21, 2014, in which she prohibited the disclosure of any of the Family Court records to any person other than those directly involved in the representation of the parties in the Family Court proceeding and painstakingly outlined why such disclosure violated state and federal law in that matter. (*Matter of Wendy P.*, Docket No. NA 27180/2013 at 15). The language of the order authorized defendant, as the respondent in the Article 10 proceeding, to have "access" to the discovery for the purposes of that proceeding, but prohibited his disclosure [*7] of any of the information to anyone, including his criminal defense attorney. (*Matter of Wendy P.*, Docket No. NA 27180/2013 at 14-16).

The Bronx Defenders filed a notice of appeal in the Appellate Division, First Department, and sought a stay of Judge Sherman's protective order. On August 13, 2014, a judge of the Appellate Division granted an interim stay only to the extent that [**4] the order could be read as "prohibiting criminal defense counsel from consulting with

[1] Defendant is named the respondent in the Article 10 proceeding. For purposes of this decision, and for the sake of clarity, the court will only refer to Edwin Salinas as the defendant, even when discussing the Family Court matter.

[2] The Bronx Defenders, although one law office, in fact operates a Criminal Defense Practice and a separate Family Defense Practice pursuant to contracts with the City of New York. The majority of its funding for each practice comes from the separate contracts it has with the City. (City of New York Department of Investigation Report Re: The Bronx Defenders, January 29, 2015 at 2). The Criminal Defense Practice operates under a contract to provide indigent criminal defense services and the Family Defense Practice operates under a contract to provide legal [*5] services to indigent respondents in Family Court Article 10 proceedings. (*Matter of Wendy P. and Valeria S.*, Decision and Order on Motion, Docket No. NA 27180-1/2013 at 12-13 [May 20, 2015] [Sherman, J.]).

[3] ACS is permitted under Section 1046(a)(vi) of the Family Court Act to introduce hearsay statements of the alleged abused child rather than have the child testify. The statute, however, prohibits a finding of abuse unless that hearsay is corroborated. ACS is permitted to use "validators," such as Dr. Treacy, to give expert testimony in an attempt to provide corroboration of the hearsay evidence. (*See Matter of Nicole V.*, 71 NY2d 112, 117-18, 518 N.E.2d 914, 524 N.Y.S.2d 19 [1987]).

Family Court counsel." (*Matter of Wendy P. And Valeria S.*, Index No. NA-27180-81/2013 [1st Dept, Aug. 13, 2014]). In all other respects, the Appellate Division judge denied the stay pending further submissions and a determination by the full bench. Following that decision, criminal defense counsel again sought to make an appearance in the Family Court matter so that he could have access to the Family Court records.[4] Judge Sherman, however, ruled that the interim stay allowed only consultation and not the disclosure of the records.

On September 17, 2014, defense counsel returned to the First Department seeking clarification of the interim stay. According to ACS, defense counsel was informed by First Department staff that the interim stay did not allow counsel to review the Family Court discovery materials. Defendant does not dispute this assertion. In a decision dated October 2, 2014, the First Department continued the interim relief that was granted by its August 13, 2014 order, *i.e.*, permitting consultation between counsel, but otherwise denying to stay Judge Sherman's order. (*Matter of Wendy P. and Valeria S.*, 2014 NY Slip Op 85220[U], 2014 N.Y. App. Div. LEXIS 9185 [1st Dept, October 2, 2014]). Subsequently, on December 11, 2014, defendant filed the instant motion seeking a subpoena for the validator's records. During the pendency of this motion, The Bronx Defenders did not perfect its appeal. Ultimately, on April 2, 2015, the Bronx Defenders moved to withdraw its appeal. The motion was granted on April 28, 2015. (*Matter of Wendy P. and Valeria S.*, 2015 NY Slip Op 71473[U], 2015 N.Y. App. Div. LEXIS 4505 [1st Dept, April 28, 2015]).

Supreme Court Criminal Proceedings

During the pre-trial proceedings in this case, the People provided discovery to defendant pursuant to their obligations under CPL Article 240. That discovery included the complainant's medical records, as well as ACS records in their own custody [*9] related to its investigation of the alleged sexual abuse. Although these records include [***780] some of the same documents produced during the Article 10 proceeding, the actual records provided to defense counsel were obtained independently by the People pursuant to their discovery obligations in the criminal matter; they are not copies made from the Family Court's records. The People also provided discovery in the form of a joint interview report of the complainant.[5] It should be noted that the People are entitled to obtain ACS records pursuant to Social Services Law § 422(4)(A)(l). They routinely do so and provide these records to defense counsel as *Rosario* material. There is, however, no statute that allows the People to obtain Dr. Treacy's report or her recorded [**5] interviews of the complainant, and they do not have possession of those materials.

Motion [*10] for a Judicial Subpoena

Because they are not in the People's possession, the validator's report and recorded interviews are not *Rosario* material and are not subject to discovery under CPL Article 240. (People v Tissois, 72 NY2d 75, 78, 526 N.E.2d 1086, 531 N.Y.S.2d 228 [1988]). Likewise, because the People do not possess the records, they cannot know if the records contain any potential exculpatory or impeachment material pursuant to the *Brady* and *Giglio* line of cases. (*See generally*, Brady v Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 [1963]; Giglio v United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 [1972]). Moreover, although defense counsel possessed a copy of the validator's report before the Family Court judge ordered him to return it, pursuant to the protective order he cannot now obtain the materials from the Family Court attorney. Defendant has, therefore, asked this court to sign a judicial subpoena ordering the production of these records.

Pursuant to CPL § 610.20(3) and CPLR § 2307, a defendant may move for a judicial subpoena *duces tecum* seeking documents and other materials from any government agency,

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[4] According to ACS, The Bronx Defenders argued that, pursuant to the interim stay of Judge Sherman's protective order, defense counsel was entitled to possession of the Family Court discovery materials, [*8] including the validator's report and interviews.

[5] In addition to the discovery provided by the People, defense counsel sought a judicial subpoena for the complainant's school records, related only to her disclosure of the abuse for the first time to school personnel. The court signed the subpoena, inspected the records *in camera*, and provided both defense counsel and the People with copies of those records, without redaction.

with at least one day's notice to the agency and the People.[6] Defendant did so on December 11, 2014.[7]

Validity of Service on ACS

As a preliminary matter, the court rejects ACS's position that ACS is not the proper agency to be served with this subpoena. ACS argues that the validator's report and recorded interviews do not belong to ACS, were not created by ACS, and are, in actuality, Family Court and not ACS records. Although the records are subject to Family Court regulation, as Judge Sherman noted in her protective order, it was ACS, as the presenting agency, who referred the complainant for a validation interview. It is without question that the validator's report and video interviews "were created by an anticipated expert witness as part of . . . ACS's trial preparation in" the Family Court proceeding pursuant to § 1038 of the Family Court Act. (*Matter of Wendy P. and Valeria* [***781] *S.*, Docket No. NA 27180/2013 at 7-8, [July 21, 2014] [Sherman, J.]). Moreover, the applicable Family Court rule requires that a duplicate copy of the video interview remain in [*12] the custody of the attorney for the party who requested the interview. (22 NYCRR § 205.86[c][1]). Accordingly, the court holds that because the validator's report and video interviews are in the possession of ACS for use in the Article 10 proceeding, they are now part of ACS's records. Therefore, defendant has validly served the notice of motion on ACS and the proposed judicial subpoena is appropriately addressed to ACS.

Requirements for the Issuance of a Judicial Subpoena for Confidential Records

A subpoena *duces tecum* may not be used for purposes of discovery or to determine the existence of evidence that may turn out to be relevant and exculpatory. (*People v Gissendanner, 48 NY2d 543, 551, 399 N.E.2d 924, 423 N.Y.S.2d 893 [1979]*). To obtain a subpoena, defendant must make a showing under *Gissendanner* that it is reasonably likely that the records he seeks contain relevant and exculpatory material that bears upon " the unreliability of either the criminal charge or of a witness upon whose testimony it depends.'" (*People v Kozlowski, 11 NY3d 223, 242, 898 N.E.2d 891, 869 N.Y.S.2d 848 [2008]* [quoting *Gissendanner, 48 NY2d at 550*]). While the justification for issuing a subpoena cannot be based on mere speculation, a defendant need not show that the materials sought actually contain relevant and exculpatory evidence. The showing requires only that these materials are reasonably likely to contain [*13] such evidence. (*Gissendanner, 48 NY2d at 550*). Access to any information that is protected by confidentiality laws, with nothing more than "a bare allegation that the inspection is sought as fodder for an untracked attack on credibility would render the principle of confidentiality meaningless for all practical purposes." (*Gissendanner, 48 NY2d at 549-50*).

Defense counsel acknowledges that he received a copy and read the validator's report after ACS provided it to his Family Court counterpart. Counsel represents that the validator's report contains statements from the complainant that he believes are inconsistent with statements that she made during the course of the criminal investigation, statements that were provided to defense counsel as discovery in this criminal case. Based on his reading of the report, defense counsel asserts there are significant inconsistencies in the report relating to the time-line of events, the actual conduct defendant allegedly engaged in, and "other circumstances surrounding the alleged sexual abuse." Since the complainant is the only witness with personal knowledge of the alleged criminal conduct, defendant argues that these inconsistent statements are material to his defense and may be used to impeach the complainant [*14] during cross-examination.

Certainly, defense counsel's representations concerning the validator's report demonstrate that this is no mere "fishing expedition" for impeachment material (*see Gissendanner, 48 NY2d at 547*). Defendant has articulated the requisite factual predicate to show that it is reasonably likely that the validator's report and recorded interviews contain relevant and material evidence bearing on the "unreliability of . . . the . . . witness upon whose testimony [the criminal charge] depends." (*Gissendanner, 48 NY2d at 550*).

[***782] This court is concerned, however, with the manner in which defense counsel initially obtained that information.

Defense Counsel's Prior Possession of the Validator's Report

It is not disputed that defense counsel's possession and review of the validator's report occurred before Judge

[6] This court understands that the child-complainant has her own attorney in the Family Court proceeding. It is not clear whether that attorney would have the right to challenge the release of this confidential information. [*11] The court is unaware of whether defense counsel notified the child's attorney of this application.

[7] ACS submitted a written opposition to defendant's application. The court heard oral arguments on the motion and the parties filed additional submissions on this issue.

Sherman ordered its return and issued her protective order. It appears, however, that it is precisely because criminal defense counsel possessed Family Court discovery documents that Judge Sherman found it necessary both to order counsel to return his copy of the report and to issue the protective order.

In providing the validator's report to his criminal court colleague, defendant's [**6] Family Court attorney violated the strict [*15] confidentiality requirements of the Family Court Act as well as the rules for discovery of documents in Article 10 proceedings. Although a Family Court judge has the discretion to permit the inspection of any records, all papers and records of any Family Court proceeding, in general, are confidential and are not "open to indiscriminate public inspection." (*FCA § 166*). Defendants and their Family Court attorneys are allowed access only to "the pleadings, legal papers formally filed in a proceeding, findings, decisions and orders and, . . . transcribed minutes of any hearing held" in any Family Court proceeding. (*22 NYCRR § 205.5[a]*). Where an order of protection has been issued in a proceeding pursuant to Articles 4, *5*, *6* and *8 of the Family Court Act*, a criminal defense attorney may have access to these documents in the related criminal proceeding. (*22 NYCRR § 205.5[d][2]*). However, Article 10 proceedings are noticeably absent from this provision. Even where there is a pending proceeding in another court, such as this one, which involves the parties from the Article 10 proceeding, these limited documents will be available *to the court* and "may not be redisclosed except as necessary to the pending proceeding." (*22 NYCRR § 205.5[e]*). It is clear that criminal defense counsel does [*16] not have access to Article 10 documents pursuant to Family Court rules. It is equally clear that these documents retain their confidentiality when provided to another court in a concurrent proceeding. Access to these limited documents does not include access to the materials defendant seeks in this matter.

While the Family Court Act provides broad discovery to the parties in Article 10 proceedings, the plain language of the statute limits the use of that discovery to that proceeding alone. (*FCA § 1038[a]*). This is consistent with the overriding concern that the courts protect the welfare of children while guaranteeing due process to all parties in abuse and neglect proceedings. (*FCA § 1011*). In enacting Article 10 of the Family Court Act, the legislature determined that a court should have all possible information available to it to "guard against erroneous findings and to fulfill the . . . mandate of the court to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being.'" (*Matter of Kayla S., 46 Misc 3d 747, 750-51, 998 N.Y.S.2d 824 [Fam Ct Bronx Co. 2014]* [quoting *FCA § 1011*]). The Family Court Act mandates the production of various records "for use in any proceeding relating to abuse or neglect under . . . [A]rticle [10]." (*FCA § 1038[a]*). The Act specifically abrogates the independent [*17] statutory privileges that would otherwise attach to medical or mental health records that the court may require to be produced. (*FCA § 1038[a]*). The party whose privacy is otherwise protected by the confidentiality laws cannot assert that privilege in the Article 10 proceeding. Nor has that [***783] party waived any confidentiality. (*See Kayla S., 46 Misc 3d at 752*).

Documents that are produced and provided to the parties for use in an Article 10 proceeding do not become public records and they do not lose the protections of their respective confidentiality laws simply because they were produced for use in that proceeding. (*Kayla S., 46 Misc 3d at 751*). In issuing a protective order in this case, it is apparent that Judge Sherman did nothing more than make explicit what should be understood from a combined reading of the Family Court Act and Uniform Rules, as well as the statutes related to privileged records - that the discovery produced to the parties in Family Court is restricted to use in the Family Court proceeding and cannot [**7] be freely copied or shared with others, including criminal defense counsel.[8]

The court is aware that a number of Bronx County Family Court judges have become concerned that some Family Court counsel are not complying with the confidentiality provisions of the Family Court Act. This has resulted in the Family Court judges issuing an increasing number of protective orders for the discovery produced in Article 10 proceedings, explicitly limiting the redisclosure or use of

[8] In this regard, ACS is not correct that the court's issuance of a subpoena in this criminal case would force ACS to violate Judge Sherman's protective order. [*18] A Family Court Judge has no authority over this court's decisions and orders in this criminal proceeding. As Judge Sherman herself noted, her qualified protective order does not, "in any way have any impact on [defendant's] ability to obtain relevant and material documents for use in the concurrent criminal court proceeding, which his criminal defense counsel may seek in criminal court in accordance with criminal law procedures." (*Matter of Wendy P. and Valeria S.*, Docket No. NA 27180/2013 at 16 [July 21, 2014] [Sherman, J.]).

the discovery documents.[9] The court is also aware that the Family Court judges are not uniform in their issuance of protective orders or the language and restrictions they place on the sharing of documents and the information contained in those documents.[10]

In any event, this court finds that, even in the absence of a protective order, the Family Court Act and rules restrict discovery materials obtained in Article 10 proceedings to use exclusively in those proceedings. (*FCA §§ 1038[a]*; *166*, *22 NYCRR § 205.5*). It follows that those records cannot then be disclosed without court authorization. If records provided in discovery in those proceedings can be copied and provided to defense counsel or any other person without a court's approval, then the confidentiality rules are meaningless.

The court recognizes that the validator's records at issue in this matter are different from other records routinely produced in Family [*20] Court for abuse and neglect proceedings. While independent statutory privileges attach to ACS records, school records, medical records and mental health records,[11] the validator's report and [**8] recorded [***784] interviews of the child are created specifically at the request of ACS for purposes of introducing expert testimony at the fact-finding hearing.[12] They are created for the Family Court litigation and are interviews of the complainant related to the same allegations of sexual abuse for which defendant is indicted. Nonetheless, the records are governed by the confidentiality provisions of the Family Court Act and its rules, which only allow for access by the court, the child's attorney, and the parties. (*FCA § 1038[c]*). The video interview itself is confidential pursuant to the Uniform Rules of the Family Court, which severely restricts how it is stored, who may access it, and who may possess it. (*22 NYCRR § 205.86[c]*). The rules make clear that a party's failure to comply with the rules subjects that individual to contempt sanctions. (*22 NYCRR § 205.86[d]*). Defendant concedes that the validator's records are confidential records and subject to restricted viewing and disclosure. Defendant instead asserts he is entitled to the records based on sweeping interpretations of constitutional rights to counsel, free speech, and due process to justify the Family Court attorney's disclosure of the validator's report to criminal defense counsel. The court notes that many of defendant's arguments concern the lawfulness of the restrictions in Judge Sherman's protective order and her refusal to allow defense counsel's appearance in the Article 10 proceeding. The court will not address these arguments. These arguments were best addressed to the appellate [*22] court, an avenue that defendant, for his own strategic reasons, has chosen not to pursue. However, the court is not persuaded by defendant's arguments that there was a valid basis for Family Court counsel to give a copy of the validator's report to criminal defense counsel without court authorization.

Defendant's primary argument is that, at the time criminal defense counsel possessed the validator's report, he was representing defendant in the Family Court matter. He also argues that he was "participating in the representation" of defendant in the Article 10 proceeding. That is just not the case. By whatever definition this court uses, criminal defense counsel was not representing or actively participating in the representation of defendant in that matter. Whatever criminal defense counsel's role may have been regarding the Article 10 proceeding when he possessed the report, that role was known only to himself, defendant, and defendant's Family Court attorney. It was certainly not known to the Family Court judge. Criminal defense counsel had not filed a notice of appearance in that court. Criminal defense counsel had not notified the court that he wished to participate in representing [*23] defendant in the Family Court proceeding. Nor did he notify the judge that he was acting in a "consultative" role in the Family Court case. No

[9] The court inquired [*19] of a number of Bronx Family Court judges regarding their practices in issuing protective orders in Article 10 proceedings. The court did not contact Judge Sherman, whose protective order is discussed in this decision.

[10] For example, it appears that some judges do not permit a represented defendant to possess copies of the records themselves, and some require the parties to return all records to the court at the end of the proceedings. Judges also vary in whether they permit criminal defense counsel to appear and participate in the Family Court proceedings.

[11] School records remain confidential pursuant to the Family Educational Rights and Privacy Act (20 USC § 1232g); ACS records pursuant to Social Services Law § 422(4)(A); individually identifiable health information pursuant to HIPAA (Pub [*21] L No 104-191, 110 Stat 1936 [1996]; 42 USC § 1320d *et seq.*; 45 CFR § 164.502 *et seq*); patient information pursuant to ***Public Health Law § 18***; information disclosed to a physician pursuant to CPLR § 4504(a); to a psychologist pursuant to CPLR § 4507; to a social worker pursuant to CPLR § 4508(a); and mental health records pursuant to Mental Hygiene Law § 33.13(c).

[12] The court rejects ACS's arguments that these are mental health records that are governed by HIPPA or by the psychologist privilege in CPLR § 4507. The complainant did not seek treatment from Dr. Treacy; ACS retained Dr. Treacy to interview the child and give an expert opinion in court.

person, attorney or otherwise, is entitled to copies [***785] of [**9] confidential Family Court documents, without court authorization, by merely deciding he is "participating" in the Family Court matter in some capacity.

It is without question that criminal defense counsel had every right to confer and consult with Family Court counsel and his own client regarding the Family Court case. That alone did not give him the right to any of the Family Court records. In fact, that was Judge Sherman's ruling in her protective order - a ruling left undisturbed by the Appellate Division's interim stay. It is for the Family Court judge to appoint counsel and to permit others to appear on a defendant's behalf in any matter before that judge. Given criminal counsel's dual roles as "consultant" on the Family Court matter and defense attorney on the criminal case, the judge was entitled to approve counsel's involvement so she could order the erection of a firewall to ensure protection of the confidential discovery documents in the Article 10 proceeding, as well as compliance [*24] with her protective order. In fact, in recently granting defendant's application to retain criminal counsel *pro bono* for the purpose of cross-examining Dr. Treacy about her expert conclusions, Judge Sherman still denied his appearance as an attorney from The Bronx Defenders' Criminal Defense Practice. This was not mere semantics. In her ruling, Judge Sherman directed that Bronx Defenders erect a "firewall" between criminal counsel and his now "retained" *pro bono* status, and precluded his own use of the Family Court documents in this criminal matter, even though he will now have legal access to them in the Article 10 proceeding.[13]

However persistently defense counsel argues that he possessed the validator's report in his capacity as defendant's counsel in the Article 10 proceeding, the fact is that he was not. He was appointed by the criminal court to represent defendant in the criminal matter and was not representing defendant in the Family Court matter. As such, defense counsel was not entitled to a copy of the report.

Defendant also argues that The Bronx Defenders as an institutional provider was appointed to represent him, not individual attorneys and, therefore, the Family Court Act cannot be interpreted to prohibit the sharing of discovery documents between attorneys from the same law firm. Defendant compares The Bronx Defenders to the "numerous" law firms that have created multi-disciplinary practice groups, while at the same time ignoring the fact that these law firms are required to create "firewalls" to prevent the sharing of information between [*26] practice groups or attorneys when necessitated either by conflict or confidentiality issues. The Bronx Defenders' argument that it is one [**10] organization that provides "integrated multi-disciplinary representation" is not determinative and does not entitle it to engage in the blanket sharing of discovery documents among its attorneys in its [***786] different practices.[14] The attorneys in Family Court are obligated to abide by the confidentiality provisions of the Family Court Act and rules, even in the absence of a protective order. Moreover, practitioners in Bronx County Family Court are certainly aware that judges presiding over Article 10 proceedings are increasingly issuing protective orders for the discovery documents produced in those proceedings. While those judges may vary in the degree of the restrictiveness of their orders, the attorneys from The Bronx Defenders Family Defense Practice (or any other practitioner in that court) have no basis to believe that they are permitted to share confidential discovery documents they receive for use solely in the Article 10 proceeding, under the very restrictive statutes and rules governing those proceedings, without court authorization. As such, [*27] The Bronx Defenders is obligated to erect a firewall at the outset to ensure compliance with the confidentiality rules and any future protective order that a Family Court judge may issue.

Defendant also argues that the confidentiality provisions of the Family Court Act cannot be interpreted as prohibiting defendant's Family Court counsel from sharing relevant

[13] In a decision handed down two days before this court's decision, Judge Sherman noted that criminal defense counsel was not representing defendant in the Article 10 proceeding because the Family Defense Division of The Bronx Defenders had already been assigned. (*Matter of Wendy P.*, Decision and Order on Motion, Docket No. NA 27180-1/2013 at 4 [May 20, 2015] [Sherman, J.]). Judge Sherman, as noted, is now permitting defendant to retain defense counsel as *pro bono* counsel and permitting access to the Family Court documents, subject to the terms of her qualified [*25] protective order and the erection of a firewall. Judge Sherman also held that defense counsel was not permitted to use any of the Family Court discovery materials "in any way whatsoever in the Criminal Court proceeding" except by order of the Criminal Court. (*Id.* at 16-17).

[14] Defendant's suggestion that all The Bronx Defenders attorneys are fungible and interchangeable is not availing. The city contracts with The Bronx Defenders to provide representation in two different courts, and the attorneys specialize in either Criminal or Family Court practice. Although providing a "holistic" approach to representation may require attorneys from different practice areas to consult and confer with each other, it is inaccurate to imply that attorneys from the Criminal Defense Practice and the Family Defense Practice cover each other's cases.

documents with his criminal defense counsel as that violates defendant's constitutional right to counsel. Significantly, the Appellate Court ruled otherwise when it decided defendant's request for interim relief. Moreover, the right to counsel in Family Court is statutory, not [*28] constitutional.(FCA § 262[a]).

Defendant's attempt to limit his constitutional arguments to cases where The Bronx Defenders represents a defendant both in Family Court and in concurrent Criminal or Supreme Court proceedings is unpersuasive. The court disagrees that such an argument can be limited and rejects defendant's right to counsel argument. These broad constitutional arguments regarding the right to counsel and the right to share documents, would necessarily apply to any criminal defendant with parallel proceedings in each court, regardless of his representation in each court. And in practice, The Bronx Defenders has not acted in accordance with this purported self-limitation. This court recently presided over a case where an 18b attorney received Family Court discovery documents from an attorney in The Bronx Defenders' Family Defense Practice, without any authorization by the Family Court or this court. In other cases, this court has learned that attorneys from The Bronx Defenders' Family Defense Practice have given ACS records, medical and mental health records to appointed and private attorneys, in complete disregard of the confidentiality provisions of the Social Services Law, the Family [*29] Court Act, and the privileges that HIPPA and the CPLR attach [**11] to medical and mental health records.

Defendant also asserts that his Sixth Amendment right to the compulsory process trumps the confidentiality provisions of the Family Court Act, as well as any statutory privileges that may apply to documents. Defendant notes that the validator's report contains statements from the only eyewitness to the alleged crime and that, if the People possessed these statements, they would be obligated to turn them over as *Rosario*, *Brady*, and/or [***787] *Giglio* material. As such, defendant argues that the Sixth Amendment right to the compulsory process requires that he be privy to them. Defendant's assertion is wrong. Although courts have long recognized the importance of the rights guaranteed by the Sixth Amendment, they have sought to balance the important policy interests in privileged or confidential records with those rights.

The right to the production of documents does not automatically supersede statutory privileges and privacy protections (*Pennsylvania v Ritchie*, 480 U.S. 39, 57-58, 107 S. Ct. 989, 94 L. Ed. 2d 40 [1987]). The privilege afforded such records as well as any statutory confidentiality provisions can only be overcome by defendant making the appropriate showing in Supreme Court. (*Ritchie*, 480 U.S. at 58 & n15 [citation omitted]). It [*30] is only after defendant makes the appropriate showing that the court in a criminal proceeding will determine whether the records contain any material that warrants disclosure.

In sum, because the Family Court attorney violated the Family Court Act's confidentiality provisions by providing a copy of the validator's report to criminal defense counsel without authorization, the court rejects defendant's arguments that criminal defense counsel lawfully possessed the validator's report.

Defense Counsel's Possession of Records in Violation of the Family

Court Act and its Effect on the Issuance of the Subpoena

This court will not issue a judicial subpoena where the sole support for the request comes from records that defense counsel possessed in violation of the Family Court Act and its confidentiality provisions. To do so is to invite a disregard of the statutes and rules that the legislature has carefully enacted to enable the Family Court to responsibly perform its difficult mandate in the challenging, emotional, and highly sensitive arena of child and family protective proceedings. Public policy demands nothing less.

This court is well-aware that the only evidence supporting the criminal charges [*31] in this matter is, in fact, the testimony of the child witness. There is no medical or forensic evidence that corroborates her testimony. The jury will be required to assess the credibility and reliability of this one critical witness to determine if her testimony proves the crimes charged beyond a reasonable doubt. The court understands the particular importance to defendant of any material that may affect the credibility and reliability of this witness.

Nonetheless, it is critical that counsel in both courts abide by the strictures of the Family Court Act and its rules, as well as the rules that govern discovery and subpoenas in criminal cases. Although defense counsel has properly sought from this court a judicial subpoena for the records he seeks by way of notice and accompanying affirmation, his support comes from information he was not entitled to

possess, [**12] because of the violation of the Family Court Act.[15]

The Court's Basis for the Issuance of the Subpoena

During the pendency of this motion, the Family Court has continued to [***788] hold its fact-finding hearing. The parties have informed the court that Dr. Treacy testified on direct examination and is to continue cross-examination when the matter is next scheduled in that court. Her report and the recordings of the child's interviews have been admitted in evidence as exhibits. The fact-finding hearing is a public proceeding, and the substance of Dr. Treacy's examination of the child and her findings, if not the report and recordings themselves, have now been made public. It is on this basis that the court now grants the application for the issuance of a subpoena for Dr. Treacy's report and recordings for an *in camera* inspection of those records.

The issues raised [*33] by this motion will continue to be litigated in this, the Child Abuse/Sex Crimes part, and elsewhere in the Supreme and Criminal Courts. In the first instance, of course, it is for the Family Court judges to determine how best to ensure adherence to the legislated requirements of confidentiality for the records produced in that court, as well as compliance with their own protective orders.

As stated earlier, this court has serious concerns that there are cases where defense counsel, both appointed and privately-retained, have been in possession of confidential Family Court records, including ACS investigation records and complainants' medical and mental health records. The court has learned that attorneys from The Bronx Defenders' Family Defense Practice, and in one instance, a Family Court 18b attorney, have unilaterally provided these records to criminal defense counsel without those attorneys seeking judicial authority to disclose the records. The documents were provided without regard to any of the statutory privileges that attach to those records, and in either ignorance or defiance of the penalties that attach to such willful disclosure.[16] Zealous advocacy need not and should not [*34] involve an abandonment of an attorney's ethical obligations to follow the law, whether that attorney agrees with the law or not. If The Bronx Defenders or any other Family Court practitioner believes Family Court judges are misinterpreting the law, or unconstitutionally restricting its clients' rights, as counsel argues in this case, then its recourse is to seek review from the Appellate Courts or to seek changes in the confidentiality laws from the legislature.

Attorneys practicing before this court are on notice that in any [*35] case before it where the defendant is a respondent in a concurrent Article 10 Family Court proceeding, the court will be making on-the-record inquiries. The court expects to be informed as to the status of any Article 10 proceeding, whether the Family Court judge has issued any protective orders in that proceeding, and whether defense counsel is in possession of any records that were produced as discovery in that proceeding [***789] and who provided them. If this court determines that a defense attorney is in possession of confidential Family Court records that were obtained without judicial authorization, this court will require the return of the documents, and prohibit their use in the criminal proceeding. Defense counsel are obligated to seek those confidential records, if there is a basis for doing so, by making the appropriate application before this court.

ConclusionWhile the court will not issue a judicial subpoena based on information possessed in violation of the Family Court Act, the court will grant defendant's application based on the parties' representations that Dr. Treacy testified in open court in a public fact-finding hearing where the substance of her examination of the child [*36] and her findings have now been made public.

The foregoing constitutes the decision and order of the court.

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[15] This decision need not and does not address the issue of whether, in the absence of a protective order, an attorney may disclose or share *information* contained in confidential discovery documents, as opposed to the documents themselves, or whether the defendant himself may make [*32] that disclosure. These issues are not before this court. However, attorneys must strictly comply with any restrictions imposed by a Family Court judge's protective order. Even if obtained lawfully and in compliance with the relevant statutes and orders, the information cannot be used in a criminal proceeding absent the authorization of the judge in the criminal proceeding. (*See e.g.*, Kayla S., 46 Misc 3d at 752-53).

[16] For example, any person who willfully permits or encourages the disclosure of information contained in the statewide central register of child abuse and maltreatment, to someone who is not permitted access to that information, is guilty of an A Misdemeanor. (SSL § 422[12]). The failure to comply with the rules concerning access to any video recording of interviews of children alleged to have been sexually abused, is punishable by contempt of court. (22 NYCRR § 205.86[d]). Finally, a HIPPA violation in which a person knowingly discloses individually identifiable health information subjects that person to a fine of $50,000 and/or one year of imprisonment. (Pub L No 104-191, 110 Stat 1936, §1777[b] [1996]).

Dated: May 22, 2015

MARGARET L. CLANCY, JUDGE

Bronx, New York

Current through 2015 released chapters 1-238, except 67, 68, 70-72, 74, 75, 88, 92, 95, 97, 98, 101-103, 110, 112-114, 129, 130, 133, 135, 138, 156, 157, 158, 160, 163, 165, 166, 168, 170-186, 190, 192, 196-1989, 201, 205-207, 211, 213-215, 218, 221, 222, 234, 235

§ 166. Privacy of records

The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record.

22 NYCRR § 205.5

This document reflects those changes received from the NY Bill Drafting Commission through September 18, 2015

New York Codes, Rules, and Regulations > *TITLE 22. JUDICIARY* > *SUBTITLE A. JUDICIAL ADMINISTRATION* > *CHAPTER II. UNIFORM RULES FOR THE NEW YORK STATE TRIAL COURTS* > *PART 205. UNIFORM RULES FOR THE FAMILY COURT*

§ 205.5 Privacy of family court records

Subject to limitations and procedures set by statute and case law, the following shall be permitted access to the pleadings, legal papers formally filed in a proceeding, findings, decisions and orders and, subject to the provisions of *CPLR 8002*, transcribed minutes of any hearing held in the proceeding:

(a) the petitioner, presentment agency and adult respondent in the Family Court proceeding and their attorneys;

(b) when a child is either a party to, or the child's custody may be affected by the proceeding:

- (1) the parents or persons legally responsible for the care of that child and their attorneys;
- (2) the guardian, guardian ad litem and attorney for that child;
- (3) an authorized representative of the child protective agency involved in the proceeding or the probation service;
- (4) an agency to which custody has been granted by an order of the Family Court and its attorney; and
- (5) an authorized employee or volunteer of a Court Appointed Special Advocate program appointed by the Family Court to assist in the child's case in accordance with Part 44 of the Rules of the Chief Judge; and

(c) a representative of the State Commission on Judicial Conduct, upon application to the appropriate Deputy Chief Administrator, or his or her designee, containing an affirmation that the commission is inquiring into a complaint under article 2-A of the Judiciary Law, and that the inquiry is subject to the confidentiality provisions of said article;

(d) in proceedings under articles 4, 5, 6 and 8 of the Family Court Act in which temporary or final orders of protection have been issued:

- (1) where a related criminal action may, but has not yet been commenced, a prosecutor upon affirmation that such records are necessary to conduct an investigation or prosecution; and
- (2) where a related criminal action has been commenced, a prosecutor or defense attorney in accordance with procedures set forth in the Criminal Procedure Law provided, however, that prosecutors may request transcripts of Family Court proceedings in accordance with *section 815 of the Family Court Act*, and provided further that any records or information disclosed pursuant to this subdivision must be retained as confidential and may not be redisclosed except as necessary for such investigation or use in the criminal action; and

(e) another court when necessary for a pending proceeding involving one or more parties or children who are or were the parties in, or subjects of, a proceeding in the Family Court pursuant to Article 4, 5, 6, 8 or 10 of the Family Court Act. Only certified copies of pleadings and orders in, as well as information regarding the status of, such Family Court proceeding may be transmitted without court order pursuant to this section. Any information or records disclosed pursuant to this subdivision may not be redisclosed except as necessary to the pending proceeding.

Where the Family Court has authorized that the address of a party or child be kept confidential in accordance with *Family Court Act § 154-b(2)*, any record or document disclosed pursuant to this section shall have such address redacted or otherwise safeguarded.

Adele Fine

This document reflects those changes received from the NY Bill Drafting Commission through September 18, 2015

§ 205.86 Video recording of interviews of children alleged to have been sexually abused

(a) In any case in which, pursuant to *section 1038(c) of the Family Court Act*, a video recording is made of an expert's interview with a child alleged to have been sexually abused, the attorney for the party requesting the video recording, or the party, if unrepresented, shall promptly after the video recording has been completed:

  (1) cause to be prepared a duplicate video recording, certified by the preparer as a complete and unaltered copy of the original video recording;

  (2) deposit the original video recording, certified by the preparer as the original, with the Clerk of the Family Court; and

  (3) submit for signature to the judge before whom the case is pending a proposed order authorizing the retention of the duplicate video recording by the attorney, (or the party, if unrepresented) and directing that retention be in conformance with this section. Both the original video recording and the duplicate thereof shall be labelled with the name of the case, the Family Court docket number, the name of the child, the name of the interviewer, the name and address of the technician who prepared the video recording, the date of the interview, and the total elapsed time of the video recording.

(b) Upon receipt, the clerk shall hold the original video recording in a secure place limited to access only by authorized court personnel.

(c)

  (1) Except as provided in paragraph (2) of this subdivision, the duplicate video recording shall remain in the custody of the attorney for the party who requested it, or the party, if not represented (the "custodian").

  (2) The duplicate video recording shall be available for pretrial disclosure pursuant to article 10 of the Family Court Act and any other applicable law. Consistent therewith, the custodian shall permit an attorney for a party, or the party, if not represented by counsel, to borrow the duplicate video recording for a reasonable period of time so that it may be viewed, provided the person to whom it is loaned first certifies, by affidavit filed with the court, that he or she will comply with this subdivision.

  (3) A person borrowing the duplicate video recording as provided in paragraph (2) of this subdivision shall not lend it or otherwise surrender custody thereof to any person other than the custodian, and upon returning such video recording to the custodian, such person shall certify, by affidavit filed with the court, that he or she has complied with the provisions of this subdivision.

  (4) Subject to court order otherwise, the duplicate video recording may not be viewed by any person other than a party or his or her counsel or prospective expert witnesses. No copy of the duplicate video recording may be made.

(d) Failure to comply with the provisions of this rule shall be punishable by contempt of court.

Statutory Authority

Section statutory authority:

Family Court Act, § 1038, § A10

department concerning child abuse and maltreatment.

8. monitor and supervise the performance of the local departments of social services.

Add, L 1973, ch 1039, § 1, eff Sept 1, 1973; amd, L 1985, ch 677, § 9, L 1986, ch 718, § 2, L 1988, ch 504, § 1, eff April 1, 1989, L 1988, ch 707, § 2, L 1989, ch 110, § 1, L 1990, ch 320, § 1, eff Sept 1, 1990 (see 1990 note below), L 2006, ch 525, §§ 1–3, eff Nov 14, 2006 (see 2006 note below), L 2012, ch 501, § 5 (Part D), eff June 30, 2013 (see 2012 note below).

§ 422. Statewide central register of child abuse and maltreatment

1. There shall be established in the office of children and family services a statewide central register of child abuse and maltreatment reports made pursuant to this title.

2. (a) The central register shall be capable of receiving telephone calls alleging child abuse or maltreatment and of immediately identifying prior reports of child abuse or maltreatment and capable of monitoring the provision of child protective service twenty-four hours a day, seven days a week. To effectuate this purpose, but subject to the provisions of the appropriate local plan for the provision of child protective services, there shall be a single statewide telephone number that all persons, whether mandated by the law or not, may use to make telephone calls alleging child abuse or maltreatment and that all persons so authorized by this title may use for determining the existence of prior reports in order to evaluate the condition or circumstances of a child. In addition to the single statewide telephone number, there shall be a special unlisted express telephone number and a telephone facsimile number for use only by persons mandated by law to make telephone calls, or to transmit telephone facsimile information on a form provided by the commissioner, alleging child abuse or maltreatment, and for use by all persons so authorized by this title for determining the existence of prior reports in order to evaluate the condition or circumstances of a child. When any allegations contained in such telephone calls could reasonably constitute a report of child abuse or maltreatment, such allegations shall be immediately transmitted orally or electronically by the office of children and family services to the appropriate local child protective service for investigation. The inability of the person calling the register to identify the alleged perpetrator shall, in no circumstance, constitute the sole cause for the register to reject such allegation or fail to transmit such allegation for investigation. If the records indicate a previous report concerning a subject of the report, the child alleged to be abused or maltreated, a sibling, other children in the household, other persons named in the report or other pertinent information, the appropriate local child protective service shall be immediately notified of the fact, except as provided in subdivision eleven of this section. If the report involves either (i) an allegation of an abused child described in paragraph (i), (ii) or (iii) of subdivision (e) of section one thousand twelve of the family court act or sexual abuse of a child or the death of a child or (ii) suspected maltreatment which alleges any physical harm when the report is made by a person required to report pursuant to section four hundred thirteen of this title within six months of any other two reports that were indicated, or may still be pending, involving the same child, sibling, or other children in the household or the subject of the report, the office of children and family services shall identify the report as such and note any prior reports when transmitting the report to the local child protective services for investigation.

(b) Any telephone call made by a person required to report cases of suspected child abuse or maltreatment pursuant to section four hundred thirteen of this chapter containing

allegations, which if true would constitute child abuse or maltreatment shall constitute a report and shall be immediately transmitted orally or electronically by the department to the appropriate local child protective service for investigation.

(c) Whenever a telephone call to the statewide central register described in this section is received by the department, and the department finds that the person allegedly responsible for abuse or maltreatment of a child cannot be a subject of a report as defined in subdivision four of section four hundred twelve of this chapter, but believes that the alleged acts or circumstances against a child described in the telephone call may constitute a crime or an immediate threat to the child's health or safety, the department shall convey by the most expedient means available the information contained in such telephone call to the appropriate law enforcement agency, district attorney or other public official empowered to provide necessary aid or assistance.

3. The central register shall include but not be limited to the following information: all the information in the written report; a record of the final disposition of the report, including services offered and services accepted; the plan for rehabilitative treatment; the names and identifying data, dates and circumstances of any person requesting or receiving information from the register; and any other information which the commissioner believes might be helpful in the furtherance of the purposes of this chapter.

4. (A) Reports made pursuant to this title as well as any other information obtained, reports written or photographs taken concerning such reports in the possession of the office or local departments shall be confidential and shall only be made available to:

(a) a physician who has before him or her a child whom he or she reasonably suspects may be abused or maltreated;

(b) a person authorized to place a child in protective custody when such person has before him or her a child whom he or she reasonably suspects may be abused or maltreated and such person requires the information in the record to determine whether to place the child in protective custody;

(c) a duly authorized agency having the responsibility for the care or supervision of a child who is reported to the central register of abuse and maltreatment;

(d) any person who is the subject of the report or other persons named in the report;

(e) a court, upon a finding that the information in the record is necessary for the determination of an issue before the court;

(f) a grand jury, upon a finding that the information in the record is necessary for the determination of charges before the grand jury;

(g) any appropriate state legislative committee responsible for child protective legislation;

(h) any person engaged in a bona fide research purpose provided, however, that no information identifying the subjects of the report or other persons named in the report shall be made available to the researcher unless it is absolutely essential to the research purpose and the department gives prior approval;

(i) a provider agency as defined by subdivision three of section four hundred

twenty-four-a of this chapter, or a licensing agency as defined by subdivision four of section four hundred twenty-four-a of this chapter, subject to the provisions of such section;

(j) the justice center for the protection of people with special needs or a delegate investigatory entity in connection with an investigation being conducted under article eleven of this chapter;

(k) a probation service conducting an investigation pursuant to article three or seven or section six hundred fifty-three of the family court act where there is reason to suspect the child or the child's sibling may have been abused or maltreated and such child or sibling, parent, guardian or other person legally responsible for the child is a person named in an indicated report of child abuse or maltreatment and that such information is necessary for the making of a determination or recommendation to the court; or a probation service regarding a person about whom it is conducting an investigation pursuant to article three hundred ninety of the criminal procedure law, or a probation service or the department of corrections and community supervision regarding a person to whom the service or department is providing supervision pursuant to article sixty of the penal law or article eight of the correction law, where the subject of investigation or supervision has been convicted of a felony under article one hundred twenty, one hundred twenty-five or one hundred thirty-five of the penal law or any felony or misdemeanor under article one hundred thirty, two hundred thirty-five, two hundred forty-five, two hundred sixty or two hundred sixty-three of the penal law, or has been indicted for any such felony and, as a result, has been convicted of a crime under the penal law, where the service or department requests the information upon a certification that such information is necessary to conduct its investigation, that there is reasonable cause to believe that the subject of an investigation is the subject of an indicated report and that there is reasonable cause to believe that such records are necessary to the investigation by the probation service or the department, provided, however, that only indicated reports shall be furnished pursuant to this subdivision;

(l) a district attorney, an assistant district attorney or investigator employed in the office of a district attorney, a sworn officer of the division of state police, of the regional state park police, of a city police department, or of a county, town or village police department or county sheriff's office or department when such official requests such information stating that such information is necessary to conduct a criminal investigation or criminal prosecution of a person, that there is reasonable cause to believe that such person is the subject of a report, and that it is reasonable to believe that due to the nature of the crime under investigation or prosecution, such person is the subject of a report, and that it is reasonable to believe that due to that nature of the crime under investigation or prosecution, such records may be related to the criminal investigation or prosecution;

(m) the New York city department of investigation provided, however, that no information identifying the subjects of the report or other persons named in the report shall be made available to the department of investigation unless such information is essential to an investigation within the legal authority of the department of investigation and the state department of social services gives prior approval;

(n) chief executive officers of authorized agencies, directors of day care centers and

directors of facilities operated or supervised by the department of education, the division for youth, the office of mental health or the office of mental retardation and developmental disabilities, in connection with a disciplinary investigation, action, or administrative or judicial proceeding instituted by any of such officers or directors against an employee of any such agency, center or facility who is the subject of an indicated report when the incident of abuse or maltreatment contained in the report occurred in the agency, center, facility or program, and the purpose of such proceeding is to determine whether the employee should be retained or discharged; provided, however, a person given access to information pursuant to this subparagraph (n) shall, notwithstanding any inconsistent provision of law, be authorized to redisclose such information only if the purpose of such redisclosure is to initiate or present evidence in a disciplinary, administrative or judicial proceeding concerning the continued employment or the terms of employment of an employee of such agency, center or facility who has been named as a subject of an indicated report and, in addition, a person or agency given access to information pursuant to this subparagraph (n) shall also be given information not otherwise provided concerning the subject of an indicated report where the commission of an act or acts by such subject has been determined in proceedings pursuant to article ten of the family court act to constitute abuse or neglect;

(o) a provider or coordinator of services to which a child protective service or social services district has referred a child or a child's family or to whom the child or the child's family have referred themselves at the request of the child protective service or social services district, where said child is reported to the register when the records, reports or other information are necessary to enable the provider or coordinator to establish and implement a plan of service for the child or the child's family, or to monitor the provision and coordination of services and the circumstances of the child and the child's family, or to directly provide services; provided, however, that a provider of services may include appropriate health care or school district personnel, as such terms shall be defined by the department; provided however, a provider or coordinator of services given access to information concerning a child pursuant to this subparagraph (o) shall, notwithstanding any inconsistent provision of law, be authorized to redisclose such information to other persons or agencies which also provide services to the child or the child's family only if the consolidated services plan prepared and approved pursuant to section thirty-four-a of this chapter describes the agreement that has been or will be reached between the provider or coordinator of service and the local district. An agreement entered into pursuant to this subparagraph shall include the specific agencies and categories of individuals to whom redisclosure by the provider or coordinator of services is authorized. Persons or agencies given access to information pursuant to this subparagraph may exchange such information in order to facilitate the provision or coordination of services to the child or the child's family;

(p) a disinterested person making an investigation pursuant to section one hundred sixteen of the domestic relations law, provided that such disinterested person shall only make this information available to the judge before whom the adoption proceeding is pending;

(q) a criminal justice agency conducting an investigation of a missing child where there is reason to suspect such child or such child's sibling, parent, guardian or other person legally responsible for such child is a person named in an indicated report of

child abuse or maltreatment and that such information is needed to further such investigation;

(r) [Repealed]

(s) a child protective service of another state when such service certifies that the records and reports are necessary in order to conduct a child abuse or maltreatment investigation within its jurisdiction of the subject of the report and shall be used only for purposes of conducting such investigation and will not be redisclosed to any other person or agency;

(t) an attorney for a child, appointed pursuant to the provisions of section one thousand sixteen of the family court act, at any time such appointment is in effect, in relation to any report in which the respondent in the proceeding in which the attorney for a child has been appointed is the subject or another person named in the report, pursuant to sections one thousand thirty-nine-a and one thousand fifty-two-a of the family court act;

(u) a child care resource and referral program subject to the provisions of subdivision six of section four hundred twenty-four-a of this title;

(v) (i) officers and employees of the state comptroller or of the city comptroller of the city of New York, or of the county officer designated by law or charter to perform the auditing function in any county not wholly contained within a city, for purposes of a duly authorized performance audit, provided that such comptroller shall have certified to the keeper of such records that he or she has instituted procedures developed in consultation with the department to limit access to client-identifiable information to persons requiring such information for purposes of the audit and that appropriate controls and prohibitions are imposed on the dissemination of client-identifiable information contained in the conduct of the audit. Information pertaining to the substance or content of any psychological, psychiatric, therapeutic, clinical or medical reports, evaluations or like materials or information pertaining to such child or the child's family shall not be made available to such officers and employees unless disclosure of such information is absolutely essential to the specific audit activity and the department gives prior written approval.

(ii) any failure to maintain the confidentiality of client-identifiable information shall subject such comptroller or officer to denial of any further access to records until such time as the audit agency has reviewed its procedures concerning controls and prohibitions imposed on the dissemination of such information and has taken all reasonable and appropriate steps to eliminate such lapses in maintaining confidentiality to the satisfaction of the office of children and family services. The office of children and family services shall establish the grounds for denial of access to records contained under this section and shall recommend as necessary a plan of remediation to the audit agency. Except as provided in this section, nothing in this subparagraph shall be construed as limiting the powers of such comptroller or officer to access records which he or she is otherwise authorized to audit or obtain under any other applicable provision of law. Any person given access to information pursuant to this subparagraph who releases data or information to persons or agencies not authorized to receive such information shall be guilty of a class A misdemeanor;

(w) members of a local or regional fatality review team approved by the office of children and family services in accordance with section four hundred twenty-two-b of this title;

(x) members of a local or regional multidisciplinary investigative team as established pursuant to subdivision six of section four hundred twenty-three of this title;

(y) members of a citizen review panel as established pursuant to section three hundred seventy-one-b of this article; provided, however, members of a citizen review panel shall not disclose to any person or government official any identifying information which the panel has been provided and shall not make public other information unless otherwise authorized by statute;

(z) an entity with appropriate legal authority in another state to license, certify or otherwise approve prospective foster and adoptive parents where disclosure of information regarding the prospective foster or adoptive parents and other persons over the age of eighteen residing in the home of such prospective parents is required by paragraph twenty of subdivision (a) of section six hundred seventy-one of title forty-two of the United States code; and

(aa) a social services official who is investigating whether an adult is in need of protective services in accordance with the provisions of section four hundred seventy-three of this chapter, when such official has reasonable cause to believe such adult may be in need of protective services due to the conduct of an individual or individuals who had access to such adult when such adult was a child and that such reports and information are needed to further the present investigation.

After a child, other than a child in residential care, who is reported to the central register of abuse or maltreatment reaches the age of eighteen years, access to a child's record under subparagraphs (a) and (b) of this paragraph shall be permitted only if a sibling or off-spring of such child is before such person and is a suspected victim of child abuse or maltreatment. In addition, a person or official required to make a report of suspected child abuse or maltreatment pursuant to section four hundred thirteen of this chapter shall receive, upon request, the findings of an investigation made pursuant to this title. However, no information may be released unless the person or official's identity is confirmed by the office. If the request for such information is made prior to the completion of an investigation of a report, the released information shall be limited to whether the report is "indicated", "unfounded" or "under investigation", whichever the case may be. If the request for such information is made after the completion of an investigation of a report, the released information shall be limited to whether the report is "indicated" or "unfounded", whichever the case may be. A person given access to the names or other information identifying the subjects of the report, or other persons named in the report, except the subject of the report or other persons named in the report, shall not divulge or make public such identifying information unless he or she is a district attorney or other law enforcement official and the purpose is to initiate court action or the disclosure is necessary in connection with the investigation or prosecution of the subject of the report for a crime alleged to have been committed by the subject against another person named in the report. Nothing in this section shall be construed to permit any release, disclosure or identification of the names or identifying descriptions of persons who have reported suspected child abuse or maltreatment to the statewide central register or the agency, institution, organization, program or other entity where such persons are employed or the agency,

institution, organization or program with which they are associated without such persons' written permission except to persons, officials, and agencies enumerated in subparagraphs (e), (f), (h), (j), (l), (m) and (v) of this paragraph.

To the extent that persons or agencies are given access to information pursuant to subparagraphs (a), (b), (c), (j), (k), (l), (m), (o) and (q) of this paragraph, such persons or agencies may give and receive such information to each other in order to facilitate an investigation conducted by such persons or agencies.

(B) Notwithstanding any inconsistent provision of law to the contrary, a city or county social services commissioner may withhold, in whole or in part, the release of any information which he or she is authorized to make available to persons or agencies identified in subparagraphs (a), (k), (l), (m), (n), (o), (p) and (q) of paragraph (A) of this subdivision if such commissioner determines that such information is not related to the purposes for which such information is requested or when such disclosure will be detrimental to the child named in the report.

(C) A city or county social services commissioner who denies access by persons or agencies identified in subparagraphs (a), (k), (l), (m), (n), (o), (p) and (q) of paragraph (A) of this subdivision to records, reports or other information or parts thereof maintained by such commissioner in accordance with this title shall, within ten days from the date of receipt of the request fully explain in writing to the person requesting the records, reports or other information the reasons for the denial.

(D) A person or agency identified in subparagraphs (a), (k), (l), (m), (n), (o), (p) and (q) of paragraph (A) of this subdivision who is denied access to records, reports or other information or parts thereof maintained by a local department pursuant to this title may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.

5. (a) Unless an investigation of a report conducted pursuant to this title determines that there is some credible evidence of the alleged abuse or maltreatment, all information identifying the subjects of the report and other persons named in the report shall be legally sealed forthwith by the central register and any local child protective services or the state agency which investigated the report. Such unfounded reports may only be unsealed and made available:

(i) to the office of children and family services for the purpose of supervising a social services district;

(ii) to the office of children and family services and local or regional fatality review team members for the purpose of preparing a fatality report pursuant to section twenty or four hundred twenty-two-b of this chapter;

(iii) to a local child protective service, the office of children and family services, or all members of a local or regional multidisciplinary investigative team or the justice center for the protection of people with special needs when investigating a subsequent report of suspected abuse, neglect or maltreatment involving a subject of the unfounded report, a child named in the unfounded report, or a child's sibling named in the unfounded report pursuant to this article or article eleven of this chapter;

(iv) to the subject of the report; and

(v) to a district attorney, an assistant district attorney, an investigator employed in the office of a district attorney, or to a sworn officer of the division of state police, of a city, county, town or village police department or of a county sheriff's office when such official verifies that the report is necessary to conduct an active investigation or prosecution of a violation of subdivision three of section 240.55 of the penal law.

(b) Persons given access to unfounded reports pursuant to subparagraph (v) of paragraph (a) of this subdivision shall not redisclose such reports except as necessary to conduct such appropriate investigation or prosecution and shall request of the court that any copies of such reports produced in any court proceeding be redacted to remove the names of the subjects and other persons named in the reports or that the court issue an order protecting the names of the subjects and other persons named in the reports from public disclosure. The local child protective service or state agency shall not indicate the subsequent report solely based upon the existence of the prior unfounded report or reports. Notwithstanding section four hundred fifteen of this title, section one thousand forty-six of the family court act, or, except as set forth herein, any other provision of law to the contrary, an unfounded report shall not be admissible in any judicial or administrative proceeding or action; provided, however, an unfounded report may be introduced into evidence: (i) by the subject of the report where such subject is a respondent in a proceeding under article ten of the family court act or is a plaintiff or petitioner in a civil action or proceeding alleging the false reporting of child abuse or maltreatment; or (ii) in a criminal court for the purpose of prosecuting a violation of subdivision four of section 240.50 of the penal law. Legally sealed unfounded reports shall be expunged ten years after the receipt of the report.

(c) Notwithstanding any other provision of law, the office of children and family services may, in its discretion, grant a request to expunge an unfounded report where: (i) the source of the report was convicted of a violation of subdivision three of section 240.55 of the penal law in regard to such report; or (ii) the subject of the report presents clear and convincing evidence that affirmatively refutes the allegation of abuse or maltreatment; provided however, that the absence of credible evidence supporting the allegation of abuse or maltreatment shall not be the sole basis to expunge the report. Nothing in this paragraph shall require the office of children and family services to hold an administrative hearing in deciding whether to expunge a report. Such office shall make its determination upon reviewing the written evidence submitted by the subject of the report and any records or information obtained from the state or local agency which investigated the allegations of abuse or maltreatment.

5-a. Upon notification from a local social services district, that a report is part of the family assessment and services track pursuant to subparagraph (i) of paragraph (c) of subdivision four of section four hundred twenty-seven-a of this title, the central register shall forthwith identify the report as an assessment track case and legally seal such report. Access to reports assigned to, and records created under the family assessment and services track and information concerning such reports and records is governed by paragraph (d) of subdivision five of section four hundred twenty-seven-a of this title.

6. In all other cases, the record of the report to the statewide central register shall be expunged ten years after the eighteenth birthday of the youngest child named in the report. In the case of a child in residential care the record of the report to the statewide central register shall be expunged ten years after the reported child's eighteenth birthday. In any case and at

any time, the commissioner of the office of children and family services may amend any record upon good cause shown and notice to the subjects of the report and other persons named in the report.

7. At any time, a subject of a report and other persons named in the report may receive, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent investigation or the agency, institution, organization, program or other entity where such person is employed or with which he is associated, which he reasonably finds will be detrimental to the safety or interests of such person.

8. (a) (i) At any time subsequent to the completion of the investigation but in no event later than ninety days after the subject of the report is notified that the report is indicated the subject may request the commissioner to amend the record of the report. If the commissioner does not amend the report in accordance with such request within ninety days of receiving the request, the subject shall have the right to a fair hearing, held in accordance with paragraph (b) of this subdivision, to determine whether the record of the report in the central register should be amended on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this title.

(ii) Upon receipt of a request to amend the record of a child abuse and maltreatment report the office of children and family services shall immediately send a written request to the child protective service or the state agency which was responsible for investigating the allegations of abuse or maltreatment for all records, reports and other information maintained by the service or state agency pertaining to such indicated report. The service or state agency shall as expeditiously as possible but within no more than twenty working days of receiving such request, forward all records, reports and other information it maintains on such indicated report to the office of children and family services. The office of children and family services shall as expeditiously as possible but within no more than fifteen working days of receiving such materials from the child protective service or state agency, review all such materials in its possession concerning the indicated report and determine, after affording such service or state agency a reasonable opportunity to present its views, whether there is a fair preponderance of the evidence to find that the subject committed the act or acts of child abuse or maltreatment giving rise to the indicated report and whether, based on guidelines developed by the office of children and family services pursuant to subdivision five of section four hundred twenty-four-a of this title, such act or acts could be relevant and reasonably related to employment of the subject of the report by a provider agency, as defined by subdivision three of section four hundred twenty-four-a of this title, or relevant and reasonably related to the subject of the report being allowed to have regular and substantial contact with children who are cared for by a provider agency, or relevant and reasonably related to the approval or disapproval of an application submitted by the subject of the report to a licensing agency, as defined by subdivision four of section four hundred twenty-four-a of this title.

(iii) If it is determined at the review held pursuant to this paragraph (a) that there is no credible evidence in the record to find that the subject committed an act or acts of child abuse or maltreatment, the department shall amend the record to indicate that the report is "unfounded" and notify the subject forthwith.

(iv) If it is determined at the review held pursuant to this paragraph (a) [illegible] some credible evidence in the record to find that the subject committed such [illegible] but that such act or acts could not be relevant and reasonably related to the [illegible] of the subject by a provider agency or to the subject being allowed to have [illegible] substantial contact with children who are cared for by a provider agency or [illegible] or disapproval of an application which could be submitted by the subject to a [illegible] agency, the department shall be precluded from informing a provider or [illegible] agency which makes an inquiry to the department pursuant to the provisions of [illegible] four hundred twenty-four-a of this title concerning the subject that the person [illegible] whom the inquiry is made is the subject of an indicated report of child [illegible] maltreatment. The department shall notify forthwith the subject of the report [illegible] determinations and that a fair hearing has been scheduled pursuant to para[illegible] this subdivision. The sole issue at such hearing shall be whether the subject [illegible] shown by some credible evidence to have committed the act or acts of [illegible] maltreatment giving rise to the indicated report.

(v) If it is determined at the review held pursuant to this paragraph (a) [illegible] some credible evidence in the record to prove that the subject committed an [illegible] of child abuse or maltreatment and that such act or acts could be relevant [illegible] reasonably related to the employment of the subject by a provider agency [illegible] subject being allowed to have regular and substantial contact with children [illegible] provider agency or the approval or disapproval of an application which [illegible] submitted by the subject to a licensing agency, the department shall notify forthwith [illegible] subject of the report of such determinations and that a fair hearing has been [illegible] pursuant to paragraph (b) of this subdivision.

(b) (i) If the department, within ninety days of receiving a request from the subject [illegible] the record of a report be amended, does not amend the record in accordance [illegible] request, the department shall schedule a fair hearing and shall provide [illegible] scheduled hearing date to the subject, the statewide central register and, as [illegible] to the child protective service or the state agency which investigated the report.

(ii) The burden of proof in such a hearing shall be on the child protective [illegible] the state agency which investigated the report, as the case may be. In such [illegible] the fact that there is a family court finding of abuse or neglect against the [illegible] regard to an allegation contained in the report shall create an irrebuttable presum[illegible] that said allegation is substantiated by some credible evidence.

(c) (i) If it is determined at the fair hearing that there is no credible evidence [illegible] record to find that the subject committed an act or acts of child abuse or maltre[illegible] the department shall amend the record to reflect that such a finding was made [illegible] administrative hearing, order any child protective service or state agency [illegible] investigated the report to similarly amend its records of the report, and shall notify [illegible] subject forthwith of the determination.

(ii) Upon a determination made at a fair hearing held on or after January [illegible] nineteen hundred eighty-six scheduled pursuant to the provisions of subparagraph [illegible] of paragraph (a) of this subdivision that the subject has been shown by [illegible] preponderance of the evidence to have committed the act or acts of child [illegible] maltreatment giving rise to the indicated report, the hearing officer shall deter[illegible]

based on guidelines developed by the office of children and family services pursuant to subdivision five of section four hundred twenty-four-a of this title, whether such act or acts are relevant and reasonably related to employment of the subject by a provider agency, as defined by subdivision three of section four hundred twenty-four-a of this title, or relevant and reasonably related to the subject being allowed to have regular and substantial contact with children who are cared for by a provider agency or relevant and reasonably related to the approval or disapproval of an application submitted by the subject to a licensing agency, as defined by subdivision four of section four hundred twenty-four-a of this title.

Upon a determination made at a fair hearing that the act or acts of abuse or maltreatment are relevant and reasonably related to employment of the subject by a provider agency or the subject being allowed to have regular and substantial contact with children who are cared for by a provider agency or the approval or denial of an application submitted by the subject to a licensing agency, the department shall notify the subject forthwith. The department shall inform a provider or licensing agency which makes an inquiry to the department pursuant to the provisions of section four hundred twenty-four-a of this title concerning the subject that the person about whom the inquiry is made is the subject of an indicated child abuse or maltreatment report.

The failure to determine at the fair hearing that the act or acts of abuse and maltreatment are relevant and reasonably related to the employment of the subject by a provider agency or to the subject being allowed to have regular and substantial contact with children who are cared for by a provider agency or the approval or denial of an application submitted by the subject to a licensing agency shall preclude the department from informing a provider or licensing agency which makes an inquiry to the department pursuant to the provisions of section four hundred twenty-four-a of this title concerning the subject that the person about whom the inquiry is made is the subject of an indicated child abuse or maltreatment report.

(d) The commissioner or his or her designated agent is hereby authorized and empowered to make any appropriate order respecting the amendment of a record to make it accurate or consistent with the requirements of this title.

(e) Should the department grant the request of the subject of the report pursuant to this subdivision either through an administrative review or fair hearing to amend an indicated report to an unfounded report. Such report shall be legally sealed and shall be released and expunged in accordance with the standards set forth in subdivision five of this section.

9. Written notice of any expungement or amendment of any record, made pursuant to the provisions of this title, shall be served forthwith upon each subject of such record, other persons named in the report, the commissioner, and, as appropriate, the applicable local child protective service, thejustice center for the protection of people with special needs, department of education, office of mental health, office for people with developmental disabilities, the local social services commissioner or school district placing the child, any attorney for the child appointed to represent the child whose appointment has been continued by a family court judge during the term of a child's placement, and the director or operator of a residential care facility or program. The local child protective service or the state agency which investigated the report, upon receipt of such notice, shall take the appropriate similar action in regard to its child abuse and maltreatment register and records and inform, for the same purpose, any other agency which received such record.

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10. [Repealed]

11. [Repealed]

12. Any person who willfully permits and any person who encourages the release of [illegible] data and information contained in the central register to persons or agencies not permitted [illegible] this title shall be guilty of a class A misdemeanor.

13. There shall be a single statewide telephone number for use by all persons seeking general information about child abuse, maltreatment or welfare other than for the purpose [illegible] making a report of child abuse or maltreatment.

14. The office shall refer suspected cases of falsely reporting child abuse and maltreatment in violation of subdivision four of section 240.50 of the penal law to the appropriate law enforcement agency or district attorney.

Add, L 1973, ch 1039, § 1; amd, L 1976, ch 823, § 1, L 1978, ch 555, § 36, L 1980, ch 480, [illegible] § 2, L 1981, ch 316, § 1, L 1981, ch 585, § 1, L 1983, ch 307, § 1, L 1984, ch 554, § 1, L 1984, [illegible] ch 822, § 3, L 1985, ch 676, §§ 6, 7 (see 1992 note below), L 1985, ch 677, §§ 10, 11, eff Jan [illegible] 1, 1986 (see 1985 note below), L 1986, ch 717, §§ 2, 3, L 1986, ch 718, § 3, L 1986, ch 719, [illegible] §§ 5, 6, L 1987, ch 159, § 1, L 1987, ch 652, § 5, L 1988, ch 545, §§ 2, 3, eff Jan 1, 1989, [illegible] L 1988, ch 634, §§ 5–8, L 1989, ch 292, § 1, L 1989, ch 434, § 1, L 1989, ch 477, § 2, L 1990, ch 156, § 1 (see 1990 note below), L 1990, ch 317, § 3, L 1991, ch 22, § 1, L 1991, ch 67, § 1 (see 1991 note below), L 1991, ch 69, § ,6 (see 1991 note below), L 1991, ch 188, § 1 (see 1991 note below), L 1991, ch 225, § 1 (see 1991 note below), L 1992, ch 32, §§ 8–11 (see 1992 note below) (see 1992 note below), L 1992, ch 707, § 1, L 1993, ch 441, § 3 (see 1993 note below), L 1996, ch 12, §§ 8–11 (see 1996 note below), L 1999, ch 136, §§ 5, 6, eff June 30, 1999 (see 1999 note below), L 2000, ch 555, § 1 (see 2000 and 2002 notes below), L 2001, ch 35, § 1, eff May 23, 2001, L 2006, ch 494, § 1, eff Dec 14, 2006, L 2007, ch 327, § 1 (Part A), L 2007, ch 452, § 1 (see 2011 note below), L 2008, ch 323, § 5, eff July 21, 2008 (see 2008 note below), L 2008, ch 323, §§ 10–12, 17, 18, eff Jan 17, 2009 (see 2008 note below), L 2008, ch 574, § 1, eff March 24, 2009, L 2010, ch 41, § 99, eff April 14, 2010, L 2011, ch 62, § 153 (Part C, Subpart B), eff March 31, 2011, L 2011, ch 377, § 3, eff Aug 3, 2011, L 2011, ch 440, § 1, eff Aug 17, 2011, L 2012, ch 501, §§ 6, 7, 7-a (Part D), eff June 30, 2013 (see 2012 note below).

§ 422-a. Child abuse and neglect investigations; disclosure

1. Notwithstanding any inconsistent provision of law to the contrary, the commissioner or a city or county social services commissioner may disclose information regarding the abuse or maltreatment of a child as set forth in this section, and the investigation thereof and any services related thereto if he or she determines that such disclosure shall not be contrary to the best interests of the child, the child's siblings or other children in the household and any one of the following factors are present:

(a) the subject of the report has been charged in an accusatory instrument with committing a crime related to a report maintained in the statewide central register; or

(b) the investigation of the abuse or maltreatment of the child by the local child protective service or the provision of services by such service has been publicly disclosed in a report required to be disclosed in the course of their official duties, by a law enforcement agency or official, a district attorney, any other state or local investigative agency or official or by judge of the unified court system; or

(c) there has been a prior knowing, voluntary, public disclosure by an individual concerning a report of child abuse or maltreatment in which such individual is named as

the subject of the report as defined by subdivision four of section four hundred twelve of this title; or

(d) the child named in the report has died or the report involves the near fatality of a child. For the purposes of this section, "near fatality" means an act that results in the child being placed, as certified by a physician, in serious or critical condition.

For the purposes of this section, the following information may be disclosed:

(a) the name of the abused or maltreated child;

(b) the determination by the local child protective service or the state agency which investigated the report and the findings of the applicable investigating agency upon which such determination was based;

(c) identification of child protective or other services provided or actions, if any, taken regarding the child named in the report and his or her family as a result of any such report or reports;

(d) whether any report of abuse or maltreatment regarding such child has been "indicated" as maintained by the statewide central register;

(e) any actions taken by the local child protective service and the local social services district in response to reports of abuse or maltreatment of the child to the statewide central register including but not limited to actions taken after each and every report of abuse or maltreatment of such child and the dates of such reports;

(f) whether the child or the child's family has received care or services from the local social services district prior to each and every report of abuse or maltreatment of such child;

(g) any extraordinary or pertinent information concerning the circumstances of the abuse or maltreatment of the child and the investigation thereof, where the commissioner or the local commissioner determines such disclosure is consistent with the public interest.

3. Information may be disclosed pursuant to this section as follows:

(a) information released prior to the completion of the investigation of a report shall be limited to a statement that a report is "under investigation";

(b) when there has been a prior disclosure pursuant to paragraph (a) of this subdivision, information released in a case in which the report has been unfounded shall be limited to the statement that "the investigation has been completed, and the report has been unfounded";

(c) if the report has been "indicated" then information may be released pursuant to subdivision two of this section.

4. Any disclosure of information pursuant to this section shall be consistent with the provisions of subdivision two of this section. Such disclosure shall not identify or provide an identifying description of the source of the report, and shall not identify the name of the abused or maltreated child's siblings, the parent or other person legally responsible for the child or any other members of the child's household, other than the subject of the report.

5. In determining pursuant to subdivision one of this section whether disclosure will be

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contrary to the best interests of the child, the child's siblings or other children in the household, the commissioner or a city or county social services commissioner shall consider the interest in privacy of the child and the child's family and the effects which disclosure may have on efforts to reunite and provide services to the family.

6. Whenever a disclosure of information is made pursuant to this section, the city or county social services commissioner shall make a written statement prior to disclosing such information to the chief county executive officer where the incident occurred setting forth the paragraph in subdivision one of this section upon which he or she is basing such disclosure.

7. Except as it applies directly to the cause of the abuse or maltreatment of the child, nothing in this section shall be deemed to authorize the release or disclosure of the substance or content of any psychological, psychiatric, therapeutic, clinical or medical reports, evaluations or like materials or information pertaining to such child or the child's family. Prior to the release or disclosure of any psychological, psychiatric or therapeutic reports, evaluations or like materials or information pursuant to this subdivision, the city or county social services commissioner shall consult with the local mental hygiene director.

Add, L 1996, ch 12, § 12, eff Feb 12, 1996; amd, L 1999, ch 136, § 7, eff June 30, 1999 (see 1999 note below).

§ 422-b. Local and regional fatality review teams

1. A fatality review team may be established at a local or regional level, with the approval of the office of children and family services, for the purpose of investigating the death of any child whose care and custody or custody and guardianship has been transferred to an authorized agency, other than a vulnerable child as defined in article eleven of this chapter, any child for whom child protective services has an open case, any child for whom the local department of social services has an open preventive services case, and in the case of a report made to the statewide central register of child abuse and maltreatment involving the death of a child. A fatality review team may also investigate any unexplained or unexpected death of any child under the age of eighteen.

2. A local or regional fatality review team may exercise the same authority as the office of children and family services with regard to the preparation of a fatality report as set forth in paragraphs (b) and (c) of subdivision five of section twenty of this chapter. Notwithstanding any other provision of law to the contrary and to the extent consistent with federal law, such local or regional fatality review team shall have access to those client-identifiable records necessary for the preparation of the report, as authorized in accordance with paragraph (d) of subdivision five of section twenty of this chapter. A fatality report prepared by a local or regional fatality review team and approved by the office of children and family services satisfies the obligation to prepare a fatality report as set forth in subdivision five of section twenty of this chapter. Such report shall be subject to the same redisclosure provisions applicable to fatality reports prepared by the office of children and family services.

3. For the purposes of this section, a local or regional fatality review team must include, but need not be limited to, representatives from the child protective service, office of children and family services, county department of health, or, should the locality not have a county department of health, the local health commissioner or his or her designee or the local public health director or his or her designee, office of the medical examiner, or, should the locality not have a medical examiner, office of the coroner, office of the district attorney, office of the county attorney, local and state law enforcement, emergency medical services and a