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Nanette Schorr

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Cover Page Footnote

Nanette Schorr directs the Family Law Unit at Bronx Legal Services, where she has represented parents in child protective proceedings for fourteen years. She is also an adjunct instructor at Fordham University School of Law. ** I wish to thank Fordham Law Students Tim Benson, Eric Montroy, Lynn Singband and Dave Tull, who prepared an extensive memorandum on this subject under the supervision of Professor Ann Moynihan in connection with their work in the Stein Program's advanced seminar on legal ethics.

ACS'S INTERPRETATION OF THE "NO CONTACT RULE" IMPEDES THE REUNIFICATION OF FAMILIES

Nanette Schorr*

INTRODUCTION**

The New York Code of Professional Responsibility DR 7-104 prohibits attorneys from speaking with represented parties about the matter in controversy without the consent of the respective counsel for each party, or unless authorized by law.¹ New York State has adopted this rule, commonly referred to as the "no contact rule."² The rule states as follows:

A. During the course of the representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party [he or she] knows to be represented by a lawyer in that matter unless [he or she] has the prior consent of the lawyer representing such other party or is authorized by law to do so.³

On August 13, 1999, the New York City Administration for Children's Services ("ACS") issued a protocol to its staff, entitled "Guidelines for ACS Caseworkers in Communicating with Attorneys."⁴ The protocol directs caseworkers not to speak to

* Nanette Schorr directs the Family Law Unit at Bronx Legal Services, where she has represented parents in child protective proceedings for fourteen years. She is also an adjunct instructor at Fordham University School of Law.

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1. Various rationales have been advanced for this rule. These include protection of attorneys from predatory practices by adverse attorneys, and protection of represented laypeople from overreaching by opposing counsel. Stephen Sinaiko, *Ex-Parte Communication and the Corporate Adversary: A New Approach*, 66 N.Y.U. L. Rev. 1456, 1462 (1991) (discussing various purposes of the "no contact rule").

2. There appears to be no New York case law that directly addresses the question of whether the "no contact rule" applies to communication between parent attorneys and ACS caseworkers in child protective proceedings.

3. N.Y. Code of Prof'l Responsibility DR 7-104 (1999); N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.35 (1999).

4. Memorandum from Gerald Harris et al., The City of New York

attorneys representing parents in child protective matters about any issue of substance related to the case.⁵ In relevant part, the procedure states: "Other than greeting the attorneys for parents and foster parents ('Parent Attorneys'), the ACS worker should not discuss the case with the Parent Attorneys either in person or by telephone."⁶

While the memorandum forbids communication between ACS caseworkers and parent attorneys, it permits contact between ACS caseworkers and law guardians for children.⁷ Specifically, it permits disclosure by the ACS caseworkers of factual information regarding "the child's progress, treatment programs and ACS' [sic] broad plan for the child."⁸ ACS caseworkers are also permitted to refer the law guardians to the foster care agency worker working with the child so that they may obtain additional information.⁹ In permitting this contact, the protocol refers to its intent "to highlight the objective of coordinated efforts by ACS caseworkers and attorneys as they pursue the shared goal of effectively representing the Commissioner and securing the best interests of children."¹⁰

While ACS's policy makes no specific reference to the "no contact rule," it seems reasonable to infer from the policy's directive to caseworkers to refer all inquiries made by parent counsel to Division of Legal Services ("DLS") attorneys¹¹ that ACS intends to eliminate all direct communication between caseworkers and attorneys for parents. This article argues that the "no contact rule" does not apply to these types of communications and that, in the spirit of its stated commitment to further the best interests of the families whose mission it is to serve, ACS should abrogate this policy and open up the lines of communication between parent attorneys and ACS caseworkers.¹²

Administration for Children's Services, to DCP, DFCPS, DLS, DCA, and ACM Staff (Aug. 13, 1999) (on file with the *Fordham Law Review*).

5. *Id.* at 3-4.

6. *Id.* at 3.

7. *Id.* at 2.

8. *Id.*

9. *Id.* at cover page.

10. *Id.*

11. Attorneys who represent ACS in child protective proceedings are members of ACS's Division of Legal Services.

12. See *Recommendations of the Conference on Achieving Justice: Parents and the Child Welfare System*, 70 *Fordham L. Rev.* 337, 344 (section 3.2.4) (ethics working group) (indicating that the Code permits such contact without prior consent, and recommending that, as part of their representational duties, attorneys for parents should speak directly with caseworkers from ACS and voluntary agencies and that ACS should develop a detailed protocol identifying specific areas parent attorneys and caseworkers are permitted to discuss).

I. ACS'S PROTOCOL EXCLUDES PARENT ATTORNEYS FROM CRUCIAL CASE PLANNING

ACS's self-described mission is to "ensure the safety and well-being of all the children of New York."¹³ ACS has set forth, in its new placement principles, the proposition that "all families deserve to be involved in their children's placement in foster care."¹⁴ "Parents must be fully informed about the reasons for their child's placement into care, the conditions for reunification, and the timeframes for meeting such conditions," and "[p]arents must be encouraged to actively participate in family case planning conferences as soon as possible after placement and at other critical points during the child's stay in foster care."¹⁵

These goals cannot be realized without the active interaction between parents and caseworkers, working together to develop case plans and implement them in a dynamic fashion.¹⁶ Case plans must be developed within thirty days of the time a child enters foster care and updated regularly (i.e., at minimum, every six months, but more frequently, if there is a significant change in circumstances).¹⁷

While parents may bring representatives, including attorneys, to case planning conferences, and are entitled by statute to be notified of this right,¹⁸ ACS does not permit caseworkers to communicate with parent attorneys nor does it allow parent attorneys (or any other counsel) to attend the Seventy-Two Hour Child Safety Conference, which is the first case conference ACS elects to hold after removal of a child. Yet, central to the extension of placement and permanency hearings is the court's examination of whether the parent has complied with the service plan.¹⁹

II. PARENT ATTORNEYS SERVE A CRUCIAL ROLE IN REUNITING FAMILIES

Attorneys for parents play a significant and multi-faceted role in the process of family reunification. Parents need strong advocates at all

13. ACS Introduction, at <http://www.ci.nyc.ny.us/html/acs/html/whatwedo/introduction.html> (on file with the *Fordham Law Review*).

14. What We Do: ACS Permanency & Planning Principles, at http://www.ci.nyc.ny.us/html/acs/html/whatwedo/pp_place.html (on file with the *Fordham Law Review*).

15. *Id.*

16. *See, e.g.*, N.Y. Soc. Serv. Law § 409-e(2) (McKinney 1992) (mandating preparation of case plans by the social services district in active consultation with the child's parent or guardian).

17. *Id.* § 409-e(1).

18. N.Y. Fam. Ct. Act § 1055(b)(vi)(B) (McKinney Supp. 2001).

19. *See id.* § 1055(b)(iv)(A).

stages of a child protective problem—from pre-removal through termination of parental rights. As was discussed in a recent article published in the *Fordham Urban Law Journal*:²⁰

The attorneys who represent parents in child abuse and neglect proceedings in the New York City Family Court . . . system enter the lives of parents at critical moments of emotional crisis. These are parents who are too poor to provide food and clothing for themselves and their children, or cannot find affordable, adequate housing for their families, or have been abused themselves, or cannot overcome an addiction to drugs or alcohol. . . . These are parents who desperately need a zealous advocate both in court, to ensure their voices are heard, and out of court, to ensure they receive the services they need to get their children back.²¹

Assignment of court-appointed counsel in New York City typically ends after a finding of abuse or neglect and the placement of the child in foster care.²² However, a parent may be found abusive or neglectful after the fact-finding hearing, in which case he or she would have to “comply with a court-ordered ‘service plan’ before [his or] her children may be returned home.”²³ A service plan “may include parenting classes, drug counseling, domestic violence counseling, or even securing a new home appropriate for [his or] her family.”²⁴ It is during a period in between court proceedings such as this (e.g., post-disposition, but before extension of placement) that parent attorneys could engage in crucial advocacy activities to assist parents in meeting service plan requirements, adjusting service plans where appropriate, and moving the plan forward expeditiously.

At least until ACS changes the permanency planning goal to adoption, there is a presumption that all parties share a goal of family reunification, though the parties may differ on the mechanism, speed of attainment, and impediments to achieving that goal. To the extent that such a goal is shared, parent attorneys should be recognized as crucial players in the joint endeavor.

20. Sheri Bonstelle & Christine Schlessler, Comment, *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 *Fordham Urb. L.J.* 1151 (2001).

21. *Id.* at 1151-52.

22. Mark Green, Pub. Advocate for the City of N.Y. & C-PLAN: Child Planning and Advocacy Now, Accountability Project, Inc., *Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Protective Proceedings*, at v (May 2000).

23. Bonstelle & Schlessler, *supra* note 20, at 1189.

24. *Id.*

III. ACS CASEWORKERS SHOULD NOT BE CONSIDERED REPRESENTED "PARTIES" TO THE ACTION FOR PURPOSES OF THE "NO CONTACT RULE"

A. Application of the "No Contact Rule" to Government Entities Involves a Balancing Test

Where two parties are involved in a legal controversy, an attorney for one of the parties is prohibited by the "no-contact rule" from contacting the adverse party without the permission of that party's attorney.²⁵

In *Niesig v. Team I*,²⁶ the New York State Court of Appeals held that "corporate employees, whose acts or omissions in the matter under inquiry are binding on the corporation (in effect the corporation's 'alter egos'),"²⁷ are represented "parties" for purposes of applying the "no contact rule."²⁸ The court further held that employees whose acts or omissions on the matter under inquiry can be "imputed to the corporation for purposes of its liability," as well as those "employees implementing the advice of counsel," are also "parties" for purposes of the rule.²⁹

In *Frey v. Department of Health and Human Services*,³⁰ the court considered the application of the "no contact rule" where the defendant was a government entity. As in *Niesig*, the term "party" was defined as encompassing those employees, "who are the alter egos of the entity, that is, those individuals who can bind it to a decision or settle controversies on its behalf."³¹ Explaining its decision to bar ex parte contact by plaintiffs' counsel with high-level managerial employees who made the employment decision at issue in the litigation, while permitting informal contact with other employees who could provide relevant information in the case, the District Court for the Eastern District of New York indicated its agreement with the balancing approach adopted earlier by the Second Circuit in *N.Y. State Association for Retarded Children v. Carey*.³² That balancing

25. N.Y. Code of Prof'l Responsibility DR 7-104(A)(i) (N.Y. State Bar Ass'n 1999).

26. 558 N.E.2d 1030 (N.Y. 1990).

27. *Id.* at 1035.

28. *Id.*

29. *Id.*

30. 106 F.R.D. 32 (E.D.N.Y. 1985).

31. *Id.* at 35.

32. 706 F.2d 956 (2d. Cir 1983); *see also Frey*, 106 F.R.D. at 36 (denying order to preclude plaintiffs' counsel from questioning employees of defendant state school based on the rationale that the danger of such an interrogation was outweighed by its potential to aid in arriving at the truth).

approach involved weighing the competing interests between "plaintiff's need for information in the possession of [defendant] and the protection of the party-defendant from adverse counsel obtaining uncounselled [sic] disclosures."³³

Applying the balancing test, the *Frey* court held that permitting a government entity to block plaintiffs from interviewing potential witnesses under the "no contact rule," except through costly discovery procedures, might frustrate the right of an individual plaintiff with limited resources to a fair trial.³⁴ This, in turn, might have the effect of deterring other litigants from pursuing their legal remedies.³⁵ Similarly, in *McKitty v. Board of Education, Nyack Union Free School District*,³⁶ the District Court for the Southern District of New York held that plaintiff's counsel may interview government employees holding "non-managerial and non-controlling positions," but may not make ex parte contact with employees who had "the power to bind the defendants or settle controversies on their behalf."³⁷

B. The Fact That Particular Types of Communication Between an ACS Caseworker and a DLS Attorney Are Privileged Does Not Make ACS Caseworkers Represented "Parties" for All Purposes, Nor Does It Privilege All Their Communications With DLS Attorneys

In reaching its decision, the court in *McKitty* considered whether its holding ran afoul of *Upjohn Co. v. United States*,³⁸ where the United States Supreme Court "held that even low and middle level corporate employees are covered by the attorney-client privilege."³⁹ Determining that its holding was not inconsistent with the decision in *Upjohn*, the *McKitty* court opted to follow the Supreme Court's reasoning,⁴⁰ which states:

The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: "[T]he protection of the privilege extends only to *communications* and not

33. *Frey*, 106 F.R.D. at 36.

34. *Id.*

35. *Id.*

36. No. 86 Civ. 3176, 1987 WL 28791 (S.D.N.Y. Dec. 16, 1987).

37. *Id.* at *4.

38. *Id.* at *2-*3.

39. In *Upjohn*, information was found to have been needed from lower- and mid-level management to supply a basis for legal advice concerning company compliance with various regulations. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). The Supreme Court found that the employees were sufficiently aware they were being questioned so that the corporation could obtain legal advice relative to practices which could be illegal. *Id.* All employees of the company were made aware of the legal implications of the questionnaire at issue. *Id.* Under these circumstances the Court held that the communications at issue (i.e., responses to the questionnaire) were protected against compelled disclosure. *Id.* at 395.

40. *McKitty*, 1987 WL 28791, at *3.

to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."⁴¹

Since child protective line caseworkers can neither bind the agency,⁴² nor bring liability on it if their actions are not taken pursuant to municipal policy or custom,⁴³ it is only on rare occasions they would be found, under the holding in *Niesig*,⁴⁴ to be represented "parties" covered by the "no-contact rule." Federal courts have consistently granted child protective caseworkers qualified immunity from liability for almost all acts⁴⁵ taken in the course of their employment, with the exception of intentional violations of due process rights.⁴⁶

Even if communications between ACS caseworkers and DLS attorneys participating in child protective proceedings were subject to the attorney-client privilege (though the relationship between them is not a traditional attorney-client relationship), the underlying facts upon which those communications are based (e.g., the parent-child relationship, reunification efforts, etc.) would not fall within the scope

41. *Upjohn*, 449 U.S. at 395 (emphasis and alteration in original) (quoting *Philadelphia v. Westinghouse Electric*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

42. To this writer's knowledge, there are no documents in the public domain that specifically set forth the responsibilities of caseworkers at each level of the ACS hierarchy with regard to decision-making for individual families. It is public knowledge, however, that ACS has a comprehensive system of supervision that consists of a significant number of levels past the line caseworkers. It is also this writer's experience that, while caseworker input is solicited by supervisory personnel, the power to make decisions on crucial issues such as permanency planning goals and timing of family reunification ultimately remains with supervisors, and line caseworkers cannot make those decisions independently. Moreover, it is rare that higher level ACS supervisory personnel appear in Family Court on any particular matter. If personnel from a higher level were to appear, however, for purposes of binding the agency, they may be presumed to be represented "parties" on those occasions, and the prohibitions of the "no contact rule" would therefore apply. See *McKitty*, 1987 WL 28791, at *2; *Frey v. Department of Health and Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985).

43. Under 42 U.S.C. § 1983 (1994), "for a court to impose liability on a municipal defendant" such as ACS, it "must identify a municipal policy or custom from which the alleged injury arose." See, e.g., *Tenenbaum v. Williams*, 193 F.3d 581, 597 (2d. Cir. 1999).

44. *Neisig v. Team I*, 558 N.E.2d 1030 (1990).

45. See, e.g., *Tenenbaum*, 193 F.3d at 597 (affording qualified immunity to child welfare workers against plaintiffs' procedural due process claims).

46. Cf. *Sundbye v. Ogunleye*, 3 F. Supp. 2d 254, 261 (E.D.N.Y. 1998) (holding that even intentional torts committed by government actors are not actionable as substantive due process claims, unless the torts are arbitrary and discriminatory or shock the conscience). In *Sundbye*, qualified immunity was not granted to the caseworker because her alleged coercion of a mother into relinquishing custody of her daughter in disregard of her due process rights could not be considered objectively reasonable. *Id.* at 265-66.

of privilege, as delineated in *Upjohn*,⁴⁷ and should, therefore, constitute areas of legitimate direct discussion⁴⁸ between parent attorneys and ACS caseworkers.

IV. APPLICATION OF THE "NO CONTACT RULE" TO COMMUNICATION BETWEEN PARENT ATTORNEYS AND ACS CASEWORKERS IMPEDES EFFICIENT RESOLUTION OF CHILD PROTECTIVE CASES AND SLOWS DOWN THE REUNIFICATION OF FAMILIES

Prohibiting communication between parent attorneys and ACS caseworkers does not serve the purposes of the "no contact rule," since the rule's purposes⁴⁹ relate to overreaching, not to protection of a party from revelation of the underlying facts in a case.

The purpose of child protective proceedings is not to find fault with ACS caseworkers who, in any event, remain mostly immune from the threat of lawsuits, but to reunite families. Caseworkers have obligations to facilitate preservation of the family unit by arranging parental visitation, helping parents obtain appropriate services, and providing information to parents regarding family preservation and reunification.⁵⁰

A caseworker's fulfillment of his or her role requires effective communication with the parents.⁵¹ Such communication ought to involve the parent attorney, who functions as the parent representative, and therefore, when necessary, acts in the parent's

47. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

48. As the court in *McKitty* held, *Upjohn* does not protect the corporate employee from factual disclosures made by its employees, but inquiry may not be made of the employee as to what he or she told defendants' attorney. *McKitty v. Board of Educ., Nyack Union Free Sch. Dist.*, No. 86 Civ. 3176, 1987 WL 28791, at *3 (S.D.N.Y. Dec. 16, 1987).

49. See Sinaiko, *supra* note 1, at 1462 (discussing the various purposes of the rule).

50. See N.Y. Soc. Serv. Law § 409-a (McKinney 1992); About ACS Policies, at http://www.ci.nyc.us/html/acs/html/whatwedo/principles_parent.html (on file with the *Fordham Law Review*). Section 409-a(1)(a) requires a social services official to provide preventive services to a child and his or her family, in accordance with the family's service plan. The relevant provision states in pertinent part:

[U]pon a finding by such official that (i) the child will be placed or continued in foster care unless such services are provided and that it is reasonable to believe that by providing such services the child will be able to remain with or be returned to his [or her] family"

§ 409-a(1)(a). Preventive services include the following, which are all described in detail in N.Y. Codes R. & Regs. tit. 18, 423.2 (2000): case management; case planning; casework contacts; daycare services; homemaker services; housekeeper/chore services; family planning services; home management services; clinical services; parent aide services; day services to children; parent training; transportation services; emergency cash or goods; emergency shelter; and housing services (rent subsidies, including payment or arrears or any other assistance necessary to obtain adequate housing).

51. About ACS Policies, at http://www.ci.nyc.us/html/acs/html/whatwedo/principles_parent.html (on file with the *Fordham Law Review*).

stead. When the parent attorney contacts a caseworker on his or her client's behalf, the purpose of the contact is to resolve issues impeding the family from being reunited. The attorney might contact the caseworker to determine the parent's responsibilities and confirm his or her clients' rights and obligations, or to facilitate resolution of potential impediments to service plan provision or compliance. Prohibiting direct contact between parent attorneys and ACS caseworkers not only hinders the reunification process, but does so needlessly, since the purposes of the "no contact rule" are not served by its application in this context.

To the extent ACS caseworkers assume the role of service providers,⁵² they do not fulfill the definition of "alter ego" in an adversarial relationship, as noted in *Frey*.⁵³ In fact, if communication between the parent attorney and a caseworker results in an admission by the caseworker about the government's failure to satisfy its obligations, the government may even benefit from such an admission by focusing on remedying any errors that may have been made by the caseworker and figuring out how best to provide services to the family. Indeed, it is the government's duty (similar to its duty in a criminal prosecution) to bring out the truth of the situation at hand and safeguard a just outcome to the proceedings, regardless of which party prevails.⁵⁴ Allowing the parent attorney to communicate directly with caseworkers recognizes this obligation of neutrality that the government owes both sides, distinguishing child protective cases from standard adversarial civil litigation cases.

An additional reason for allowing direct contact between parent attorneys and caseworkers arises from the fact that caseworkers in the child protective system, acting under their supervisor's directives, have broad discretion when taking action to achieve what is in the best interests of the child.⁵⁵ By expanding the opportunities for communication between parents and caseworkers, parent attorneys can play a crucial role in assisting parents to express their needs and, thereby, help level the power imbalance between the parents and the caseworkers.

Parents need an advocate not only to represent them in court, but also to manage the court-ordered directives they have been given and

52. If children are removed from their family, caseworkers must provide supportive services during the temporary placement, coupled with a plan for how the family will be reunited. N.Y. Soc. Serv. Law § 409.

53. *Frey v. Department of Health and Human Servs.*, 106 F.R.D. 32, 35 (E.D.N.Y. 1985) (stating that "alter ego" analysis applies only to those corporate officers with the authority to bind the company).

54. *Id.* at 37.

55. When service plans have been satisfied, ACS decision-makers determine whether, or if, children should be reunited with their parents. While decisions are subject to Family Court review pursuant to N.Y. Fam. Ct. Act § 1055 (McKinney 1999) and adjustment, the opinion of social service officials is accorded due deference.

help them navigate through the child protective system. In this context, attorneys may advocate for fair case plans, assist parents in complying with court orders, and help manage the overall progress toward reunification.⁵⁶ Parents often have difficulty negotiating conflicting requirements of treatment programs, parent-child visits, and work obligations, identifying and retaining affordable and appropriate housing, and integrating themselves into their children's educational and treatment programs. Moreover, many parents involved with the child welfare system are required to participate in the Work Experience Program ("WEP") or have jobs that restrict access to telephones during the work day. Permitting the direct involvement of parent attorneys in case plan implementation through communication with caseworkers and attendance at case planning meetings together with their clients can aid in the speedy resolution of such matters and facilitate reunification of the parents and their children.

CONCLUSION

ACS's policy of prohibiting caseworkers from communicating with parent attorneys inhibits the reunification of families and, hence, the full engagement of parents in the planning process. ACS's openness to its caseworkers communicating with children's law guardians reflects its opinion that direct contact between its caseworkers and lawyers for opposing parties in the proceedings is not only necessary, but productive. The prohibitive policy of ACS with respect to parent attorneys shuts them out of an important avenue of advocacy for parents and shuts parents out of the opportunities such advocacy could have otherwise provided to them. Since ACS caseworkers are not represented "parties" pursuant to the New York Code of Professional Responsibility DR 7-104, there is no firm legal grounding for a policy precluding direct communication between parent attorneys and caseworkers. The policy should be revisited and revoked.

56. For example, if the parents have been referred to a therapy provider to whom they cannot relate, or a provider who is ill-suited to meet the requirements of the service plan, the parent attorney can frame this issue for the caseworker. In addition, the parent attorney can troubleshoot difficulties between the parents and the foster parents with the caseworker. The parent attorney can articulate skillfully the particular impediments the parents face in meeting the service plan requirements and advocate for much needed assistance. The parent attorney can convey general objections or concerns about the family service plan.

CONFERENCE PARTICIPANTS

Mimi Abramovitz
Hunter College School
of Social Work

Nina Allen-Jackson
Parent Advocate

Alex Atkinson
JCCA

Alexandra Barsdorf
Fordham University,
Department of Psychology

Nicki Bazer
NYU School of Law

Irene Berthel
Child Welfare Organizing Project

Rolando Bini
Parent Advocate

Eric Brettschneider*
Agenda for Children Tomorrow

Patricia Brownell
Fordham University, GSSS

Folasade Campbell
Concerned Citizens for
Family Preservation

Sandra Carr
WINGS

Eileen Ain
National Association of
Social Workers

Michael Arsham*
Child Welfare
Organizing Project

Regina Ballard
Seaman's Society

LaTonya Baskerville
JCCA

Denis Berger
Brooklyn Legal Services,
Corp A

Stephen Billick
New York Medical College

Bernadette Blount*
Child Welfare
Organizing Project

Scott Brown
Manhattan Family Court

Susan Bryant
The City University of
New York

Joseph Cardieri*
ACS

Annabel Carreras
Graham-Windham

Jill Cohen*

Child Welfare Organizing Project

Steve CohenSpecial Child Welfare
Advisory Panel**Mary Jane Cotter****John Courtney**Hunter College Center for
Study of Family Policy (Child
Welfare Fund & Watch)**Helene Craner**Resources for Children with
Special Needs**Barbara DeMayo***

Manhattan Family Court

Vivian DeMilley

ACS, Department of Advocacy

Annette DePalma*Fordham University Stein
Center for Law & Ethics**Marguerite Dingle***

Parent Advocate

Monica Drinane*

The Legal Aid Society

Ilze EarnerImmigration and Child
Welfare Project**Laurel Eisner**

Public Advocates Office

Judith ElkinTalbot Perkins
Children's Services**Judge Lee Elkins**

Kings County Family Court

Paula Fendall

NYU School of Law

Janet FinkNYS Office of Court
Administration**Jennifer Fisher**

Fordham University

Mary Ann Forgey*Fordham University GSS;
Interdisciplinary Center for
Family & Child Advocacy**Karen Freedman**

Lawyers for Children

Paula Galowitz*

NYU School of Law

Philip GentyColumbia University
Law School**Katherine Gerald**

Voices of Women

Jill Gerson*

NASW Committee on

Organizing Project

Children & Families

Linda Gibbs

ACS, Management and Planning

Dave Glenwick

Fordham University, Graduate
School of Psychology

Arlene Goldsmith

New Alternatives for Children

Ms. Geetha Gopalan

Graham-Windham

Ms. Carmen Goris

Kinship Foster Boarding
Home, JCCA

Theresa Gorski

Bruce Green*

Fordham University Stein Center
for Law & Ethics

Daniel Greenberg

Legal Aid Society

Martin Guggenheim

NYU School of Law

Marlene Halpern*

Legal Aid Society,
Volunteer Division

Alan Halpin

Lawyers for Children

Dana Hamilton*

Child Welfare
Organizing Project

Debra Harris*

Fordham University,
Interdisciplinary Center for
Family & Child Advocacy

Beth Harrow*

Brooklyn Legal Services,
Corp. A

Alison Harte

Agenda for Children Tomorrow

Debbie Heiser

Fordham University Graduate
School of Psychology

Dorothy Henderson

JBFC

Woody Henderson

National Action Network

Ann Higgins-D'Alessandro*

Fordham University, Department
of Psychology; Interdisciplinary
Center for Family & Child
Advocacy

Leah Hill

Fordham University School of
Law; Interdisciplinary Center
for Family & Child Advocacy

Edith Holzer*

COFCCA

Judge John Hunt

Queens County Family Court

Jacqueline Israel
Graham Windham

Katherine Jankowski
Fordham University,
Department of Psychology

Conchita Jones
People United for Children

Stephen Kapovich
Parent Advocate

Tanya Krupat
ACS, Division of Foster Care &
Preventive Services

David Lansner
Lansner & Kubitschek

Amy Liszt
C-PLAN

Judge Margarita Lopez Torres
Kings County Family Court

Naomi Lynch
COFCCA Training Consortium

Nancy Matles*
Appellate Division,
2nd Department

Bonnie McCoy-Williams*
Professional Development
Program, Satterwhite Academy

David Megley*
Graham-Windham

Sue Jacobs*
Legal Action Center

Sandra Jimenez
St. Christopher's, Inc.

Christopher Juge
ACS Law Academy

Caroline Kearney*
Legal Support Unit, LSNY

Madeleine Kurtz
NYU School of Law, Family
Defense Clinic

Katherine Law*
Law Guardian Program,
Appellate Division, 1st Dept.

Susan Lob
Battered Women
Resource Center

Alexandra Lowe
ACS, Division of Foster Care
& Preventive Services

Jessica Marcus
NYU School of Law

Brian Maxey
Director, Citizens Jury Project

Dean McKay
Fordham University Graduate
School of Psychology

Sania Metzger
Office of Roger Green,
NYS Assembly

Jan Miner
Fordham University GSSS

Jose Nazario
MFY Legal Services

Iya Negra
NRW & Associates
Consulting Service

Jennifer Nelson*
Voices of Youth

Danielle Nisivoccia
Fordham University, GSSS

Emily Olshansky
Appellate Division
1st Department

Deirdre O'Sullivan*
Office of the Public Advocate

Diana Pichardo Henriquez
East Harlem Parent's Center

James Purcell
COFCCA

Martha Rayner
Fordham University Criminal
Defense Clinic

Judy Reisman*
Parent Advocate

Ann Moynihan*
Fordham Law School;
Interdisciplinary Center for
Family & Child Advocacy

Marty Needelman
Brooklyn Legal Services,
Corp A

Catherine Nelson*
Child Welfare
Organizing Project

Stephanie Nilva
LIFT - Legal Info for
Families Today

Gessy Nixon*
Voices of Youth

Hank Orenstein*
C-PLAN

Lisa Parrish
ACS, Foster Care &
Preventive Services

Rose Pierre-Louis

Martha Raimon
The Women's Prison
Association

Chantal Regis
Urban Justice Center

Edwina Richardson-Thomas
18-B Panel Attorney
New York County

Lawyers' Association

Sara Rios

Puerto Rican Legal Defense and
Education Fund

Jayne Roberman**Eve Robinson**

Children FIRST

Joyce Russell Anderson

Seamen's Society

Judge Sara P. Schechter

New York County Family Court

Christine Schessler

Fordham University
School of Law

Nanette Schrandt*

Legal Aid Society Juvenile
Rights Division

Junius Scott

Youth & Family Services Div,
AC&F/NE Hub, Region II

Lauren Shapiro

Brooklyn Legal Services, Corp. B

Alison Rivard

Fordham University,
Children FIRST

Dorothy Roberts

Northwestern University
School of Law

Barry Rosenfeld

Fordham University,
Department of Psychology

Sharonne Salaam*

People United for Children

Andrew Scherer

LSNY

Nanette Schorr*

Bronx Legal Services

Beth Schwartz

Fordham University,
Law Clinic

Yvette Sealy

Fordham University, GSSS

Carol Sherman

Children's Law Center

Lonnie Sherrod

Fordham University,
Department of Psychology

Judge Gloria Sosa-Lintner

New York County Family Court

Jane Spinak*

Columbia Law School

Virginia Strand*

Fordham University,
Children FIRST

Marybeth Sullivan Kass

Holyoke, MA

Androniki Tsamas

Satterwhite Training Academy

Ernst VanBergeijk

Fordham University, GSSS

Jay Wade

Fordham University,
Department of Psychology

Nakea Walker

Staten Island, NY

Harriet Weinberger*

Law Guardian Program,
Appellate Division,
2nd Department

Anne Williams Isom

ACS, External Affairs

Carole Zabar**Lyn Slater***

Fordham University Graduate
School of Social Service

Evette Soto Maldonado

Puerto Rican Legal Defense &
Education Fund

Judge Carol Stokinger

Bronx County Family Court

Jim Sugrue**Nancy Thomson***

ACS, Division of
Legal Services

Janice Tudy-Jackson**Lynn Vogelstein***

NYU School of Law, Family
Defense Clinic

Charles Walker

Voices of Youth

Karen Walker-Bryce

Lawyers for Children

Marcia Werchol*

Family Court Mental
Health Services

Barbara Winter**Aimee Zeltzer**

Fordham University

Brian Zimmerman
18-B Panel Attorney
New York County
Lawyers' Association

Judge Ruth Jane Zuckerman

* Member of Conference Planning Committee