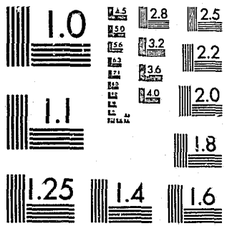

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LAW GUARDIANS IN NEW YORK STATE

A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN

JANE KNITZER, Ed.D., Director
Institute of Child and Youth Policy Studies
Statewide Youth Advocacy, Inc.

PROF. MERRIL SOBIE, Legal Consultant
Pace University School of Law

This study was funded by the Division of Criminal Justice Services, the W.T. Grant Foundation and the Foundation for Child Development, and was conducted under the auspices of the Special Committee on Juvenile Justice of the NYSBA. This report was approved and released by the Executive Committee of the New York State Bar Association at its meeting held April 26, 1984.

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Acknowledgments

As always in a study of this magnitude, there are countless people who provided help and information that cumulatively make such a report possible. At the outset, special gratitude is owed to the judges who opened their courts to us, to the law guardians who candidly shared their views and to others across the state who so willingly responded to our requests for information.

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I also owe special thanks to Julie Burdick Hewitt, who served as my assistant and who enthusiastically, thoughtfully, and competently pitched in to do whatever was necessary, to Ro Cavallo, who with unending cheerfulness and skill typed the many drafts, and to Merril Sobie, Esq. who provided advice and help at every step of the project. I am also grateful to Cheryl Bradley, Esq. who is primarily responsible for the guidelines for law guardians representing children in child abuse and neglect proceedings, foster care approval, foster care review, and termination of parental rights proceedings, and to Alan Sussman, Esq. who reviewed all the guidelines.

Without the generous support provided by the William T. Grant Foundation, The Foundation for Child Development and the New York State Division of Criminal Justice Services, as well as the New York State Bar Association which made publication of the report possible, there, of course, would have been no study.

And finally, I am especially grateful to the members of the Technical Advisory Committee who throughout the project provided steady encouragement and thoughtful criticism, and to the Hon. Howard A. Levine, chair of the Juvenile Justice Committee of the New York State Bar Association, whose commitment to the project has been deeply appreciated.

Jane Knitzer

Preface

When the Family Court was created in 1962, New York led the nation in providing a statutory right to legal representation for the children appearing before the court. For reasons not entirely clear from the legislative history, the act employed a new phrase, "Law Guardian," to denominate the lawyer providing that representation. Moreover, the drafters chose not to particularize the duties and functions of the law guardian, but merely formally to recognize that representation was needed for achieving "due process of law" and to assist in the factfinding and dispositional processes of the court (Family Court Act, §241). Shortly after the New York State Bar Association's Special Committee on Juvenile Justice was formed in the late 1970's, the panel unanimously came to the conclusion that the time had come for a full-scale study of the law guardian system as it had evolved over the nearly 20 years of its existence. Among the factors supporting that conclusion were:

(1) the existence of considerable confusion and debate among the bar, bench and social agencies concerning exactly what a law guardian is and does. The statute did not define the role and, because of the lack of any significant number of appeals from Family Court determinations, decisional law had not expanded on the statutory generalities, comparable to the common law development of the concept of effective representation in the criminal justice system. A further complicating factor was that in a number of important areas of Family Court jurisdiction (e.g., foster care review) the proceedings bore little resemblance to traditional forms of litigation. Also, the wide range of discretionary alternatives open to Family Court Judges at the dispositional stage were quite unique and required new skills and knowledge on the part of the child's advocate;

(2) the enormous expansion of the use of law guardians over the past 20 years, partly due to the Family Court's comparable growth in case load (much greater than any other court in the State judicial system), a greater general awareness of the rights of children to have independent representation in litigation affecting their interests, and finally to statutory additions to the Family Court's jurisdiction through child welfare legislation in the ensuing years. The dramatic growth in the use of law guardians is easily demonstrated: in the Judicial Conference Report for the first full judicial year of operation of the Family Court, the Statewide cost of law guardian services outside the City of New York was shown as about $84,000. By 1982, the cost of the same services was in the several millions of dollars;

(3) there were many signs that the system was seriously deficient, including the personal observations of committee members, complaints received from individuals and organizations, and reports from various local or regional studies of the operation of the Family Court.

With these considerations and conclusions in mind, the Committee then sought funding for the study. We were fortunate in having elicited support from the State Division of Criminal Justice Services and two private foundations, the W. T. Grant Foundation and the Foundation for Child Development, to underwrite the study and report. At this point, it was concluded that, due to time and financial constraints, the study would not cover law guardian services in New York City. Such services were primarily provided by the New York City Legal Aid Society and previous studies of the City Family Court had already provided broad information concerning how the Society performed its function. Procedures were then established to insure that the study would be objective, comprehensive and responsible, both as a social research project and insofar as it entailed evaluations of the performance of lawyers. A detailed request for proposals to do the study was prepared and then disseminated. The written proposals submitted in response were screened and the finalists were interviewed personally. Once a research organization was selected, a technical advisory committee was formed, composed of experts in the fields of Family Court litigation, child welfare and social research. The advisory committee scrutinized the proposed methodology of the study and each successive draft of each part of the report and its supporting data. There were also a number of meetings with Dr. Jane Knitzer, director of the study, and Professor Merril Sobie, the project's legal consultant, for purposes of clarification and to offer constructive suggestions and criticism.

The study in its final form, for which full credit should be given to Dr. Knitzer and her staff and to Professor Sobie, represents in our view a professional work product of the highest caliber in terms of its thoroughness and fairness. The report's recommendations were arrived at only after careful consideration and debate within the Committee on Juvenile Justice and the technical advisory committee.

Unquestionably, the findings contained in the report will be found disturbing to say the least. It would be grossly unfair, however, to view the report as simply an indictment of the Bar. The unique features of representing children in the Family Court, the sensitivity of the issues, the novelty of the law, the wide discretion accorded the court and its juvenile and child care agencies, the problem of even communicating with the client, combine, we think, to make the role of law guardian one of the most difficult assignments for a lawyer in any court. Viewed from that perspective, and taking into account the revelations of the grossly inadequate support and direction given law guardians under the system, a fairer conclusion would be that the findings would have been far bleaker but for the unselfish devotion of many lawyers to the causes of the children for whom they served as law guardians.

We are firmly convinced that the law guardian study is important, not only to the bench and bar, but to social policy makers and the public as a whole. With the single exception of custody disputes between parents, all

of the kinds of Family Court proceedings studied by the project, for which some 80,000 Family Court petitions were filed in total throughout the State last year, involve cases where the child was before the court because of some form of State action. Under our system of justice, the lawyer, vigorously advocating for his or her client, represents the primary means by which official decisions and assertions of authority are subjected to independent and objective scrutiny. Because Family Court Judges and juvenile justice and child welfare agencies have such broad, undefined power and discretion, that vital social function of providing independent review and accountability regarding governmental action is especially important in the case of the law guardian. Also to be considered is that, for all too many youngsters, a Family Court appearance represents their first exposure to the legal system. Whether the initial experience breeds respect or cynicism about law and justice will in large part depend on the child's law guardian. From our collective, extensive experience with the juvenile justice system, the members of the Committee believe that a youngster's first impression of the courts can have a profound effect on future behavior. Finally, this report should be a matter of general concern because it directly confronts us with a moral issue. Out of a combination of our parens patriae tradition and an honest recognition of the special needs of children in court, society has committed itself to providing them with legal representation. The study demonstrates, unassailably, that to a significant degree, this guarantee of counsel is illusory - that a child before the Family Court will not receive the kind of legal representation we would want or expect for our own children under like circumstances. The reforms suggested in the report represent ways in which we as a society can honorably fulfill our commitment.

The New York State Bar Association's Special Committee on Juvenile Justice expresses deep appreciation to various persons and organizations who made the law guardian study possible. Among these were the late Frank Rogers, former Commissioner, Richard J. Condon, present Commissioner, and Howard Schwartz, all of the State Division of Criminal Justice Services; the W. T. Grant Foundation and the Foundation for Child Development; the presidents , executive director and staff of the New York State Bar Association serving during the course of the study; State Chief Administrative Judge Robert J. Sise and the staff of the Office of Court Administration; the Presiding Justices of the Appellate Division, Francis T. Murphy, Jr., Milton Mollen, A. Franklin Mahoney and Michael F. Dillon and their respective staffs; the members of the technical advisory committee; and the Family Court Judges and their staffs, law guardians, and others within the juvenile justice system who so generously and openly permitted themselves to be the subject of the research.

Howard A. Levine
Chairman
Special Committee on Juvenile Justice
New York State Bar Association

Table of Contents

Chapter 1

THE LEGAL REPRESENTATION OF CHILDREN IN NEW YORK STATE: EXECUTIVE SUMMARY

This chapter summarizes the findings and recommendations of a two-year study of the effectiveness of legal representation accorded to children in New York State. The study was undertaken at the request of the New York State Bar Association and was designed to assess both the quality of representation on behalf of individual children and the adequacy of the delivery system through which such representation is provided. It marks the first statewide effort since the enactment of the Law Guardian statute in 1962 to determine whether the law guardian system in practice is reflective of the state's strong statutory commitment to protect the rights and interests of the children who come before Family Court (F.C.A. §241).

In calling for the study, the Juvenile Justice Committee of the New York State Bar Association, along with a number of others concerned with children in New York, had three specific concerns. They were troubled by findings from several county studies suggesting serious problems in the overall quality of law guardian representation. They were aware of serious questions among both lawyers and non-lawyers about whether law guardians are adequately responding to the complex legal and psychological interests of the increasing numbers of abused and neglected children coming before the Family Court. And, they were concerned about whether law guardians adequately understand their potential importance in ensuring that children placed in foster care "voluntarily" by their parents do not remain too long in foster care, and, if appropriate, receive services to prevent unnecessary (and costly) out-of-home placements.

In recognition of the complexity of these issues, the scope of the study was broad. The charge was threefold: to examine the quality of representation in all proceedings in which representation is either mandated (including juvenile delinquency, Persons in Need of Supervision (PINS), child abuse and neglect), or discretionary (including the approval and review of voluntary foster care placements); to draft guidelines for the effective representation of children in specific proceedings; and to analyze the extent to which the current fiscal and administrative structure underpinning the Law Guardian Program facilitates or impedes the effective representation of individual children.

The study was supported by the New York State Division for Criminal Justice Services, the Foundation for Child Development and the W. T. Grant Foundation. A Technical Advisory Committee especially constituted for the study, along with the Juvenile Justice Committee, provided advice and encouragement throughout. (See Appendix A for a list of the members of both committees.)

THE LAW GUARDIAN PROGRAM: AN OVERVIEW

As a context for considering specific study findings and recommendations consider first the Law Guardian statute itself, then the current system for delivering and monitoring the representation of children.

The Law Guardian Statute

New York State was the first state in the country to recognize the importance of providing independent representation to children coming before the Family Courts. As early as 1962, the legislature provided for the appointment of a law guardian at the request of a minor or parent in either neglect or delinquency proceedings. In 1970, in part to comply with the Supreme Court decision that juvenile delinquents had certain due process rights, including the right to counsel, [In Re Gault, 387 U.S. 1, (1967)] the New York legislature made representation mandatory in not only juvenile delinquency proceedings, but in PINS and abuse and neglect proceedings as well. That 1970 statute remains substantially unchanged today. (F.C.A. §§ 241-249-a)

The language of the findings and purpose section of the law guardian statute (F.C.A. § 241) is especially significant because it calls attention to the law guardian's obligations. In particular, it specifies that the law guardian protect the child's due process rights and express the child's wishes to the court. But it also indicates that law guardians have an important role with respect to both facts and the dispositional outcome.

> "...[C]ounsel is often indispensible to a practical realization of due process of law, and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court."

However, while the statute makes clear that the law guardian's role is to protect the due process rights and the interests of the child, as well as to express the child's wishes to the court, it does not offer guidance as to how law guardians should carry out this mandate. Further, the legislative history does not indicate why the legislature decided to call the child's lawyer a law guardian, an issue which, as we show later, continues to trouble and confuse many who represent children.

The Structure of the Law Guardian Program

Under the statute, representation of children can be provided within each county in one of three ways: by a legal aid society designated to provide full-time representation, by a law guardian panel comprised of attorneys willing to serve on a per case basis, or by an attorney or attorneys serving, on a contract basis, as law guardians to the Family Court.

Responsibility for these different approaches is divided among two agencies. The Office of Court Administration is charged to negotiate contracts with legal aid societies while the Appellate Division of each of the four Judicial Departments is authorized to designate the law guardian panel and to contract with independent attorneys. (Initially, all responsibility rested with the Appellate Divisions; in 1974, the bifurcated approach described here was adopted.)

Additional guidelines for the operation of the Law Guardian Program are provided by the Rules of the Chief Judge and by Appellate Division Rules within each of the four Judicial Departments. The Rules of the Chief Judge require each Appellate Division to promulgate its own rules concerning standards for the appointment, removal, evaluation and training for the law guardians. The rules also authorize each Appellate Division to establish a Departmental Advisory Committee and require them to submit an annual report to the Chief Administrator of the Courts.[1] Consistent with this directive, Appellate Division Rules for each Department were promulgated in 1980.[2] The rules vary somewhat by department, but all address the required areas.

The Scope of Law Guardian Program

Law guardian representation is provided by panel attorneys in fifty-three counties in New York State. It is estimated that there are about 2,300 panel attorneys in the state. They are paid $25 an hour for in-court time and $15 an hour for out-of-court time. Counties in New York City and four other counties have full-time law guardian programs through legal aid society offices. At present, no county contracts with individual law guardians.

Based on the best available, but incomplete, data, panel law guardians handle at least two thirds (67%) of the total petitions for which law guardians are assigned, non-New York City legal aid attorneys about 11% and law guardians from the Juvenile Rights Division of the New York City Legal Aid Society the remainder (22%). In 1982, the last year for which complete fiscal information is available, the Law Guardian Program cost about $10 million dollars. Panel costs account for about 25% of the total, legal aid costs 75%. In Fiscal Year 1983, $10.8 million was requested to fund the entire program.

In 1982, a total of 348,877 petitions were disposed of by Family Court. 85,825 of these involved the proceedings under scrutiny in this study; juvenile delinquency, PINS, abuse and neglect, custody, foster care approvals, foster care reviews and termination of parental rights. Of these petitions, 54,785 involved proceedings in which law guardian representation was mandatory; 31,040 involved proceedings in which law guardians may have been assigned (such as custody, foster care approvals and foster care reviews).[3] Recent

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[1] 22 N.Y.C.R.R. Section 7.1.

[2] 22 N.Y.C.R.R. Sections 611, 679, 835, 1032.

[3] Fifth Annual Report of the Chief Administrator of the Courts 1983 Table 49 "Original and Supplementary Petitions, Petitions Added, Deducted and Actively Pending by Type of Proceeding." At present, there is no accurate way to determine on a statewide, or even countywide basis whether a law guardian was assigned in a proceeding for which representation is discretionary.

trends in caseload changes suggest that while the numbers of delinquency and PINS petitions are fairly stable, the caseload figures for proceedings in which representation is discretionary are steadily increasing. Statewide, the number of foster care approvals, foster care reviews and custody petitions before Family Court increased 30% between 1979 and 1981. During this same period petitions for which representation is mandated (juvenile delinquency, PINS, abuse and neglect and termination of parental rights) decreased by 9%.[4]

The increases in foster care and child custody cases coming before Family Court, as well as the steady levels of child protective cases are particularly significant. Such cases now comprise about 36% of the statewide Family Court caseload for which law guardians must be, or may be assigned. These cases are often complex and their outcomes may have life-long consequences for the children involved, particularly with respect to the status of biological, foster or adoptive parents. Yet the legal knowledge and skills involved, such as the capacity to sensitively interview an abused child, are frequently unfamiliar ones, not easily acquired in other types of practice.

THE LAW GUARDIAN STUDY: METHODOLOGY

In recognition of the complexity of studying the representation of children, a multi-pronged research strategy, requiring the collection of different types of data from a variety of sources, was designed. First, in order to get the views of law guardians themselves on issues relating to representation, all known panel attorneys were surveyed by mail. The questions focused on: the characteristics of attorneys serving as panel law guardians; their general caseload patterns; the extent to which they specialize in juvenile law; the nature of the back-up and support services available to them; their views about the scope of their role; their frustrations; and the nature of the changes they would like to see in the law guardian program.

Second, fourteen counties, representing a range with respect to population levels, location in the state, and Judicial Department were studied intensively through on-site visits.[5] All four counties outside of New York City relying on legal aid societies to provide law guardians were included in the sample; the other ten counties rely on panel systems.[6] The on-site component of the

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[4]Third Annual Report 1980, Table 49, Fourth Annual Report 1982, Table 49.

[5]The counties studied are not named in this report as our purpose is to identify systemic issues affecting the delivery of effective law guardian services. Initially, 15 counties were to be studied. Family Court judges in one county, however, refused to cooperate.

[6]The original request for a proposal excluded the Juvenile Rights Division of the New York City Legal Aid Society, which represents about 90% of the children in New York City, on the grounds that the JRD has been studied extensively in the past. Thus, the findings in this report cannot be generalized to include the Juvenile Rights Division.

study had three purposes. The first was to provide data on how, in fact law guardians actually represent individual children. The second was to ensure that the perspectives of those who work most closely with the law guardians, such as judges, social workers and probation officers, were included in the study. The third was to gather information from a sample of law guardians on a more intensive basis than is possible through a survey.

To this end, in order to assess the representation accorded to individual children in each county, the study team observed in Family Court and reviewed a sample of randomly selected court files. In all, 199 courtroom observations were made and 335 case files reviewed. Since courtroom observations provide only partial information about representation, the field team also selected specific cases in each study county to discuss with the appropriate law guardian in order to understand the law guardian's strategy, his or her familiarity with the facts of the case, the dispositional alternatives, and the child. In all, 84 case-specific interviews were conducted. Finally, verbatim transcripts of a total of 85 completed cases from three counties were also analyzed. This made it possible to supplement the courtroom observations, which typically capture only one appearance, with fuller information about the entire course of selected cases.

In order to ensure an adequate sampling of the views of those who work with the law guardians, in each study county interviews were conducted with the Family Court judge or judges, the court clerk, the president of the local Bar Association and/or the chair of the most relevant committee, representatives of the Department of Social Services and Probation, non-law guardian attorneys, and, as appropriate, others closely involved with law guardians, such as detention workers and directors of residential programs. Questions were both general and focused on specific examples of effective and ineffective representation. In all, over 175 people who work with law guardians were interviewed.

In addition, at least a ten percent sample of the panel law guardians were interviewed in each of the panel counties, and all but 3 of the 20 legal aid attorneys in the legal aid offices studied. The law guardians were asked to respond to a general set of questions similar to those asked on the mail survey, as well as to the case specific questions described above. In all, about 100 law guardians were interviewed.

To augment both the law guardian survey and the field component of the study, twenty-four children in placement were interviewed to determine their perceptions and feelings about law guardians. Finally, as appropriate, officials involved with the law guardian program in each of the Judicial Departments and the Office of Court Administration were interviewed. All available written material on the Law Guardian Program was also reviewed.

THE LAW GUARDIAN STUDY: MAJOR FINDINGS

Below is a summary of the major findings that are discussed in greater detail in the full report. The first section, based primarily on survey data,

focuses on the panel law guardians.[7]

A Profile of New York State Panel Law Guardians

The survey of all panel law guardians (conducted during the fall of 1982) sought information about: the size and nature of both their general practice and their law guardian practice; the extent to which law guardians have access to training and support services directly relevant to their law guardian practice; their perception of the fundamental obligations and role of a law guardian; and their view of needed changes in the law guardian system. The responses were analyzed to show statewide patterns as well as to highlight differences in the law guardians' responses as a function of experience, county population, and for selected questions, region (upstate/downstate) and Judicial Department. Highlights of the findings follow.

Most panel law guardians do not represent many children a year, nor do they see themselves as specialists in children's law.

-The typical panel law guardian represents fewer than twenty children a year. This is less than one-fifth of his or her total practice.

-About one-fifth of the panel law guardians accept only delinquency type cases, 6% accept only child welfare type cases. The remainder accept all types of cases.

-Only one-quarter of the law guardians view themselves as specialists in juvenile law. Over half the law guardians report little interest in the substance of juvenile law.

As a group, panel law guardians report limited experiences to prepare them specifically for law guardian work.

-Almost 70% of the panel law guardians report they did not have any special screening, orientation or co-counsel experience prior to joining the panel, although this varies somewhat by Judicial Department and population levels. 30 to 40% report no relevant clinical or academic experience prior to becoming a law guardian.

This lack of prior experience is compounded for many by a lack of training after appointment to the panel.

-42% of the panel law guardians have had no relevant law guardian training within the last two years. For law guardians in rural or medium-sized counties, this is true

[7]The original intent was to ask legal aid law guardians to complete a parallel form of the survey. However, because we were unable to include the legal aid attorneys from the Juvenile Rights Division in the sample, the decision was made not to use the parallel version.

of over 50% of them. For those who have had training, most has involved child abuse and neglect. Only 14% of the law guardians report any targeted training about the Child Welfare Reform Act, New York State's landmark legislation designed to prevent unnecessary foster care and ensure that children in placement are returned home or adopted in a timely manner.

Overall, the panel law guardians in New York State view their role as representing what they perceive to be the child's best interest.

-Even in juvenile delinquency and PINS proceedings under 15% of the law guardians view the representation of youth as analogous to that of a defense lawyer. A still smaller percentage say they would consistently represent their client's wishes in the face of personal disagreement. These views are greatly affected by region; downstate law guardians are twice as likely to take a rights oriented view and to represent the child's wishes. However, within both upstate and downstate counties, the full range of views about representation was visible, along with reports from a substantial number of law guardians that they are simply uncertain about their role.

Although individual levels of frustration with the Law Guardian Program are not seriously problematic, as a group law guardians are surprisingly critical of the panel.

-Most individual panel law guardians, despite considerable frustration related to reimbursement levels and court delays, anticipate serving as law guardians indefinitely.

-The law guardians as a group have many specific complaints about the panel system and their fellow law guardians. They report frustration with court schedules and scheduling processes, with levels of and delays in the reimbursement process, and sometimes with the failure of other law guardians to represent children effectively.

Panel law guardians seem keenly aware of their need for updates on case law and legislation, and access to independent social workers and mental health professionals.

-From the law guardians' perspective, the greatest training need is for updates on current case law and legislation. Further, 87% of the panel law guardians report they would like to have access to independent social workers and mental health professionals. Half of them would also like access to a brief bank and paralegal assistance. This is particularly true of law guardians living downstate.

These findings have significant implications for the Law Guardian Program. In the first place, the majority of panel law guardians see only a limited number of children a year, making it difficult to develop great expertise in juvenile proceedings. Further, for a good many attorneys, exactly what a law guardian is expected to do is not clear. And finally, the lack of training available to the law guardians is significant both because of the complexity of the substantive laws governing many key proceedings for children and the complexity of the children's circumstances, particularly those involving abuse and neglect, and/or out of home placements.

Quality of Representation

The second set of findings, based primarily on courtroom observations and transcript analysis, supplemented by the views of others, addresses the central question of this study: how effective is the representation accorded to individual children. First, consider the findings from the courtroom observations.[8]

The patterns reflected in the observations are very troubling. Using the most basic criteria of effectiveness -- that the law guardian meet the client, be minimally prepared, have some knowledge of the law and of possible dispositions, and be active on behalf of his or her client -- serious and widespread problems are evident.

-Overall, 45% of the courtroom observations reflected either seriously inadequate or marginally adequate representation; 27% reflected acceptable representation, and 4% effective representation. 24% of the observations lacked sufficient information to be coded. Similar patterns were visible in the transcripts.

Specific problems center around lack of preparation and lack of contact with the children.

-In 47% of the observations it appeared that the law guardian had done no or minimal preparation. In 5% it was clear that the law guardian had not met with the client at all. In 37% of the cases observers could not tell whether the law guardian had met with the client before the court proceeding. Further, in 35% of the cases, the law guardians did not talk to, or made only minimal contact with their clients during the court proceedings.

[8]Information was coded about the law guardian's pre-court and in-court involvement with the client; the apparent level of preparation; and the extent to which the law guardian in an informed and active way argued about the facts or sought to protect the child's best interest or rights. Each observation was also given an overall score. Reliability between the coders was 82%. The methodology is described in detail in Appendix C.

-In the observed instances of effective representation in 5% of the cases the law guardians gave evidence of interviewing their clients carefully; in 17% of the cases the law guardians argued in an informed way about the facts, the child's best interest or the child's rights and in 5% of the cases the law guardians seemed especially responsive to their clients during the proceeding.

Findings with respect to continuity of representation, that is the extent to which the same law guardian represents the same child throughout one proceeding or in different proceedings are also troubling.

-According to case-specific interviews with law guardians, in only 35% of the cases where the child had prior court contact did the same law guardian provide representation in subsequent proceedings. Particularly troubling was the evidence of missed opportunities in foster care review proceedings when the law guardian representing the child at the initial removal proceedings was not reassigned at subsequent reviews of the placement. (Since data suggest that over 40% of the children in placement are likely to have at least two, and often more, periodic court reviews, the pattern of changing law guardians can affect large numbers of children.)

-Efforts to ensure that children are represented by the same legal aid law guardian throughout one proceeding, in concurrent proceedings, and from one proceeding to another are seriously inadequate in the legal aid offices studied. For example, in the panel counties, substitution of law guardians within a proceeding occurred on the average of 18% of the case files reviewed. In the legal aid offices, substitution occurred on the average in 61% of the cases. In one of the largest legal aid counties studied, substitution occurred in 76% of the case files reviewed.

Both the ineffective and effective representation observed and described reflected several recurring patterns.

-The first pattern involves a lack of preparation or investigation even when there are clear questions of fact, as in serious abuse cases; the second, representation in which the law guardian is present, but otherwise inactive, unprepared and unresponsive to the client. In addition, ineffective representation is characterized by violations of statutory or due process rights; almost 50% of the transcripts included appealable errors made either by law guardians or made by judges and left unchallenged by the law guardians. Violations were especially visible in delinquency and PINS cases, particularly when detention was involved.

To a lesser extent, there is also evidence that law guardians are unfamiliar with the substantive statutes

governing different proceedings, particularly proceedings related to voluntary placement (including reviews) and PINS proceedings involving educational issues. Further, substantial numbers of law guardians assume virtually no role at dispositional proceedings. Instead, they rely almost totally upon others. Ineffective law guardians also have only perfunctory, if any, relationships with the children they represent.

-The effective law guardians observed in court use legal strategies, actively protect the rights of their clients, are knowledgeable about the laws, and are vigorous and creative at the dispositional stage. They also become important sources of psychological support and information to their clients.

Three additional findings also have significant implications for the quality of representation; the comparative effectiveness of panel and legal aid law guardians studied; levels of appellate activity, and the law guardians' view of their role.

The courtroom observations suggest that legal aid attorneys are more likely to give perfunctory or acceptable representation, while panel attorneys are more likely to give either very poor or very effective representation.

-45% of both the legal aid law guardians and the panel attorneys were identified in the overall coding of the observations as seriously inadequate or marginally adequate. Further, while a higher percentage of panel law guardians were coded as either seriously inadequate compared to legal aid attorneys (19% compared to 8%), more panel attorneys were also judged to be effective as compared to legal aid attorneys (6% compared to 1%). Somewhat more legal aid attorneys, 37%, as compared to 21% of all panel attorneys, were determined to be providing acceptable representation.

This pattern does not readily lend itself to compelling arguments that, as currently structured either delivery approach, panels or legal aid, as reflected in the counties studied, is superior to the other. It does suggest that both need to be strengthened in different ways to improve the overall level of representation accorded to children.

-Appellate actions brought by either panel or legal aid law guardians are virtually non-existent outside of New York City. This is problematic not only for individual children, but for the general quality of representation. The absence of appeals means there is virtually no check on judicial or law guardian errors, and statutory issues requiring interpretation or clarification remain unresolved.

-Courtroom observations, transcripts and interviews with law guardians confirm that the majority of law guardians in the state view their primary role as representing what they

perceive to be the child's best interest, even, as is typical, when this interest is determined on the basis of a five minute interview of the child and no further investigation. The best interest role orientation appears to account at least in part for the rather casual attitude toward protecting the rights of juveniles in delinquency or PINS proceedings. It may also be related to the failure on the part of many law guardians to express the child's wishes to the court, as is mandated in the law guardian statute.

Finally, it is appropriate to consider the views of some of the children represented by law guardians.

-From the perspective of the children themselves, who made for the most part, careful and finely differentiated comments, the most striking theme, repeated by many, was the desire to feel that the law guardian was on their side, even if they did not like the outcome. The significance to the child of not having the same law guardian at different proceedings was also evident.

The Adequacy of the System

Law guardian panels, legal aid offices, the Appellate Divisions and the Office of Court Administration, all have roles in the delivery of representation to children in New York. In this section, we highlight the findings about how this delivery system impacts on the quality of representation accorded to children. Fundamentally, our findings suggest that the current bifurcated and essentially ad hoc administrative structure works against the delivery of quality representation.

-Within the counties there are no written or informal guidelines governing recruitment, appointment and recertification of panel law guardians. Assignment practices are variable; of the ten panel study counties, four assign based solely on the judge's decision, one on a perceived match between the law guardian and the child, and two based on a modified rotation system. The remaining study counties use a combination of methods.

-Policies with respect to the four legal aid societies studied also reflect local decisions. Annual caseload size varies considerably from 300 to 800, as does expenditure per case. In both the largest and smallest legal aid office studied each law guardian handles approximately 800 cases per year; in the other two legal aid offices caseloads are between 300-400 for each law guardian. The largest legal aid office studied has no back-up panel and so routinely represents co-defendants in conflict or potential conflict situations. Only the smallest office has access to a social worker; the largest office has no non-legal support staff at all. No legal

aid office studied has any formal policies regarding continuity of law guardians either within proceedings or from one proceeding to another. In two offices, assignment policies virtually preclude continuity. Formal on-going training is not provided.

-County-level law guardian policies are informal and largely determined by the counties themselves. In the counties with panels, there are few, if any, efforts to ensure compliance with the Appellate Division Rules regarding the law guardian program. In the study counties with legal aid societies there is no clear line of authority outside of the individual offices for identifying and taking corrective action when policies or practices are dysfunctional.

-Only two of the 14 study counties reported any county-based training within the past two years, although Appellate Division Rules in three of the Departments specify that such training shall be provided, and the fourth specifies what the law guardian should know.

State-level involvement with the Law Guardian Program is fragmented, and focused primarily on fiscal, rather than programmatic issues. Neither the Family Court Act nor any other statute has clearly ascribed centralized administrative responsibility for law guardian services. Hence, there is now no one place where all the issues pertaining to a coherent and effective system can be addressed.

-The Office of Court Administration (OCA) has responsibility primarily for budget issues, since its funding for law guardian fees, a state charge, is contained within the budget for the judiciary. The Appellate Division oversees the panel system and the actual mechanics of attorney assignments and vouchering. In neither of these agencies has responsibility relating to the Law Guardian Program been seen as requiring staff assigned exclusively to it.

-Monitoring of the law guardian system for quality is minimal. In the Appellate Division there is no mechanism except volunteer advisory committees. The Office of Court Administration does not see its role as including monitoring except as related to the disbursement of funds. (According to OCA, its conception of its role reflects the view that as an administrative body for the courts, it should not intrude in the day-to-day provision of legal services to one class of litigants who use the courts.) Thus, although OCA negotiates contracts with legal aid societies, it has not examined elements affecting quality of representation or addressed policy matters, such as case load, staff ratio, appellate capacity, mechanisms for handling conflict or continuity of representation. (OCA views these as matters more properly left to individual judges or legal aid offices.)

-With the exception of the Appellate Division, First Department, the other appellate divisions do not provide any informational materials to the law guardians designed to provide updates on new legal or other developments. Nor, routinely, does OCA, which views education and training as an Appellate Division responsibility.

-In the absence of a clear legislative mandate for centralized and administrative responsibility, or for monitoring the overall effectiveness of the Law Guardian Program, the system for delivery of law guardian services has developed on an ad hoc basis. Local preference and circumstance, historically, has shaped such services without any long-range statewide planning. This lack of focused responsibility has also meant that neither OCA nor the Appellate Divisions has a clear mandate for responding to local initiatives to change from one approach to delivering representation to another. (At present, such questions rarely arise. If they do, they are handled informally, primarily by OCA.) In fact, the number of counties relying upon law guardian panels or legal aid societies has not changed since the beginning of the Law Guardian Program.

-Although on paper the role of the Departmental Advisory Committees has been considerably strengthened in recent years, in practice, the committees are not all equally active, and their efforts limited by a lack of access to staff or resources.

CONCLUSIONS AND RECOMMENDATIONS

Taken together, the central findings of the law guardian study are very sobering. Most significant is that all the data point to extensive inadequacies in the general level of representation accorded to children, regardless of whether the children are involved in delinquency type proceedings, or as is increasingly the case, child protective proceedings and those related to out-of-home placements. These findings, in turn, must be considered in relation to the picture of the law guardians that emerged from the data. Those data show that the majority of panel law guardians do not view themselves as experts in juvenile law, do not have the opportunity to become so through pre-appointment experiences or continuing training, and in fact, represent relatively few children a year. Legal aid law guardians in the four offices studied handle many cases a year, but do so in the absence of both support staff and continuity policies. In many instances, this significantly limits their capacity to provide effective representation.

The administrative and fiscal structure of the Law Guardian Program appears to compound many of the problems identified in the representaton of children. The core of the problem seems to be that there is simply no clear locus of responsibility the Law Guardian Program. Indeed, most telling, there is not even one full-time staff person in the entire state assigned to it,

either in the Appellate Divisions or the Office of Court Administration. This results in a system that is, at best, ad hoc. There is now no one place where all the issues pertaining to a coherent and effective law guardian system can be addressed. Further, the current structure does not appear to lend itself readily to strengthening those functions (such as standard setting, training, monitoring and encouraging appellate activity) that are so essential to any effective legal services delivery system.

If the representation accorded to children were adequate, this would not be problematic. But overall, the representation is not adequate. Almost half of the representation provided to children is either seriously or marginally inadequate. Part of this may be attributed to differences among individual law guardians. But the data in this report also suggest that law guardians get little help in carrying out their responsibilities to children. Reimbursement levels are minimal and access to support services, on-going information about relevant legal or service developments, caselaw and legislative updates or guidelines limited. This places a great and perhaps unfair burden on the law guardians themselves. But it places an even greater burden on the children of this state, for it is the children who often bear the most serious consequences.

In the face of these findings a series of recommendations are proposed to: improve and more effectively monitor the overall quality of representation; strengthen the existing system of panel and legal aid representation; provide a focus for enhanced state leadership of the Law Guardian Program; ensure that certain activities, such as training and appeals, are strengthened in a uniform way throughout the state; relieve the burden now placed on both full and part-time law guardians to be informed and expert in the absence of adequate support services and on-going information about relevant legal or service developments; and test out, through demonstration and other efforts, alternative approaches to ensuring that the rights and interests of the children who come before family court are effectively protected.

To this end, there must be the capacity within the Law Guardian Program to:

-Develop consistent administrative guidelines for the operation of the panels and full-time law guardian offices. For the law guardian panels, guidelines should be developed regarding the appointment, recertification and removal of law guardians and for assignment and reimbursement policies. Guidelines should also be developed governing contracts with legal aid societies, private attorneys or other non-profit legal organizations to ensure that the representation meets specific performance levels and to ensure that prior to contract renewal, past performance has been satisfactory.

-Strengthen the quality, accessibility and scope of training and other related materials, including periodic caselaw and legislative updates. An overall training approach for all law guardians should be developed, including, at a minimum, interviewing children, dispositional planning and options, legal strategies and tactics, and appellate practice. Such training might be provided through the use of videotaped

curricula which could be used flexibly in local counties. In addition, the capacity for individual lawyers to get independent advice on mental health, social service and legal questions should be developed, for example, by identifying a statewide network of professionals willing to provide consultation.

-Review and clarify current fiscal policies to ensure that the policies are equitable, efficient and supportive of effective representation. Existing reimbursement procedures should be modified to reduce delays in payment. Reimbursement policies that discourage out-of-court preparation and appellate activity should be reassessed and changed. The law guardian statute itself should be modified to permit the awarding of contracts to other non-profit legal organizations as well as legal aid societies, provided they can meet the performance criteria established.

-Expand appellate and special litigation capacity outside of New York City. Existing appellate capacity is virtually non-existent outside of New York City, and, should be significantly increased. To this end, individual law guardians should be encouraged to initiate appeals when appropriate. Further, lawyers interested in appellate representation should be encouraged, either through the development of county or regional appeals panels, or on a statewide basis, to represent children involved in appeals. Similarly, the capacity for special litigation outside of New York City should be increased, and steps taken to ensure children in placement have access to law guardians.

-Stimulate within counties, within Judicial Departments, and on a statewide basis efforts to improve the quality of representation to individual children and the administration of the Law Guardian Program. This requires ensuring that there is a mechanism to determine when a county should change from a panel or legal aid approach to an alternative, criteria for evaluating proposed alternative approaches, and the strengthened involvement of the Departmental Advisory Committees, either by providing them with staff or with small incentive grants. Specific projects to correct weaknesses within current panel or legal aid offices or to test out modifications, such as developing a child welfare panel composed of specially trained panel law guardians, should also be encouraged.

-Monitor on a periodic basis the programmatic and fiscal aspects of the Law Guardian Program. Monitoring might be done through periodic on-site reviews of individual counties with the advice and involvement of the Family Court Judges and the local Bar Associations or through other program audits using a methodology similar to this study.

-Ensure the collection of meaningful data about the Law Guardian Program, including the adequacy of the supply of law guardians and the frequency of their assignment in discretionary proceedings. Working with OCA and the Appellate Division gaps in existing information should be identified and corrective action taken. Information on the operation of the Law Guardian Program, including data on such questions as the cost, continuity, appellate and training activities, should be publicly available through an annual report.

-Strengthen the overall planning, decision-making and leadership capacity within the Law Guardian Program. The current fragmentation of responsibility for the Law Guardian Program is counterproductive. Interdisciplinary staff must be designated and given the authority and support to make programmatic, fiscal and administrative changes necessary in the Law Guardian Program.

In order to carry out these eight essential functions a new state-level Law Guardian Office should be created.

-A Law Guardian Office should be established by statute charged to carry out, on behalf of the Law Guardian Program, the necessary fiscal, programmatic, planning, guideline development, training, educational, monitoring and appellate activities, as well as such other functions as may be needed. The Office should not provide any direct trial level representation, but should be viewed as a supervisory and back-up unit for the Law Guardian Program.

To ensure that the Office can make the needed changes it should be accountable to an independent Executive Board composed of between seven to ten legal and non-legal members appointed for fixed terms. This Board should be responsible for setting policy, carrying out the needed changes in the Program, overseeing the appellate activity and hiring the Director of the Office. Because of the substantive nature of the Board's mandate, the majority of the appointments should be made by the Chief Judge of the State, the Governor, and the President of the New York State Bar Association. The most appropriate location for the Office should be worked out with the Governor and the Legislature. The Office should receive basic support from state funds, but for special projects, outside funding should be permitted.

It should be noted that the decision to recommend the creation of a new Law Guardian Office was made only after consideration of other alternatives, including expanding the role of the Office of Court Administration, providing staff for the Law Guardian Program through the Appellate Divisions, or developing a mechanism to coordinate those functions now being carried out more effectively. Upon analysis, however, each of these approaches seemed too

limited. As reported to us, OCA, for instance, feels that in the interests of preserving independence of legal representation, it is unwise to assign to the judiciary a major role with respect to the Law Guardian Program. They also see it as unwise because there is a real danger of potential conflict between the responsibilities to administer the courts and the role of an advocate for a litigant. Providing staff to the Appellate Divisions emphasizes a regional, rather than a state-level strategy, yet the data strongly suggest that most of the problems in the Law Guardian Program are not geographically determined, but rather, visible throughout the state. Requiring better coordination between the Appellate Divisions and OCA does not address the reality that some of the most essential functions, particularly the provision of on-going training and updates to the law guardians, as well as appellate activities, are not occurring at all. For these reasons, creating an entirely new, and independent office seems the most effective approach to ensuring an improved Law Guardian Program.

Two additional steps should also be taken:

-The New York State Bar Association should develop guidelines, with commentary, about what the law guardian's responsibilities are. Such guidelines should be procedure-specific, and should identify what the law guardian must do, as well as what factors the law guardian should consider in developing a legal strategy and/or dispositional plan. They should be made available to all law guardians and should be periodically updated in the light of any relevant appellate decisions. This would go a long way toward eliminating the confusion which many law guardians now feel about their obligations and responsibilities as law guardians. (For one proposed set of guidelines, see Appendix B.)

-Each county should review its own practices and policies critically, take steps to improve areas of weakness, and/or plan for alternatives to the current approach to providing law guardians. Such efforts should involve the local Bar Associations, as well as Family Court Judges and others who work with the law guardians.

Why the Proposed Changes in the Law Guardian Program Are So Important

The key recommendations just described, the creation of a law guardian Office charged to carry out eight specific functions, coupled with provision of guidelines to law guardians from the New York State Bar Association offer a feasible approach to improving the quality of representation provided to New York's children. Taken together, the recommendations are designed to strengthen the Law Guardian Program by implementing changes in programmatic structure and responsibilities and by maximizing the likelihood that the appropriate professional bodies, particularly the New York State Bar Association and the courts, will become more active in defining the parameters of effective representation to children. The recommendations grow directly from the study findings. They assume that the problems in the Law Guardian Program can be corrected without massive restructuring of the way law guardian

services are provided. Instead, they seek to build on the strengths of both the panel system and the legal aid model, as well as the examples set by law guardians who even under existing constraints can and do represent children effectively. But the recommendations also assume, based on over twenty years experience, that patchwork changes here and there will not be sufficient to effect, in any significant way, the overall quality of representation. Thus, they envision a coherent state level approach to providing leadership and initiating changes. And finally, while the recommendations assume that fiscal reforms are appropriate and necessary, they also acknowledge that providing more funds, in the absence of other actions, will not correct the problems.

The changes called for in the Law Guardian Program will not solve all of the problems facing children who come before the courts or indeed, all of the problems in the Family Court system. Outcomes to children are affected not only by law guardians and the quality of representation they provide, but by the way the family courts function, by the judges, and by the extent to which the child welfare and juvenile justice service networks have the capacity to meet the range of needs manifested by the children requiring their intervention.

These realities, however, in no way limit the urgency of improving the Law Guardian Program itself. No more compelling reason is needed than the fact that as the Law Guardian Program is now implemented, substantial numbers of children are not receiving representation that is consistent with New York State's statutes and case law. This is particularly unacceptable in a state that has traditionally had, and continues to enact, some of the finest substantive laws governing juvenile justice, child welfare and special education. Nor is it insignificant that the absence of effective representation continues to mean that for some children, dispositions may be needlessly restrictive, inappropriate, or lengthy. This is neither good for the children nor for the state coffers. Therefore, it is urgent that the changes recommended in this report be made in a timely and comprehensive manner in order to make the Law Guardian Program more responsive to the children it serves.

Chapter 2

NEW YORK STATE PANEL LAW GUARDIANS: A PROFILE

In the fall of 1982, a survey was sent to all known panel law guardians in New York State[1] in order to better understand who the panel attorneys are and how they view their law guardian work. The survey sought information about the law guardians' background; the nature of their general practice; the nature of their law guardian practice (e.g. the type and numbers of juvenile cases in their caseload); problems they experience as law guardians; the assumptions that guide their representation of juveniles; and the changes they would like to see in the law guardian system. (See Appendix D for a copy of the questionnaire.)

880 individuals responded to the survey, for a response rate of 37%. Of these, 95 respondents indicated they were not serving or had never served as panel law guardians, or returned data too late to be analyzed. The remaining 785 questionnaires were coded and form the basis for the analysis reported here.[2]

In order to get as rich a picture of the panel law guardians as possible, the data were analyzed in a number of different ways. The statewide analysis involved determining the frequency of each type of response from all the respondents. The analysis by population levels involved determining the frequency of responses from panel law guardians living in counties having 100,000 youth or more (defined as high population areas); counties with 30,000 to 99,000 youth (defined as medium population areas); and counties with under 30,000 youth (defined as low population areas). For the analysis by experience levels, the panel law guardians were divided into groups based on their years of experience as lawyers. (Those practicing law for five years or under were categorized as inexperienced; those practicing for 5-20 years were classified as experienced; and those practicing for 20 years or more were classified as very experienced.) In addition, when relevant, responses were also analyzed by each of the four Judicial Departments and by "upstate" or "downstate" residence. When the frequency data suggested the law guardians responded differently as a function of population size, experience, or Judicial Department, correlational analyses and tests of statistical significance were performed to uncover the nature and strength of these relationships. For example, we sought to determine if law guardians with more experience tend to have a greater or lesser orientation toward representing the child's rights, or if years of experience influence caseload size. (For a technical discussion of the methodology and terminology, see Appendix C.)

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[1]Names were taken from the lists of current law guardians provided by each Judicial Department of the Appellate Division.

[2]Six percent of the usable questionnaires were from the First Judicial Department; 25 percent from the Second Judicial Department; 37 percent from the Third and 32 percent from the Fourth Judicial Department.

The findings are reported below. They are divided into four sections. In the first we examine the backgrounds and interests of the lawyers who become panel law guardians. In the second we analyze the types and numbers of both law guardian and non-law guardian cases for which the attorneys provide representation. In the third section, we examine the extent to which panel law guardians use selected legal strategies, and their views of the law guardian's role. Finally, we describe the law guardians' perception of needed improvements in the system of representation for juveniles. As appropriate, we have also included some of the most lively and typical comments the law guardians so candidly shared with us.

THE PANEL LAW GUARDIANS' BACKGROUND AND INTERESTS

Years of Experience

As a group, about one-third of the lawyers serving as law guardians have been practicing law for fewer than five years, and two-thirds for more than five years. (See Table 1.) Such findings are particularly interesting because of the light they shed on the prevailing stereotype about law guardians. That stereotype suggests that a substantial proportion of the law guardians are either very inexperienced or about to retire. Our figures provide some support for this perception. In all, just over 50% of the law guardians have practiced either for five years or less, or for more than 20. In urban areas, one-quarter of the law guardians have practiced 20 years or more.

TABLE 1

Distribution of Law Guardians Years of General Legal Experience

	Statewide	Population Levels		
		High	Medium	Low
Years as Lawyer	%	%	%	%
Under 2 years	8	8	6	8
2-5 years	24	22	24	27
5-10 years	29	25	33	30
10-20 years	20	20	23	17
20+ years	19	25	14	18
	100	100	100	100

Nature of the Law Guardian's Practice

Length of Time on Law Guardian Panel Ten percent of the current law guardians have been on the law guardian panel for under one year; 25% for 1-3 years; and 19% 3-5 years. 46% of the panel attorneys have served as law guardians for over five years; thus the panel is in general not as inexperienced as it is usually described. Urban areas, however, have a greater percentage of law guardians with under five years experience. (See Table 2.)

TABLE 2

Distribution of Law Guardians Years of Experience as Law Guardians

	Statewide	Population Levels		
		High	Medium	Low
Years as Law Guardian	%	%	%	%
Under 1 year	10	11	11	10
1-3 years	25	31	18	25
3-5 years	19	20	18	19
Over 5 years	46	38	53	46
	100	100	100	100

Specialization

The majority of lawyers serving as law guardians view themselves as generalists. It is particularly noteworthy that overall only 25% of the law guardians indicate they consider themselves experts in juvenile law; although among the most experienced law guardians, this is true for a somewhat higher proportion, 38%. Law guardians in rural areas are less likely than the state average to see themselves as specialists in juvenile law. (See Table 3.)

Size of Practice

51% of the lawyers who serve as law guardians are in practice alone; another 40% practice in firms of five or fewer attorneys. Only 7% percent practice in large firms. Those attorneys serving as law guardians in urban areas are most likely to be in solo practice; in other places, the most typical setting is a small firm. (See Table 4.)

TABLE 3

Percentage of Law Guardians Reporting Specific Areas of Expertise*

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Reported Specialty	%	%	%	%	%	%	%
Juvenile Law	25	33	22	19	22	21	38
General Law	75	68	77	82	77	70	81
Real Estate Law	25	18	26	33	23	29	18
Commercial Law	5	8	5	6	6	8	3
Torts	7	6	9	10	18	16	3
Matrimonial Law	15	18	15	13	18	14	10
Criminal Law	15	21	12	13	8	12	13
More than three Specialties	34	40	37	37	27	37	39

*Percentages add to more than 100 because law guardians could check more than one category.

TABLE 4

Distribution of Law Guardians Practicing in Different Size Firms

	Statewide	Population Levels		
		High	Medium	Low
Type of Setting	%	%	%	%
Solo	51	61	43	48
Small Firm	40	31	45	46
Large Firm	7	6	11	6
Other	2	2	1	-
	100	100	100	100

Number of Counties in Practice

Over three quarters of the lawyers practice only in one county; of the remainder, 11% practice in two counties, 5% in three counties, another 5% in four counties and the rest in more than four. The high percentage of lawyers living in urban counties, and practicing in two counties may reflect New York City data. (See Table 5.)

TABLE 5

Distribution of Law Guardians With Single or Multi-County Practice

	Statewide	Population Levels		
		High	Medium	Low
Number of Counties	%	%	%	%
One County	78	61	81	74
Two Counties	11	31	9	15
Three Counties	5	6	5	6
Four Counties	5	-	5	4
More than Four Counties	1	2	-	1
	100	100	100	100

Law Guardian-Specific Experience

Prior Experience

It is frequently said that any lawyer can be appointed as a law guardian. Responses from the law guardians tend to support this. As a a group, close to one-third of the law guardians reported no specifically relevant family or juvenile experience prior to joining the law guardian panels. Further, as Table 6 suggests, there is a clear trend indicating that the more rural the setting for the law guardian's practice, the less likely s/he is to have had relevant experience.

Of the two-thirds reporting relevant experience prior to becoming law guardians, most took juvenile or family law courses (49% statewide). Under 10% reported any direct clinical involvement, either through clinical law school programs or as co-counsel. Not surprisingly, somewhat more panel attorneys in urban areas reported prior experience working for legal aid societies. It is also interesting that very experienced law guardians are more likely to cite family law practice as relevant prior experience, while less experienced law guardians are more likely to report course work and clinical experience. This may reflect the increasing availability of juvenile-related experience in law schools.[3]

Panel-Related Activities

When queried about special requirements or screening procedures specifically related to actually joining the panel, close to 70% of the law guardians indicated that their names were simply placed on the list; only 10% attended any orientation; only 7% served as co-counsel or were interviewed by members of the bar.

The data do suggest, however, that significantly more law guardians participate in some special activity related to their appointment to the panel in urban than in less urbanized areas. There also appears to be substantial variation by judicial department, particularly with respect to co-counsel experience and interviews by experienced law guardians. (See Table 7.)

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[3]In the course of this study, New York State law school catalogues were reviewed. All 13 of the law schools in New York State were surveyed on their course offerings in the area of juvenile law. Five schools, or 38%, offer courses in juvenile law. Twelve schools offer courses in family law; however, except for custody, issues involving juveniles are not typically addressed.

Of the five schools offering courses specifically dealing with juvenile matters, four are titled either Juvenile Justice or Juvenile Rights. They focus on the legal status of youths charged as JDs or PINS or who are the subjects of abuse or neglect petitions. Only one course, Child, Parent & State, appears to examine issues involving foster care.

There are also three clinical programs in the state where law students can gain experience representing juveniles. In the first program, approximately ten students a year have the opportunity to represent children in abuse and neglect proceedings. The purpose of the clinic is not so much to acquaint students with issues in the practice of juvenile law, but to provide a forum for obtaining trial experience and expertise in dealing with non-legal professionals. The second clinical program is similar in size to the first but is much wider in scope. Through an extensive training program students are prepared to represent children in foster care review, custody and termination of parental rights proceedings. Student lawyers are assigned to clients in pairs and provide representation under the guidance of both legal and social work professionals. A special casebook and practice manual focusing on these areas of juvenile representation have been developed to further aid the student lawyers. The third clinical program provides students with the opportunity to represent youths in JD, PINS and child protective proceedings and to assist legal aid law guardians in taking appeals and pursuing special litigation.

TABLE 6

Percentage of Law Guardians Reporting Various Experiences Impacting Upon Law Guardian Practice*

Type of Experience	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
	%	%	%	%	%	%	%
None	31	25	31	38	28	35	25
Family or Juvenile Law Course	49	54	49	46	57	50	37
Rep. of Juveniles Through Clinical Programs	5	4	6	4	7	5	2
Co-Counsel	2	2	2	2	2	3	1
General Family Law Practice	11	14	10	9	6	10	23
Legal Aid Society	6	9	7	4	6	7	5
Other**	22	28	22	14	23	17	31

*Percentages add to more than 100 because law guardians could check more than one category.

**"Other" responses include clerking, working in a juvenile facility, observing law guardians on own.

TABLE 7

Percentage of Law Guardians Engaging in Specific Activities Related to Joining the Law Guardian Panel*

Nature of Panel-Related Experience	Statewide	Population Levels			Judicial Departments			
		High	Medium	Low	1	2	3	4
	%	%	%	%	%	%	%	%
Name placed on list only	69	49	80	80	75	66	81	66
Attended Orientation	10	22	6	1	19	10	5	16
Served as Co-Counsel	7	11	7	8	25	7	6	9
Interviewed by Bar or Experienced Law Guardian	7	21	1	2	50	18	-	2
Other**	15	16	15	13	21	12	15	15

*Percentages add to more than 100 because law guardians could check more than one category.

**Other responses generally involved the type of experience reported in Table 6.

Reasons for Serving as Law Guardians

Overall, about 40% of the law guardians who serve on the panels do so because of an interest in the substance of juvenile law. They are equally likely to serve because they are developing a law practice, and most likely to serve out of a sense of obligation. (See Table 8.) Further, a correlation between experience and interest in juvenile law indicated that more experienced law guardians report significantly less interest in the substance of juvenile law ($p < .001$) than do less experienced ones. There may be many explanations for this. For example, experienced law guardians may be familiar with the substance of juvenile law and may not see it as a challenge, or they may simply feel an obligation to serve as law guardians apart from any substantive interest. Similarly, a correlational analysis also confirmed that law guardians in the early stages of their careers use law guardian work in order to develop a law practice ($p < .001$).

TABLE 8

Percentage of Law Guardians Reporting Various Reasons for Serving as Law Guardians*

Reason for Serving	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
	%	%	%	%	%	%	%
Interest in Juvenile Law	40	45	44	30	51	36	34
Developing a Law Practice	41	50	40	32	62	39	11
Obligation	64	51	60	74	56	69	66
Pressure from the Bar	8	3	5	16	2	12	7

*Percentages reflect law guardians reporting yes for each specific category.

Satisfactions and Frustrations as Law Guardians

The questionnaire also sought to assess the extent and nature of the satisfactions and frustrations the law guardians experience. First, the law guardians were asked to identify the most satisfying and frustrating aspects of their law guardian work. In response, they cited as the most frequent satisfaction, "working with kids." Only a small percentage of the law guardians reported satisfaction from either using legal skills or developing a good dispositional plan for a child.

With respect to the frustrations, court delays, reported by 13% of the law guardians, ranked first. Youth returning to court, reimbursement levels and the general circumstances of the children were all cited by under 10% of the law guardians. (See Table 9.) Note too, that overall the percentage of law guardians reporting specific frustrations is fairly low, and that there seems to be no clear consensus among law guardians about the most frustrating aspects of their work.

TABLE 9

Percentage of Law Guardians Citing Specific Satisfactions and Frustrations From Their Law Guardian Practice*

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Satisfactions	%	%	%	%	%	%	%
Working with kids	50	51	53	45	45	48	63
Using legal skills	3	4	4	1	4	3	1
Developing a Good Plan	4	5	2	4	5	3	4
Seeing youth respond to a disposition	8	5	9	8	9	7	5
Frustrations							
Court delays	13	22	7	9	13	12	15
Recidivism	8	5	13	7	6	10	6
No facilities	6	7	6	6	8	6	4
Returning children to bad home situation	6	8	6	9	4	5	9
General circumstances of children and families	7	6	8	8	6	8	7
No legal support	5	6	5	5	7	5	5
Reimbursement levels	6	6	7	4	4	8	2

*Percentages add to more than 100 because law guardians could check more than one category.

Law guardians were also asked about future assignment preferences and how long they intend to continue serving as law guardians. These data too reveal that the level of frustration among the law guardians is not so great as to cause large numbers to be on the verge of resigning. Indeed, only 14% of the law guardians report wishing fewer assignments (although this is somewhat higher in the more rural areas), and only 9% are actively planning to discontinue serving as law guardians. As would be expected, inexperienced law guardians are most likely to desire more cases, although so do lawyers in urban areas. (See Tables 10 and 11.)

TABLE 10

Distribution of Law Guardian Assignment Preferences Regarding Caseload Levels

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Projected Assignment Desires	%	%	%	%	%	%	%
More Cases	30	41	22	24	42	22	29
Fewer Cases	14	10	14	17	10	17	11
Same Cases	56	49	64	59	48	61	60
	100	100	100	100	100	100	100

TABLE 11

Distribution of Law Guardians Anticipating Continued Service

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Projected Tenure As Law Guardians	%	%	%	%	%	%	%
Indefinitely	65	61	72	63	68	67	56
Under Two Years	9	11	8	10	10	8	10
Unknown	14	14	13	13	11	14	17
Other	12	14	7	14	11	11	17
	100	100	100	100	100	100	100

Finally, because preliminary interviews indicated widespread concern with the current reimbursement system, a specific set of voucher-related questions were also included. These indicated close to 80% of the law guardians have experienced some voucher-related problems. (See Table 12, and for a graphic sense of some of the spontaneous comments about such problems, see Figure 1.) The slowness of processing is particularly troubling in high population areas. Interestingly, there is very little variation across the state in the ranking of any of the voucher-related problems. (See Table 13.) The voucher-related questions also confirm that almost all law guardians on occasion do not submit vouchers, primarily because they believe it is just not worthwhile, or less frequently because the case took too little time. (See Tables 14 and 15.)

TABLE 12

Distribution of Law Guardians Reporting Problems with the Voucher System

	Statewide	Population Levels			Judicial Departments			
		High	Medium	Low	1	2	3	4
Problems Experienced	%	%	%	%	%	%	%	%
Some	79	84	80	73	79	90	78	71
None	21	16	20	27	21	10	22	29
	100	100	100	100	100	100	100	100

TABLE 13

Percentage of Law Guardians Reporting Specific Voucher Problems*

	Statewide	Population Levels			Judicial Departments			
		High	Medium	Low	1	2	3	4
Type of Problem	%	%	%	%	%	%	%	%
Lack of clarity	18	20	19	14	27	18	19	14
Slowness of Processing	67	82	63	53	78	91	58	53
Levels of Reimbursement	57	55	55	61	54	47	61	61
Voucher Form	13	10	15	14	5	10	23	6
In Court/Out of Court Differences	2	2	2	1	5	1	2	1
Voucher Reductions	10	13	13	6	10	4	1	0

*Percentages reflect law guardians reporting yes to each specific category.

TABLE 14

Distribution of Law Guardians Reporting
Various Practices Regarding Voucher Submission

Frequency of Voucher Submission	Statewide	Population Levels			Judicial Departments			
		High	Medium	Low	1	2	3	4
	%	%	%	%	%	%	%	%
Always submit	34	36	32	34	36	31	30	40
Occasionally do not submit	54	54	56	52	53	58	56	49
Routinely do not submit	12	10	12	14	11	10	14	11
	100	100	100	100	100	100	100	100

TABLE 15

Distribution of Law Guardians Reporting
Various Reasons For Not Submitting Vouchers

Reason for Not Submitting Voucher*	Statewide	Population Levels			Judicial Departments			
		High	Medium	Low	1	2	3	4
	%	%	%	%	%	%	%	%
Not worth it	52	36	57	62	40	44	62	46
Laziness	1	2	1	2	4	2	1	1
Obligation to do pro bono	5	5	4	5	0	7	5	1
Case took too little time	26	34	25	19	36	28	21	30
Other	16	23	13	12	20	19	11	22
	100	100	100	100	100	100	100	100

Since Appellate Division staff in each of the departments must approve the vouchers after the family court judges sign off and before they are sent to the state budget office for payment, these voucher-related questions were also analyzed by each Judicial Department. Statewide, about half of the law guardians report problems with both speed of processing and levels of payment. The data also reveal some differences related to Judicial Departments. So, for example, the slowness or processing the vouchers is perceived as substantially more problematic in the First and especially in the Second Judicial Departments. Levels of reimbursement, however, are more problematic in the Third and Fourth Judicial Departments, both of which have a larger proportion of rural counties. The voucher itself, voucher reductions, and in-court, out-of-court differences in reimbursement levels are perceived as far less troublesome.

CASELOAD PATTERNS

Information about overall caseload size and the distribution of types of cases was collected for both law guardian and non-law guardian cases. These data were the most difficult to analyze, primarily because there were frequent internal inconsistencies in the information the law guardians provided. For example, the total caseload size law guardians reported in one question was substantially different from the results obtained by adding the numbers of

Figure 1

THE LAW GUARDIANS' COMMENTS ON
FRUSTRATIONS AND SATISFACTIONS

Frustrations

-"The pay is absurdly low. The forms are ridiculously complicated and forever changing or not available, take five months to process."
-"I lose money on them (these cases) to begin with and then lose more trying to collect from the appropriate agency."
-"This area is a disgrace to the profession and participants, including clients. We are treated by the bureaucracy (excluding family court staff) as felons in the preparation of certain voucher expense items and time records."
-"I should not be penalized financially for helping kids."
-"Current level of payment is barely sufficient to meet office overhead and does not yield a livable wage. That compounded with weeks and sometimes months of delays make continuation or expansion of this practice economically not feasible."

-"Insist judges appoint from a rotating list of law guardians. It is very frustrating to set aside a day, then have cases assigned only to hacks and hangers on. I have complained to no avail."
-"The process of calling a case should be computerized, so that I need not be faced with sitting in court for three hours when all I requested is an adjournment."
-"Scheduling of cases is abominable. Family court is always a half day, even if one case is all you have." (small rural county).

-"Inadequate space for consultation with client in courtroom."
-"Family court too much resembles a cattle-car loading platform. Need more professionals from agency attorneys, more support staff, (and) more privacy for clients in court."

-"Desperate need for ready access to experts in medicine, psychologists and others in behavioral science (with easy access to funds to pay).

-General low esteem in which the organized Bar views this type of work.

Figure 1 continued

Satisfactions

-"Helping a kid get on the right track. I've had several kids come back to me to ask advice so that they avoid trouble."
-"The occasional successful rehabilitation of a child in trouble."
-"Hoping you can see progress."

-"Knowing that I protected the rights of juveniles as adequately as if they were facing adult prosecution."
-"Getting the police to extend constitutional rights and guaranties to young people."

-"Giving the child the idea that he has a person who will defend or represent the point of view regardless of the contrary feelings or opinions of the social work establishment."

-"Recommending a creative disposition which the judge follows. Conducting an independent investigation and then reading a probation report which agrees with me."

specific cases they reported in another; or the total caseload reported for a six-month period was the same as that reported elsewhere for a yearly period. Using what we believed was the most accurate report, the data revealed some interesting patterns. (For the actual numbers of cases reported see Appendix G.)

Law Guardian Caseload

Mean Caseload Size

The average law guardian represents under 20 children a year, although the overall caseload is increasing. Thus the figures reported by law guardians for 1981 cases were significantly higher than 1980 levels ($p < .05$) The mean caseload size for both years the and percentage change is indicated in Table 16. The increases appear to be fairly evenly distributed across all parts of the state, regardless of population. However, there does seem to have been a substantial increase in the number of cases inexperienced attorneys handled in 1981 compared to 1980.

Distribution of Law Guardian Caseload

The proportion of different types of cases the law guardians handle varies somewhat as a function of both population and experience. For example, a larger proportion of the caseloads of law guardians in urban areas involve representation of JD's and juvenile offenders, while law guardians in less populated areas represent a larger proportion of PINS. Variation as a function of population in the assignments of law guardians in custody cases is also clear. Law guardians report that assignments to such cases are more likely to occur in medium sized or ruarl areas rather than in urban ones. (Under current law, assignment of law guardians is discretionary in custody cases.) The frequency of law guardian assignments in Foster Care Approval (358-A) and Foster Care Review (392) proceedings (which are also discretionary) as reported by law guardians, do not vary across the state. Equally interesting is the pattern that emerges when assignments are viewed in relation to experience. Child abuse and neglect cases comprise 25% of the caseload of the most experienced law

TABLE 16

Changes in Mean Law Guardian Caseload 1980 - 1981

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Year	Mean Caseload	Mean Caseload	Mean Caseload	Mean Caseload	Mean Caseload	Mean Caseload	Mean Caseload
1980	16	19	16	13	10	17	16
1981	19	22	18	15	16	18	18
Percentage Change	+19%	+16%	+13%	+15%	+60%	+3%	+12%

guardians in contrast to 13 and 11% of the less experienced ones. Experienced law guardians living in urban areas account for virtually all appeals cases. (See Table 17.)

TABLE 17

Distribution of Law Guardian Caseload by Type of Proceeding

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Proceeding	%	%	%	%	%	%	%
JD	26	30	26	23	29	31	19
PINS	20	18	28	30	25	21	14
JO	2	3	1		1	2	2
Custody	12	10	13	18	14	13	8
Child Abuse	17	17	9	12	12	13	25
Ext.	8	9	10	9	9	9	7
392	5	5	7	5	6	6	4
358	3	2	3	1	2	2	2
TPR	2	5	3	2	2	3	4
Appeals	5	1	-	-	-	-	15
	100	100	100	100	100	100	100

Specialization

There also appears to be some but not a great deal of informal specialization among the law guardians. We identified three groups of law guardians; those who only accept delinquency-type cases (JD/JO and PINS); those who accept only child welfare-type cases (392, 358-A, Article X, TPR,) and those who accept both. As Table 18 suggests, 21% of the law guardians accept only delinquency related cases, and 6% accept only child welfare type cases. Thus, the majority of the law guardians do not specialize but accept all types of cases. (On the basis of the distribution of law guardian caseload data we would have predicted greater specialization among those practicing more than twenty years. However, the data do not support this.)

TABLE 18

Distribution of Law Guardians Preferring Certain Types of Juvenile Cases

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Type of Cases Accepted	%	%	%	%	%	%	%
Only JD/JO/PINS	21	16	26	20	24	19	18
Only X/TPR/358-A/392	6	6	6	6	6	6	6
Mixed Caseload	73	78	68	74	70	75	76
	100	100	100	100	100	100	100

General Caseload

We also sought to profile the total caseload of the law guardians, particularly to determine what proportion of the total caseload, on the average, involves representing juveniles, and how much of the total caseload is accounted for by assignments in law guardian, criminal or adult family court cases, by juvenile or adult private practice, or by other types of representation.

Mean Caseload Size

The figures indicate that with the exception of the very experienced law guardians, the mean caseload size is about 100 cases a year. (See Appendix G.) Statistical analyses (analyses of variance) were also conducted to determine if years of experience impact upon the size of the law guardian caseload, the total caseload, and type of caseload. Experience does not effect the size of the law guardians' caseloads, although there is a trend ($p < .10$) for the more experienced lawyers to take fewer total cases.

Distribution of Total Caseload

The most significant finding from this set of questions is that at best, one-fifth of the typical law guardian total practice involves law guardian work. This varies from a low of 14% for those in rural counties to a high of 19% for the most experienced law guardians and law guardians in urban areas. The data also indicate several other noteworthy patterns. The first is that for all law guardians except those living in highest population areas, half of their practice does not involve either assigned counsel cases or cases requiring the representation of juveniles or adults in family court. Second, for the law guardians as a whole, just over one third of their practice involves assigned counsel cases; either as law guardian or 18-B[4] lawyers. (See Table 19.) A further analysis indicated that 55% of the law guardians serve as 18-B lawyers in family court cases, and 46% in 18-B criminal cases.

TABLE 19

Distribution of Law Guardians Total Practice
By Type of Case

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Assigned Counsel	%	%	%	%	%	%	%
Law Guardian Caseload	17	19	17	14	16	16	19
18-B (Criminal)	14	17	7	15	15	13	13
18-B (Adult/Family Court)	6	9	5	4	6	5	10
Private Practice							
Juvenile (Family Court)	2	3	2	2	2	2	4
Adult (Family Court)	10	6	14	12	9	11	12
Other	51	46	55	53	52	53	42
TOTAL	100	100	100	100	100	100	100

THE PANEL LAW GUARDIANS AS LAWYERS

Use of Selected Legal Tactics

§722-c

While assessing the quality of representation is impossible on the basis of a questionnaire alone, three questions were included to give some sense of the law guardians' familiarity with and use of specific legal procedures. First, law guardians were asked whether they had ever requested whether they had ever requested special evaluations under §722-c of the County Law.[5] 17% of the law guardians, just under one-fifth of the sample, reported making requests on at least one occasion under §722-c, with a slightly higher proportion among those living in urban areas. (See Table 20.) Law guardians not using §722-c indicated either they are unaware of its applicability, unfamiliar with how to use it, have been discouraged by judicial refusals in the past, or generally feel the same information is available through DSS or Probation reports.

Law guardians were also asked whether they had ever filed a notice of appeal or represented juveniles in appeals cases. (See Table 20.) Overall, 16% of the law guardians reported filing notices of appeal. The percentage increased for lawyers living in more urban areas or for the more experienced lawyers. 11% of the sample reported they had actually represented juveniles in appeals cases. Again, lawyers involved in appeals tend to be from urban areas, and to be more experienced. (See Table 20.) Law guardians involved with appeals were also asked to describe any particular problems. These are reported in Figure 2.

It should be emphasized that these questions asked if lawyers had ever made requests under §722-c, ever filed notices of appeals or ever represented juveniles in appeals cases. In contrast, in the distribution of current caseloads, law guardians report appeals cases account for 5% of their total law guardian caseload, a figure which also seems surprisingly high. Note that the questionnaire did not seek information about whether the law guardian actually initiated the appeal. (See Table 17.)

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[4]Under Article 18-B of the county law there is a county-wide list of attorneys who are reimbursed by the county for their services. Outside of New York City, 18-B lawyers are assigned either in criminal cases or to represent adults in Family Court proceedings. In New York City, the 18-B panel includes attorneys who represent children as well as adults. Both law guardians and 18-B attorneys are considered to be "assigned" counsel, although law guardians are paid not by the county but by the state.

[5]§722-c provides that upon a finding by the court that expert or other services are needed (and that the defendant is unable to afford them) the court shall authorize counsel to obtain these services at county expense. (Compensation up to $300 is permitted.)

Figure 2

LAW GUARDIANS' COMMENTS ON THE USE AND NON-USE OF 722-c AND PROBLEMS IN BRINGING APPEALS

On §722-c

-"Judges routinely deny."
-"I have not even had a hearing in five years. Nearly all cases are settled."
-"I don't recall any cases requiring such services, but I'm glad to learn of it."
-"Didn't know about it. Boy this is revealing. You guys are on to something - we don't know what we are doing."
-"I tried, court wouldn't approve."
-"Frankly, I am ashamed to admit that I was not aware of County Law Section 722-C and would venture a guess that 95 percent of the other law guardians in the county are also unaware of that Section."

On Problems In Bringing Appeals

-"Appellate Division substantially cut the voucher for no apparent reasons. This chills strong appellate advocacy."
-"Child disappeared in the system before the appeal was decided."
-"Years ago, and yes, they gave me a hassle about the hours I put in for research."
-"Apparently we're supposed to know the cases and spend no time on research."

TABLE 20

Distribution of Law Guardians Using Selected Legal Tactics

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
	%	%	%	%	%	%	%
Used §722-c							
Yes[a]	17	19	16	16	14	20	14
No	83	81	84	84	86	80	86
	100	100	100	100	100	100	100
Filed Notice of Appeal							
Yes	16	22	17	9	9	19	21
No	84	78	83	91	91	81	79
	100	100	100	100	100	100	100
Represented Juvenile in Appeals							
Yes	11	14	11	6	8	11	15
No	89	86	89	94	92	89	85
	100	100	100	100	100	100	100

Role Orientation

In trying to understand how the law guardians actually represent juveniles, there are three fundamental questions: how do the law guardians perceive their underlying responsibility to the juveniles; do these underlying orientations vary with different procedures and or different aged juveniles; and in fact, do different role orientations result in noticeably different types of representation. These questions are complex and subtle, and therefore can best be answered by a combination of in-depth discussion with law guardians and observations of them as they represent juveniles. (For this reason these strategies were extensively used in the field component of the law guardian study as described in Chapter 4.)

In the questionnaire we did, however, try to assess the law guardians' basic orientation in three ways. First, the law guardians were asked to respond to a question about whether they view their responsibility at both fact-finding and dispositional stages of PINS and JD proceedings in terms of representing the child's rights or the child's best interest. (See Figure 3.) In addition, they were queried about their view of the law guardian role in abuse and neglect proceedings. This general question was followed by a more specific one, asking what they do in each of four proceedings if their own views and that of their client differ. (See Figure 4.) Finally, law guardians were given the opportunity to discuss in their own words, conflicts, confusions, or views on the role of the law guardians. This is particularly relevant since the law guardian statute calls upon the law guardians to express the child's wishes to the court. (See F.C.A. §241.)

Figure 3
QUESTION USED TO ASSESS RIGHTS VS. BEST INTEREST ORIENTATION

15. a. The law guardian's role in a juvenile delinquency proceeding is similar to that of criminal defense at:

Fact-finding:

Disagree		Agree Moderately		Agree Strongly
1	2	3	4	5

Disposition:

Disagree		Agree Moderately		Agree Strongly
1	2	3	4	5

b. The law guardian's role in a PINS proceeding is similar to that of defense counsel at:

Fact-finding:

Disagree		Agree Moderately		Agree Strongly
1	2	3	4	5

Disposition:

Disagree		Agree Moderately		Agree Strongly
1	2	3	4	5

c. The law guardian at a fact-finding hearing of an Article X proceeding, should under most circumstances remain neutral:

Disagree		Agree Moderately		Agree Strongly
1	2	3	4	5

d. The law guardian at a dispositional hearing of an Article X should, under most circumstances, represent the child's best interest.

Disagree		Agree Moderately		Agree Strongly
1	2	3	4	5

Figure 4
QUESTION USED TO ASSESS RESPONSE TO CONFLICT
BETWEEN LAWYER'S JUDGMENT AND CHILD'S WISHES

16. a. What are you likely to do if your assessment of the most appropriate disposition for a child differs from what the child wishes in a juvenile delinquency proceeding?

Represent the child's wishes _____ Argue for the best plan _____

Inform the court/judge of both the child's wishes and his or her best interest _____ Request that a new law guardian be assigned _____

Other (please specify):

b. What are you likely to do if your assessment of the most appropriate disposition for a child differs from what the child wishes in a PINS proceeding?

Represent the child's wishes _____ Argue for the best plan _____

Inform the court/judge of both the child's wishes and his or her best interest _____ Request that a new law guardian be assigned _____

Other (please specify):

c. What are you likely to do if your assessment of the most appropriate disposition for a child differs from what the older child/adolescent wishes in an Article X proceeding?

Represent the child's wishes _____ Argue for the best plan _____

Inform the court/judge of both the child's wishes and his or her best interest _____ Request that a new law guardian be assigned _____

Other (please specify):

d. What are you likely to do if your assessment of the most appropriate disposition for a child differs from what the older child/adolescent wishes in a 392 proceeding?

Represent the child's wishes _____ Argue for the best plan _____

Inform the court/judge of both the child's wishes and his or her best interest _____ Request that a new law guardian be assigned _____

Other (please specify):

Taken together, these sets of data reflect a very interesting and somewhat more complex picture with respect to role orientation than is often described.

Rights versus Best Interest Orientation

The data from the rights vs. best interest orientation question were analyzed to determine the mean (average) score for panel law guardians statewide, by population levels, by experience and for this analysis by downstate and upstate regions. Further, because the general consensus is that downstate law guardians are more rights oriented than upstate law guardians, means were obtained by region as well. The means resulting from the analysis are reported in Table 21. There are two striking points about the data. The first is that for each type of proceeding the statewide means within each type of proceeding and the means for each category analyzed are very similar. (A multiple regression analysis confirmed that the means were not influenced by population levels, experience, or region.) The second is that the means for both fact-finding and dispositional stages differ from proceeding to proceeding, suggesting there is considerable differentiation among law guardians regarding their basic orientation as a function of the type of proceeding, even at fact-finding. This is particularly visible in comparing the JD and PINS means at fact-finding, and the means for dispositional hearings in all three proceedings.

In addition, because there is so much debate in New York about the appropriate stance of a law guardian , a special analysis was conducted to determine what proportion of the law guardians view the most critical aspect of the law guardian role as protecting the child's rights. To assess this, we determined the proportion of law guardians who believe very strongly that their role at both JD and PINS fact-finding and dispositional proceedings is analogous to that of a criminal lawyer. (See Figure 3.) 14% of the law guardians so responded.

Thus, overall, the responses to this question suggest there is considerable homogeneity throughout the state in the way the law guardians view their role. Further, while there appears to be a "hard-core" (under 15%) of consistently rights oriented law guardians, the vast majority of law guardians reflect some combination of a rights and a best interest orientation.

Handling Disagreements with the Child

The pattern of responses to the question about how the law guardians handle situations in which they do not agree with their client's wishes is similar, but not identical. The data suggest that the inclination to represent the child's wishes (which follows from a rights orientation) is greatest in a JD proceeding, somewhat less in a PINS proceeding and the least in an abuse and neglect proceeding. In general law guardians report responding to their clients wishes in foster care review proceedings as they do in PINS proceedings. (See Table 22.)

TABLE 21

Mean Scores on Rights vs. Best Interest Orientation for Three Types of Juvenile Proceedings

	Statewide	Population Levels			Experience Levels			Regions	
		High	Medium	Low	Inexp.	Exp.	Very Exp.	Downstate	Upstate
Proceeding & Stage	Mean Scores	Mean Scores	Mean Scores	Mean Scores	Mean Scores	Mean Scores	Mean Scores	Mean Scores	Mean Scores
Juvenile Delinquency									
Fact-finding	4.0	4.1	3.9	4.0	4.0	4.1	3.9	4.0	4.0
Disposition	3.1	3.3	2.9	3.1	3.0	3.2	3.0	3.1	3.1
PINS									
Fact-finding	3.5	3.5	3.4	3.6	3.4	3.5	3.5	3.5	3.3
Disposition	2.8	3.0	2.6	2.9	2.7	2.9	2.9	2.9	2.7
Abuse and Neglect									
Fact-finding	2.4	2.4	2.2	2.5	2.4	2.4	2.2	2.4	2.2
Disposition	4.5	4.4	4.6	4.6	4.5	4.5	4.7	4.6	4.5

*Note: Because of the way the questionnaire was worded, in the first two proceedings the lower the mean score the greater the best interest orientation; in the third, the higher the mean score, the greater the best interest orientation.

TABLE 21

Mean Scores on Rights vs. Best Interest Orientation for Three Types of Juvenile Proceedings

	Statewide	Population Levels			Experience Levels			Regions	
		High	Medium	Low	Inexp.	Exp.	Very Exp.	Downstate	Upstate
Proceeding & Stage	Mean Scores	Mean Scores	Mean Scores	Mean Scores	Mean Scores	Mean Scores	Mean Scores	Mean Scores	Mean Scores
Juvenile Delinquency									
Fact-finding	4.0	4.1	3.9	4.0	4.0	4.1	3.9	4.0	4.0
Disposition	3.1	3.3	2.9	3.1	3.0	3.2	3.0	3.1	3.1
PINS									
Fact-finding	3.5	3.5	3.4	3.6	3.4	3.5	3.5	3.5	3.3
Disposition	2.8	3.0	2.6	2.9	2.7	2.9	2.9	2.9	2.7
Abuse and Neglect									
Fact-finding	2.4	2.4	2.2	2.5	2.4	2.4	2.2	2.4	2.2
Disposition	4.5	4.4	4.6	4.6	4.5	4.5	4.7	4.6	4.5

*Note: Because of the way the questionnaire was worded, in the first two proceedings the lower the mean score the greater the best interest orientation; in the third, the higher the mean score, the greater the best interest orientation.

TABLE 22

Distribution of Law Guardians Using Different Strategies to Resolve Differences Between Their Views and Their Clients Wishes for Four Types of Proceedings

Law Guardian Strategy	Statewide	Population Levels			Experience Levels			Region	
		High	Medium	Low	Inexp.	Exp.	Very Exp.	Downstate	Upstate
	%	%	%	%	%	%	%	%	%
JD									
Represent Child's Wishes	13	19	10	7	13	16	6	20	9
Inform the Court of Conflict	57	51	59	63	65	55	50	51	60
Argue for Best Plan	19	19	18	21	10	21	27	19	19
Other	11	11	13	9	11	8	17	10	12
	100	100	100	100	100	100	100	100	100
PINS									
Represent Child's Wishes	11	16	10	6	12	13	5	16	8
Inform the Court of Conflict	59	53	60	64	67	58	47	55	60
Argue for Best Plan	21	23	19	23	12	22	35	21	25
Other	9	8	11	7	9	7	13	8	7
	100	100	100	100	100	100	100	100	100
Article X									
Represent Child's Wishes	9	11	10	5	8	11	4	12	7
Inform the Court of Conflict	58	53	61	61	66	58	47	53	60
Argue for Best Plan	25	27	22	26	18	25	36	26	25
Other	8	9	7	8	8	6	13	9	8
	100	100	100	100	100	100	100	100	100
392									
Represent Child's Wishes	11	13	12	6	9	13	7	15	9
Inform the Court of Conflict	60	56	58	66	70	57	52	55	62
Argue for Best Plan	21	22	21	20	12	22	31	21	21
Other	8	9	9	8	9	8	10	9	8
	100	100	100	100	100	100	100	100	100

*Other includes requests for new law guardians reported by three/four percent of the law guardians in each category.

Overall, the majority of law guardians lean more strongly toward a best interest than a rights orientation. Again, only a relatively small percentage of law guardians (between 9 and 13, depending upon the proceeding) would consistently represent the child's wishes in the face of personal disagreement. However, this question elicited substantially more variation as a function of geography than was visible in the previous questions. Law guardians living in urban areas consistently report being more likely to represent the child's wishes than others. It is also noteworthy these data do indicate a very strong upstate-downstate split, with virtually twice as many downstate law guardians being likely to represent the child's wishes in conflict situations in JD and PINS as can be expected upstate, and only somewhat fewer in foster care review and abuse and neglect proceedings. Further, experience is not as important as geography in shaping these orientations.

The Law Guardians Own Comments on Their Role

An analysis of the law guardians own comments introduces two additional complexities not directly visible in either set of statistical data.[6] The first is that even within the same geographic area there can be a tremendous range of opinion about the law guardian role, a range documented for all sized counties. (See Figure 5.) The second is that across the state many law guardians are simply unsure about their role.

The Meaning of the Role Orientation Data

In interpreting the data on role orientation, two caveats are in order. In the first place, it may be that the questions themselves, particularly those inquiring about rights vs. best interest orientation were simply not powerful enough to elicit the more subtle differences that may exist as a function of geography and experience. Second, and perhaps most importantly, in interpreting these data, it is crucial not to assume that these role beliefs are in fact reflected in the ways law guardians behave when they actually represent children.

But even with these limitations, at least three conclusions can be drawn. As measured either by the view that JD and PINS proceedings at fact-finding and disposition are analogous to criminal defense proceedings, or that a child's lawyer is always obligated to represent his client's wishes, under 15% of the panel law guardians take a hard line child's rights orientation either upstate or downstate. Second, there do appear to be overall regional differences between upstate and downstate with downstate law guardians reflecting a more rights-oriented perspective. This dichotomy is tempered by the existence, within both upstate and downstate counties, of views representing both ideological extremes as well as considerable confusion. Third, the prevailing role orientation among the law guardians in New York State is in fact a hybrid one reflecting a mix of a child's rights and a best interest orientation.

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[6]Both of these patterns, visible in the law guardians' spontaneous responses to the questionnaire are also visible in the county profile reports.

Figure 5

LAW GUARDIANS' COMMENTS ON THE ROLE OF LAW GUARDIANS

Rights vs. Best Interest Orientation Within the Same Geographic Areas

Downstate Urban County

-"It should be clear that the best interests of the child should be the prime consideration."
-A satisfaction is "knowing that I protected the rights of juveniles as adequately as if they were facing adult prosecution."

-"Qualified law guardian must also become a guardian ad litem as the two roles are interchangeable."
-"Stop calling them law guardians. An attorney assigned to a juvenile is that juvenile's lawyer, and should be so referred."

Middle-sized Upstate Counties

-"The role of law guardian should be clarified to make it clear that each law guardian is expected to use his own perceptions of what is best for the client to determine the course of action. As of now, this independent type of role is not clearly sanctioned."
-"The child's wishes should be represented. I believe Gault requires no less. If the judge is concerned about the best interest, a guardian ad litem should be appointed."

-"Have the statute §249 provide; a law guardian shall represent the best interests of the child for whom he is appointed.
-"My task is to represent the legal interest of the child as vigorously as I can articulate that interest."

Rural Upstate County

-"I strongly feel that a law guardian representing a juvenile charged with a crime owes that child a defense and functions as an advocate."
-"My experience teaches me to represent the child's best interest not wishes."

Figure 5 continued

Role Confusion and the Need for Clarification

-"Right now, most law guardians are playing it by the seat of their pants."
-"I am sometimes concerned whether I am representing the child's best interest, the parents' best interest with regards to the child, the desires of the child or a combination."
-"I'm sometimes torn between my assessment, that of the court, that of the child. Perhaps more experienced judges can give guidelines.

-"The majority of the time I feel a tremendous conflict between JD/PINS acting as defense counsel as opposed to actually doing what I feel is in the child's best interest. (Especially at fact-finding, there are many times I feel a full hearing would be more damaging to the child (due to home environment) than an admission of the allegation with a view towards a satisfactory disposition that may rectify some of the problems in the home."
-"I believe JDs should be assigned a lawyer as in criminal or other civil proceedings. Don't call it 'law guardian.' PINS is different I guess. It is an advocate role - I think!"

-Before it can be clarified, it must be defined. To my knowledge, it has never been so defined."
-"There should be a clear-cut guideline as to whether our presentation should be on a strictly legal basis or whether a mixture of legal and sociological tactics should be employed.
-(The greatest frustration) is "not really understanding my role. Am I a sociologist, psychologist, lawyer, advocate, judge, etc."
-"The very name law guardian engenders too many misconceptions. It should be changed."
-(There should be) "wholesale re-evaluation of the role of the law guardian."

Access and Receptivity to Legal Training

The New York State statutes affecting juveniles are complex and frequently changing. Further, particularly in legislation in which New York State has charted new statutory ground (as in the Child Welfare Reform Act),[7] they are accompanied by myriad regulations and evolving case law. Equally complex is the service delivery system to which a law guardian must react, or fashion a dispositional plan for a juvenile. Hence, we questioned the lawyers about the content, the quality and the extent of recent (within two years) training activities.

According to the law guardians, 42% have not participated in any training within the past two years; an equal percent participated in seminars, and about 17% of the attorneys were involved in some other unspecified type of training. The more urban the population and the more inexperienced the law guardian, the more likely he or she is to participate in training. (See Table 23.)

TABLE 23

Distribution of Law Guardians Reporting Training Experience Within Past Two Years

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Training Reported by Law Guardians	%	%	%	%	%	%	%
No Training	42	23	50	57	35	45	48
Seminar	41	67	30	22	45	39	39
Other	17	10	20	21	20	16	13
	100	100	100	100	100	100	100

With respect to the type of training, the pattern of emphasis is fairly consistent across geographic regions. For approximately three quarters of the law guardians reporting training, the training involved child abuse and neglect; about one-half of the lawyers were trained in the juvenile offender law (more in urban areas, fewer in more rural areas), one-half in tactics and skills. The least training has been directed toward informing the law guardians about the Child Welfare Reform Act (CWRA). Statewide, 14% of the attorneys reported training in the CWRA; in highly populated areas, 18% so reported; in less populated areas, 9 and 10 % respectively. The more experienced lawyers report highest level of participation in both child abuse related training and CWRA (See Table 24.) Regardless of the topic, about one-quarter of the lawyers found the training very useful, over one-half, moderately useful, the remainder less so. (See Table 25.)

[7] 5 Social Services Law §409.

As a group, although a substantial number had no recent training experience, most law guardians did indicate a general interest in more training. Only 9% of the sample stated they would not participate in training under any conditions. However, the more experienced law guardians seem less inclined to desire more training than those with less experience. If this is reflected in actual participation patterns, it underscores the need for some other mechanism for assuring the experienced law guardians are aware of new developments. Training with reimbursement was clearly preferable to training without reimbursement, particularly during days. In general, however, law guardians indicated a preference for evening training sessions. (See Table 26.)

TABLE 24

Percentage of Law Guardians Reporting Various Types of Training*

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Area of Training	%	%	%	%	%	%	%
Child Abuse & Neg.	74	77	67	76	77	69	81
J.O.	52	64	45	35	45	53	64
Tactics & Skills	52	53	48	54	59	48	49
TPR	45	58	31	34	45	42	56
Child Welfare	14	18	9	10	9	13	24
Dom. Rel.	2	2	2	2	2	2	3
Other	18	15	25	19	20	18	10

*This table includes the responses of those law guardians who said they had training (N=456). Percentages reflect law guardians reporting yes to each specific category.

TABLE 25

Distribution of Law Guardians Reporting Different Reactions to Training

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Perceived Usefulness	%	%	%	%	%	%	%
Not at all	2	4	1	0	1	2	5
Minimally	17	15	22	15	16	17	16
Moderately	56	54	57	59	58	60	42
Very	25	27	20	26	25	21	37
	100	100	100	100	100	100	100

TABLE 26

Distribution of Law Guardians Indicating Willingness to Participate in Training at Different Times and With or Without Reimbursement*

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Training	%	%	%	%	%	%	%
Evenings with Reimbursement	74	75	76	69	78	74	50
Days with Reimbursement	73	68	76	74	79	70	65
Evenings without Reimbursement	64	66	66	61	82	60	55
Days without Reimbursement	50	44	53	55	59	47	42

*Percentages reflect law guardians reporting yes to each specific category.

Those responding to an open-ended query about the specific nature of desired training indicated four major needs. The most frequent suggestion was for periodic updates on current case law and legislation. In addition, the law guardians requested: greater exposure to placement options; more information about specific facilities; greater opportunity to talk collectively with other law guardians, with judges, and or with others such as caseworkers and probations officers; and training in child psychology, family dynamics and interviewing children.

PERCEPTION OF NEEDED CHANGE IN THE LAW GUARDIAN SYSTEM

Three questions were specifically designed to elicit the law guardians' suggestions for improvements in the law guardian system. First, the law guardians were asked about needed changes at both the county and state level. According to the responses, fully 88% of the lawyers view change at the county level as necessary, and even more (91%) at the state level. (See Table 27.)

TABLE 27

Distribution of Law Guardians Reporting Improvements Needed in County and State Systems.

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
County Improvements	%	%	%	%	%	%	%
Yes	88	94	85	83	90	87	84
No	12	6	15	17	10	13	16
	100	100	100	100	100	100	100
State Improvements							
Yes	91	93	93	88	95	92	83
No	9	7	7	12	5	8	17
	100	100	100	100	100	100	100

Figure 6

THE LAW GUARDIANS' COMMENTS ON TRAINING

On Training in General

-"I myself could use updates on new legislation and case law.
-"I found many new law guardians absolutely unknowledgable in neglect and PINS. Training sessions should be mandatory."
-"Some training (is needed). The type of service rendered varies terrifically from lawyer to lawyer."
-"I feel strongly that law guardian training should be mandatory, comprehensive and that participating attorneys should be paid by the state at law guardian rate. Most law guardians are young attorneys like myself who could use the few bucks involved and who need the training."
-"In our county lawyers volunteer to be on the list, appointed from the list. No training required. I see that as inadequate."
-"In _____ County, you put your name on the list and you become a law guardian - no seminars, no guidelines, nothing. I think that some training should be involved because most law guardians are the people with the least training. Is the law guardian system to be a training ground for young lawyers?"

On Specific Training

-(From a participant in a recent trainng session:) "More of the same - opportunities to share experiences, impressions and procedures with other law guardians as well as various family court judges, provides a valuable sense of confidence and insight."
-"Continuously updated source book or manual for law guardians."
-"More information about possible placements and dispositional alternatives for more effective dispositional hearings."
-"Unified statewide curriculum so everyone knows what everyone else knows and their assumptions."
-"NYSBA Continuing Education program should strongly emphasize law guardian matters. CLE has been very helpful in other areas."

Second, the questionnaire also provided the law guardians with the opportunity to indicate the specific changes they view as necessary, both in their own counties and on a statewide basis. Particularly interesting in their responses was the extent of consensus within counties about widespread problems. So, for example, in one county there were repeated complaints from attorneys that the appointment system is unfair, with old time law guardians or judges' "cronies" getting a disproportionate share of appointments; in another, poor scheduling was repeatedly cited. Beyond this, many law guardians were quite explicit in their proposals for improvements. Suggestions included substituting full-time law guardians for the panel system; providing more rigorous screening, training, and back-up support for panel attorneys; and improving the environment in which law guardians practice (e.g. streamlining the assignment process, notifying law guardians of cancelled hearings prior to arrival at court, submitting reports to law guardians in advance of the hearing, and providing space in the courtroom to interview clients in privacy). (See Figure 7.)

The law guardians also made a surprising number of specific comments about problems in the quality of representation accorded to individual juveniles, and about how individual representation could be improved. They suggested, for example, that each law guardian actually interview clients, that there be continuity of representation, and that there be more ready access to information. These comments are especially interesting because they indicate how both implicitly and explicitly critical some law guardians are of their colleagues, and because they suggest a reservoir of concern and standards among at least a core of law guardians. (See Figure 8.)

In addition to the opportunity to share their own views, the law guardians were also asked to give their reactions to five changes proposed in the questionnaire. These include ready access to: a brief bank; a legal research service; paralegal assistance; independent social workers or mental health professionals; and advice from experienced law guardians.

The law guardians reactions to these potential improvements were particularly interesting. Regardless of levels of experience, population size or philosophical orientation, the highest priority recommendation for the law guardians is greater access to independent social workers and mental health professionals. This ranked first among all groups. (See Table 28.) The same unanimity was not visible with respect to the three recommendations that have a more "legal" thrust, access to a brief bank, paralegals and a legal research service. t-tests indicated that those attorneys scoring highest on rights orientation were significantly more likely to favor both a brief bank and paralegal assistants ($p < .01$) and access to a legal research service ($p < .05$). Differences in the perceived desirability of "legal support services" were also clearly apparent by region, with downstate lawyers significantly more likely ($p < .001$) to see such services as very desirable. (This is important because it indirectly lends support to the view that downstate lawyers are more rights oriented.) There were no differences as a function of role orientation with respect to the perceived utility of advice from more experienced law guardians.

Figure 7

IMPROVEMENTS PROPOSED IN THE LAW GUARDIAN SYSTEM
BY LAW GUARDIANS

-"Many of the attorneys handling these cases do not wish to act as law guardians. The system should be changed so that a few attorneys handle all law guardian cases. The few could be better paid and trained."
-"A salaried law guardian might do a better, more consistent job. You could specialize and be properly paid."
-"Whole structure needs updating. Too many lemons on the payroll. No enforcement, no responsibility, lack of help, lost files."
-"Scrap the system and hire full-time law guardian."
-"Do away with the system. Have a statewide system with each county having an office of law guardians similar to the public defenders."
-"Appoint one or two attorneys as the official law guardian on a salary or comparable basis and let that person develop the knowledge and skill to handle the cases."

-"New law guardians should be backed by a committee of experienced law guardians."
-"A screening committee for law guardians with requirements for seminars for them to stay."
-"Mandatory annual training. Evaluation of all law guardians by panel every two to three years or screen complaints from professionals. Being on the panel should be a privilege, not a right."
-"Training program for every new member of the panel. An honest attempt not to reappoint the obviously senile attorneys who can no longer represent clients. Only experienced counsel in neglect and abuse cases."
-"A brief bank - very valuable - recommended last month to the assigned counsel plan."
-"Speed up vouchers, mandate statewide pre-requisite course, administer locally."

-"A certificate of appreciation for law guardian's wall!"

Figure 8

LAW GUARDIANS' VIEWS ON THE QUALITY OF REPRESENTATION

-"Too many law guardians don't put enough effort into the assignment, won't fight like they should, don't advise the kids and families properly and let the court take the heat."

-"A good many law guardians seem to follow the line of least resistance, that is they go along with whatever the agency recommends. . .certain checks and balances are lacking in the system."

-"Teach the professional law guardians the canons of ethics and get them to see their clients before rushing into court."
-(There should be)"mandatory meeting of law guardian with client."

-"Same law guardian should be assigned if the child is before the court in any matter. If must be new law guardian, should be given the name of the old."
-"Continuation of same law guardian in extension of placement and foster care review to ensure continuing knowledge of care and afford child an attorney with whom he is familiar."
-"Keep law guardian on case until conclusion."
-"Substitution of law guardians during pending proceedings weakens representation of the child."

-"All investigative reports delivered to law guardian at least one week prior to court date."
-"Access to all records re the case. Discovery proceedings cause delay and not sufficiently compensated."
-"Immediate full disclosure of all records - obviate the need for needless costly discovery attempts."

-"I do not believe law guardians understand the seriousness of the dispositions."
-"Law guardian should be more active in development of case, especially TPR."

-"The apparatus of representation is not geared for continuity of thought, effort and strategy."

Table 28

Percentage of Law Guardians Indicating
Specific Improvements as Very Desirable*

	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Services	%	%	%	%	%	%	%
Brief bank	27	32	26	21	27	25	30
Legal Research	28	33	27	21	29	23	37
Paralegals	27	37	25	19	28	26	30
Social Workers	49	52	50	47	52	47	48
Advice from experienced law guardians	27	33	22	26	40	19	23

*This table reports only those who indicated they perceived the change as "very desirable." Law guardians also had the opportunity to check moderately desirable, minimally or not at all desirable. If both those viewing a recommendation as very desirable and moderately desirable are considered together, 62% of the law guardians supported a brief bank, 59% access to legal research, 60% access to paralegals, 87% access to social workers and 57% advice from experienced law guardians.

SUMMARY

This chapter profiles the New York State panel law guardians. It provides aggregate information, based on a mail survey of all current panel law guardians, about the length of time practicing law, level of general interest in juvenile law, caseload patterns, access to training and support services directly relevant to the law guardian practice, perception of the fundamental obligations and role of a law guardian and view of needed changes in the system. Based on the data, a number of important conclusions seem warranted.

Panel law guardians across the state are, with respect to background and years of experience, more similar than they are different. Further, where there are differences, they appear to be more related to whether the law guardian lives in urban or rural areas, rather than how experienced the law guardian is. Thus, across the state, close to one-third of the lawyers have been in practice for five years or less, two-thirds for more. However, somewhat more of the law guardians living in heavily populated areas have been in practice for 20 years or more, although the percentage of those serving as law guardians with under five years experience is also higher in urban areas.

Over one-half of the law guardians who serve as law guardians report little interest in the substance of juvenile law; this is particularly so for law guardians in rural areas, who, more than their counterparts, serve out of a sense of obligation. And yet, despite some frustration, two-thirds of the law guardians anticipate serving indefinitely, regardless of geography or years of experience.

The typical panel law guardian represents under 20 children a year. This is about one-fifth of his or her total practice. In fact, family law practice, involving the representation of either children or adults in family court as private or retained counsel together accounts for only a little over one-third of the law guardian's total practice. Two-thirds of the law guardians typical practice involves matters unrelated to family law. Within the law guardian practice itself, the majority of law guardians accept all types of cases. Specialization appears to be limited, with about one-fifth of the law guardians accepting only delinquency type cases, 6% only child welfare type cases (such as abuse and neglect, foster care approvals and reviews and termination of parental rights proceedings).

The law guardians as a group have not had extensive experience to prepare them for law guardian work, nor do they view themselves as specialists in juvenile law. Thirty to 40% of the law guardians report no relevant clinical or academic experience prior to becoming a law guardian. (This is most marked in rural areas.) Further, two thirds of the attorneys serving on law guardian panels have not had to go through any screening, orientation, or other selection process, although there is some variation in the data by both population levels and Judicial Departments. Surprisingly, only one-quarter of the law guardians even view themselves as specialists in juvenile law. (The percentage of those who view themselves as experts increases as experience increases, and is also greatest in urban areas.)

Over 42% of the law guardians have had no relevant law guardian training within the past two years. Of those reporting training, 74% were trained in child abuse and neglect related issues; only 14% of the law guardians received training in the Child Welfare Reform Act.

Law guardians in general tend to view their obligation to their clients as a mixture of representing the child's best interest and, primarily at juvenile delinquency proceedings, the child's rights. The data on role orientation suggest a complex picture. Overall, under 15% of the law guardians tend to take a strong rights orientation regardless of the proceeding. However, this varies by geography. Downstate law guardians are somewhat more rights oriented in non-juvenile delinquency as well as juvenile delinquency proceedings than are upstate law guardians. At the same time, within each part of the state, sharply contrasting perspectives on the proper role of the law guardian co-exist, along with evidence that a substantial number of law guardians are simply uncertain about what they should be doing.

The panel law guardians as a group are surprisingly critical of the panel system, and sometimes of the competence of their fellow law guardians as lawyers. Their concerns center in three major areas. First, panel law guardians are frustrated by the unprofessional treatment they are accorded by the courts. (Specific complaints focused on the scheduling process, the absence of privacy for interviewing, favoritism in appointments, and agency policies making access to reports difficult.) Second, the reimbursement levels and procedures are troublesome. Third, a number of law guardians appear to be sharply critical of their colleagues for such failures as not interviewing children and not being familiar enough with the area of juvenile law to provide quality representation.

From the law guardians' perspective 80% of the law guardians would like much greater access to independent social workers or mental health professionals. This was perceived as a priority need by law guardians in all areas of the state and by law guardians with all levels of experience. Over half of the law guardians would like access to paralegal assistance, a brief bank and a legal research service. Downstate law guardians are particularly likely to favor these legally-oriented improvements.

Chapter 3

WHAT IS EFFECTIVE REPRESENTATION: DILEMMAS AND GUIDELINES

This chapter seeks to provide a perspective on the question most central to this study: what constitutes the effective representation of children. As a way of approaching the issue, it seems helpful to pose three questions: what should all lawyers who represent children do and know because they are lawyers, what should all lawyers who represent children do and know because their clients are children, and what should lawyers do and know because of the specific nature of the proceedings in which they represent children.

Answers to these questions are by no means complete. Guidelines, however, may be found in a close reading of the New York State law guardian statute; in emerging caselaw nationally and in this state; and in general and juvenile-specific legal standards. The first part of this chapter provides an overview of the emerging wisdom from these sources; the second discusses guidelines to assess the quality of law guardian representation in this state that were developed specifically for this project.

EXISTING GUIDELINES

The Law Guardian Statute

A review of the law guardian statute itself, and the related legislative history provides a useful framework from which to start. The initial law guardian legislation in New York State was enacted in 1962. Thus it predated the Gault decision [In Re Gault, 387 U.S.1 (1967)] by five years. The legislation provided for the appointment of a law guardian under articles three (neglect) or seven (delinquency and PINS) at the request of a minor or of a parent or person legally responsible for the minor's care.[1] As such, it marked the first legislative recognition in the country of the importance of lawyers to children involved with the courts. In 1970 the legislation was amended, in part to comply with Gault. Representation was made mandatory in juvenile delinquency, PINS and neglect and abuse proceedings, and permissive in all other family court proceedings involving juveniles. No further major changes have been made in the law guardian statute since that time.[2]

Both the legislative history and the statutory language itself suggest that to a much greater extent than is often acknowledged the law guardian's role

[1] §249, Family Court Act (1962); L. 1962, C. 686.

[2] For the past several years there has been legislative discussion of making representation in custody cases mandatory, and, most recently of requiring representation in foster care review and approval proceedings. To date however, these proposed changes have not been enacted.

was, at its inception, seen as fundamentally legal in nature. The relevant legislative committee at the time the statute was enacted explicitly noted:

> "The committee looked to the law guardian to assist the court, [and] to insure against any invasion of civil rights or violations of constitutional privileges." [Report of the Joint Legislative Committee on Court Reorganization, 2 McKinney's Sessions Laws, 3431 (1962).][3]

This perspective in turn was also incorporated into the findings and purpose section of the law guardian statute, which noted:

> "... [C]ounsel is often indispensible to a practical realization of due process of law, and may be helpful in making reasoned determinations of fact and proper orders of disposition."

Further, in 1970, when representation was made mandatory in delinquency, PINS and abuse and neglect proceedings, a new emphasis was added. F.C.A. 241 provides: "This part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court." (Underlining ours.)

It is also interesting to note what is not addressed either in the statute or the legislative history. Consistent with the emphasis on the law guardian as lawyer found in the statute, the law guardian is not charged with protecting the best interest of the child, but with the child's interests. Nor does the statute require, or even suggest that the law guardian express his views about what he perceives to be the child's best interest to the court. Further, the statute is silent on the weight that should be given to the fact that in New York those who represent children are not called lawyers, but law guardians.[4]

But even as all these facts suggest a stronger emphasis than is frequently acknowledged on the lawyer aspects of the law guardian role, those instrumental in the passage of the law guardian statute were also cognizant that being a children's lawyer is not absolutely parallel to other kinds of representation. So for example, Isaacs, who was one of the principal

[3] Interestingly, the committee also looked to the law guardians to "supply the legislature and governor with an independent view of the practical effect of the new [Family Court] Act."

[4] In this context, it should also be noted that until 1983 under F.C.A. §741(a) (repealed in 1983), if a parent was not present in a delinquency or PINS case, a guardian ad litem, separate from a law guardian was to be appointed. The new Article 3 of the Family Court Act (effective July 1983) does not provide for such appointment, although a guardian ad litem in appropriate circumstances may be appointed under provisions of the Civil Practice Laws and Rules.

draftsmen, elaborated on the role of the law guardian in a 1963 article. He first stressed the legal nature of the decisions made on behalf of juveniles coming before the court, and then in a beginning way, indicated that nonetheless the overall need to serve the interest of the minor client did have some unique implications for how the lawyer functioned.

> "... the family court is a court and not a social agency. The order of disposition which may ultimately be issued affects the basic rights of some parent or child.... Accordingly, the lawyer in the family court, no less than in any other court, must stand as the ardent defender of his client's constitutional and legal rights. He should bring to this task the usual tools of the advocate -- familiarity with the applicable law, the ability to make a thorough investigation and logical presentation of the pertinent facts and the faculty for forceful and persuasive expositions of his client's position ...."
>
> But Isaacs also noted, "... conscientious counsel will also have to exercise intelligent discrimination in the use of tactics learned in other courts since wholesale importation of techniques developed in the handling of criminal or civil cases before other tribunals may not only threaten the objectives of the court but will rarely serve the interests of the minor clients."
> "The Role of the Lawyer Representing Minors in the Family Court" 12 Buffalo L. R. 501, 506, (1962-1963).

In sum, the law guardian statute requires that the law guardian's primary role be to protect the due process rights and the interests of his or her child client, as well as to express the child's wishes to the court. The statute does not emphasize, or even address the guardian aspect of the role, although from the beginning it was recognized that in some way the dependent status of children makes representing them different from representing adults.

Caselaw

The law guardian statute defines the parameters of representation to children broadly, but it does not specifically address the question of what constitutes effective representation to them. Legal clarification of this has come from two sources: general caselaw that pertains primarily to criminal cases, but has applicability to juvenile representation, and caselaw emerging from juvenile specific decisions.

As an example of the former consider the following recent decision in a criminal case:

> "While the standard for determining effectiveness of counsel cannot be precisely defined 'it is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review

> both the law and the facts relevant to the defense' (cite omitted) and who is familiar with, and able to employ at trial basic principles of criminal law and procedure." [People v. Rodrigues, 94 A.D. 2d 805 (2d Dept. 1983)]

Clearly, the aspects of effective representation articulated in this decision are generic ones, relevant not only in criminal cases, but in all types of cases, civil, criminal and juvenile.

It should also be noted that even with respect to representation of adults, debate about the appropriate overall test of adequate representation continues. The traditional test of whether the attorney's performance rendered the trial a "farce and mockery of justice", a standard obviously difficult to prove, has evolved in several states to a new standard of "reasonable competence." In New York State, the Court of Appeals has declined to subscribe to a specific test, and instead, has held that adequacy of counsel should be determined on a case by case basis in light of "the totality of circumstances."

However, in individual cases, the court has identified specific inadequacies which are relevant for some types of juvenile proceedings. These include: the failure to investigate the facts or law [People v. Bennett, 29 N.Y.2d 462 (1972)], the failure to protect a client against self-incrimination, [People v. Bell, 48 N.Y. 2d 933 (1979)] the failure to request any pretrial hearings, [Ibid.] the failure to move to suppress identification testimony [People v. Sims, 55 A.D.2d 629 (2d Dept. 1976)] or to move to supress illegally obtained evidence, [People v. Roff, 67 A.D. 2d 805 (4th Dept. 1979)] the failure to order the minutes of a preliminary hearing [People v. Sims, 55 A.D.2d 629 (2nd Dept. 1976)] and the failure to make an opening statement or cross-examine witnesses. [People v. Bell, 48 N.Y.2d 933 (1976)]

Each of these deficiencies, standing alone, does not necessarily amount to ineffective representation under the "totality" test and the courts have not singled out any one fact which would constitute a per se violation of the adequacy standards. But each has been held to be one ingredient which may constitute an indication of possible ineffectiveness.

But even more to the point, it should also be noted that in the aftermath of Gault several Appellate courts throughout the country began to apply criminal standards of adequate representation to juvenile delinquency actions. See, for example, [Interest of Williams, 233 N.E.2d 674 (Ill. 1975)] in which an Illinois appeals court held that the criminal rule of "minimum standards of professional representation" was applicable; see also [In re Charles Beard, 166 Cal. Rptr. 729 (1980)]. As noted in a 1970 Pennsylvania Supreme Court decision:

> "Wilson's [the child's] counsel did not meet his client until the morning of the hearing. He did not present the court or argue a self-defense theory even though he was aware of evidence which tended to show that Wilson was 'provoked' in his striking

the complaining witnesses. He made no objection to the trial court's references to Wilson's prior history. He made no final argument. It is our view that the facts of this case raise a high probability of inadequate representation." [In re Wilson, 264 A.2d 614, 617; the case was reversed for other reasons.]

Although the New York State Court of Appeals has not addressed the issue of effective representation in delinquency cases, several appellate division decisions have applied criminal standards.[5] In two early post Gault cases the appellate divisions held that a child was denied the effective assistance of counsel when the law guardian was forced into delinquency hearing without an adequate opportunity to prepare the case [Matter of Gary T., 29 A.D.2d 980 (2d Dept. 1968)] or an adequate opportunity to interview his client. [Matter of Franciscos, 36 A.D.2d 810 (1st Dept. 1971)] An appellate division subsequently adopted the criminal standard for effective representation in a case in which the law guardian was denied the right to interview a PINS petitioner:

"We note that in granting the temporary injunction, special term wrote:

Without delving too far into the respective merits, it is the opinion of the court that the constitutional right to counsel in proceedings brought in family court, pursuant to Article VII of the Family Court Act (PINS and delinquency) as set forth in Matter of Gault, [cite omitted] extends to the right and duty of such counsel to proceed in a manner as counsel representing a defendant in a criminal proceeding. This is not to say that a PINS matter is a strict criminal proceeding.

We are in accord. Specifically, a law guardian representing a juvenile respondent in a family court adversary proceeding has the right to interview any petitioner or witness who may possess information bearing on the issues before the court." [Rapoport v. Berman, 49 A.D.2d 930 (2d Dept. 1975)]

In another case the appellate division, First Department, held that the criminal standards of independent representation and conflicts applied to delinquency proceedings, thus precluding in most instances the joint representation of multiple respondents by one law guardian. [Matter of Jeffrey M., 62 A.D.2d 858 (1970)]

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[5]The only occasion in which the court of appeals commented on law guardian responsibilities is the 1969 case of [Matter of Samuel W., 24 N.Y.2d 196 (1969)]; the central issue in Samuel W., decided by a 4-3 vote, was the burden of proof; the court of appeals' decision was subsequently reversed by the United States Supreme Court, [In re Winship, 397 U.S. 358 (1970)].

The few juveniles cases just cited involve primarily representation at the fact-finding stages in delinquency and PINS cases. Appellate address to the effectiveness of counsel in non-delinquency juvenile proceedings has been even more rare. In a decision related to a custody case the Supreme Court in Alaska noted that:

"Like any attorney he [a guardian ad litem] should, upon appointment, investigate the facts thoroughly, a responsibility which ordinarily should include home visits and a private interview with the child with no one else present. When he feels it necessary he should consult with non-legal experts - psychologists, social workers, physicians, school officials and others. He should exercise his best professional judgment on what disposition would further the best interests of the child, his client, and at the hearing vigorously advocate that position before the court. With this responsibility necessarily goes the power to conduct discovery, to subpoena witnesses called by other parties and to argue his position to the court." [Veazey v. Veazey, 560 P.2d 382,387 (Alaska 1977)]

It is also surprising how little specific address there is in caselaw to what is perhaps the most unique event in juvenile representation -- the dispositional process. The dispositional hearing has no counterpart in criminal or civil procedure; hence the strict application of criminal standards for effective counsel may be precluded. And yet, it could be argued that in view of the juvenile court's latitude in framing a remedy the dispositional hearing is the most important event in a juvenile action. Facing the issue squarely, the West Virginia Supreme Court has articulated the following standards in analyzing the adequacy of counsel at a juvenile delinquency dispositional hearing:

"The dispositional stage of any juvenile proceeding may be the most important stage in the entire process; therefore, it is the obligation of any court appointed or retained counsel to continue active and vigorous representaton of the child through that stage. We have already held that counsel has a duty to investigate all resources available to find the least restrictive alternative ... and here we confirm that holding. Court appointed counsel must make an independent investigation of the child's background ... Armed with adequate information counsel can then present the court with all reasonable alternative dispositions to incarceration and should have taken the initial steps to secure the tentative acceptance of the child into those facilities. It is not sufficient to suggest upon the record as an abstract proposition that there are alternatives; it is the affirmative obligation of counsel to advise the court of the exact terms, conditions and costs of such alternatives...." [Ex rel D.E.H. v. Dostert, 269 S.E.2d 401 at 412-413 (W. Va. 1980); see also state ex rel C.A.H. v. Strickler, 251 S.E.2d 222 (W. V. 1979)]

There is only one reported New York case which articulates the law guardian's responsibilities at the dispositional stage, a decision involving representation in a termination of parental rights case. In that case the court affirmed the law guardian's right to advocate a specific disposition which would in his judgment promote the child's best interests. [Matter of Appel, 409 N.Y. 2d 928 (Ulster County, 1978)][6]

In sum, legal clarification through caselaw of what constitutes effective representation for juveniles has been fairly limited.[7] The decisions that are reported address primarily the representation of juvenile delinquents or status offenders and emphasize the importance of generic lawyering skills. Appellate address to what constitutes effective representation in custody or child-welfare related proceedings is extremely infrequent. Similarly, despite the unique nature of the dispositional hearing in juvenile proceedings, almost no caselaw deals with the role of the lawyer, and the nature of effective counsel at the dispositional stages of a proceeding.

Other Guidelines

Several sets of general guidelines also provide some insight about the nature of effective representation. The most basic of these are the Canons of Professional Responsibility. Particularly noteworthy with respect to children is the charge to all lawyers that:

> Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary and procedural law.... The advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgment. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law." [Rule E.C. 7-19, Rules of Professional Responsibility]

[6]In an interesting recent criminal law case, the Appellate Division, Third Department, held that a defendant was denied effective counsel at sentencing when the attorney failed to determine any mitigating factors which may have aided his client and acknowledged that he "didn't really have an opportunity to talk" with the defendant prior to the hearing. The court concluded that the lawyer's participation was a "sham" and that the defendant was "effectively unassisted at the crucial stage of his sentencing" [People v. Washington, 96 A.D. 2d 966 (3rd Dept. 1983)] The far broader aspects of a Family Court dispositional hearing, including the opportunity for testimony and the introduction of evidence, should require at least a similar application of the basic effective representation standards.

[7]The fiscal, administrative and psychological factors that appear to limit appeals in New York State are discussed more fully in Chapter 5.

However, while this has obvious implications for the overall approach to the representation of juveniles it does not provide much concrete guidance. More directly applicable are the standards for private counsel to juveniles developed and officially promulgated by the American Bar Association in 1979.[8] The standards focus on representation in juvenile delinquency and status offense proceedings. They say little about representation in abuse and neglect, and nothing about representation in foster care reviews.

Fundamentally, the ABA Standards emphasize the similarity between representing juveniles and representing adults. They require the lawyer to conduct a full and prompt investigation, to confer as frequently as necessary with the client and to keep the client informed about all developments in the case. They explicitly state that the decision about how to proceed rests with the client, after full consultation with the attorney. They also speak to the lawyer's obligation to object to evidence that would be inadmissible under Constitutional or local rules of evidence. Significantly, the standards also require the "active participation" of the attorney at the dispositional stage, since "[i]n many cases the lawyer's most valuable service to clients will be rendered at this stage of the proceeding."[9] Consistent with the emphasis on defining and protecting juvenile's rights, the standards also require counsel to inform his or her client of the right to appeal, and, unless specialized counsel is available, to evaluate and, if appropriate, conduct the appeal.

Two other points are also noteworthy. First, the standards state that the lawyer has a continuing responsibility to his or her client after disposition to "provide counseling or information, secure community services or provide representation in subsequent proceedings.[10] Second, the standards state

[8]Institute of Judicial Administration - American Bar Association, (1980) Juvenile Justice Standards. Cambridge, MA: Ballinger Publishing Co.

[9]Institute of Judicial Administration - American Bar Association (1980). Counsel for Private Parties. Cambridge, MA: Ballinger Publishing Company, Standard 10.1

[10] It is also significant that elsewhere in the project standards, (although not in the standards for counsel) there is a requirement that the court inquire concerning the effectiveness of representation before any admission is accepted. Specifically, the court is charged to ask the juvenile's counsel about the number and length of conferences between the attorney and the respondent, about the factual investigation the attorney conducted, about the legal preparation, about the advice the attorney gave the respondent, and about any conflict between them. (Institute of Judical Administration - American Bar Association. (1980) Adjudication. Cambridge, MA: Ballinger Publishing Company, Standard 3.6) The commentary further notes that this inquiry is necessary because in juvenile cases, unlike adult cases there is no jury present to observe and take into account the quality of representation provided the adults, and further, that "The criminal defendant or juvenile respondent is ill-equipped to judge the performance of the attorney and the plea acceptance ceremony is unlikely to uncover even the most gross instances of neglect by defense counsel." (p. 45.)

that adequate supporting services should be available to attorneys representing juveniles, since such representation typically involves investigatory, expert, and other non-legal services.

The ABA standards have been helpful in focusing attention on the role of children's lawyers and in defining a state of the art consensus, particularly with respect to delinquency type proceedings. In addition, several jurisdictions and organizations are also trying to promulgate guidelines about what is expected of lawyers (and or guardians ad litem) representing abused and neglected children. For example, one court in Wisconsin provides each guardian ad litem with an outline of the functions he or she is expected to carry out, and in addition suggests some issues to be considered in making custody determinations. (See Figure 1.) Similarly, the ABA has also made available a monograph outlining specific expectations of children's lawyers in abuse and neglect proceedings. These suggest that the lawyer should: complete a comprehensive independent investigation (including a visit to the child's parental or foster home); actively participate in creating a treatment plan for the child; actively cross-examine and examine witnesses at fact-finding; present all available dispositional alternatives to the court, and remain active after disposition to ensure the plan is implemented.[11] (See Figure 2.)

THE UNRESOLVED DILEMMAS

Taken together, the review of the law guardian statute itself, of caselaw, and of legal or quasi-legal guidelines suggests an emerging consensus that lawyers who represent children should be good lawyers: they should be well-prepared, they should know the facts of the case, and although this is less emphasized, they should be cognizant of the importance of the dispositional proceeding. In other words, the implicit definition of effective representation that emerges seems to focus on generic qualities of good lawyering, qualities that are relevant regardless of the type of law or proceeding involved. In addition, it can also be said that caselaw, the law guardian statute, and the most comprehensive existing standards, the ABA standards emphasize both the lawyer's obligation to protect his or her client's rights and to represent the client's wishes, much as would be the case in representing adults.

At the same time, it is also clear that the emerging guidelines are only partial. They clearly define an overall approach for lawyers, and a set of general expectations. They by no means however, provide answers to all the issues lawyers face in representing children. For example, they barely touch on the very significant question of the impact of different procedures on the

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[11]It should be noted that similar guidelines for specific procedures have been developed for training purposes in New York State. (See, for example, Office of Projects Development, (1981). Child Abuse and Neglect: A Handbook for Proceedings in the New York Family Court of the State of New York. N.Y.: Appellate Division First Department. These, however, have been distributed only on a selective and generally limited basis, and without the authority of the court or the Bar behind them.

Figure 1

FUNCTIONS OF THE GUARDIAN AD LITEM
AS DEFINED BY DANE COUNTY FAMILY COURT, WISCONSIN
Appointment as G.A.L. in a Family Court Case*

1. Read the Court file and sign the order accepting the appointment as G.A.L.
2. Contact Family Court Counseling and determine from the secretary which counselor is working in this case.
3. Confer with the Family Court Counselor assigned to this case.
4. Personally interview the parents, children, and/or custodian of the child.
   a. Interview each child privately.
   b. Include at least one home visit with advance notice to each home being considered.
5. Interview people having contact with and knowledge of the child, (i.e. school personnel).
6. Contact people knowing the parents or used as references by the parents.
7. Exchange information with other professionals involved, (i.e. psychologists, social workers).
8. Check back with Family Court Counselor before hearing.
9. Prepare, for your own use, a tentative report of your conclusions and the basis for them. Determine from the Judge if he wants a copy of a written tentative report.
10. Attend the hearing, being aware of the G.A.L.'s power to cross-examine witnesses, to subpoena witnesses, and to offer testimony. Be prepared to offer the Court a recommendation on the advisability of the children testifying or conferring with the judge.
11. At the close of the testimony, if necessary to properly determine the issue, request time to file a written report with copies to the parties and to the Family Court Commissioner.
12. Determine with the Court whether you should be discharged before the time for appeal has passed.
13. Should the outcome be adverse to what you believe are the best interests of the children, determine whether you as G.A.L. should appeal.

Considerations in Determining Custody

A. The love, affection and other emotional ties existing between the proposed custodians and the child.
B. Assessment of the physical and mental health of the child and proposed custodians.
C. The amount of time that proposed custodians will have available to devote to the child and the quality of their interaction with the child.
D. Background of the proposed custodians.
E. Home situation that would be created for the child by proposed custodian.
F. Proposed plan of the custodian for the care, supervision and education of the child.
G. Basic motivation for desiring custody.

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*Family Law Reporter, 2098-99 (1975).

H. Child's wishes based on chronological age and emotional maturity of the child.
I. History of the prior relationships of the proposed custodians with the child.
J. Attitude toward visitation of non-custodial parent created by proposed custodial parent.
K. The recommendations written or oral of trained social worker, Family Court Counselor, and that of a psychiatrist or psychologist if involved.
L. The existing statutory and Wisconsin case law as applied to this specific fact situation.

Figure 2

FUNCTIONS OF THE CHILD'S LAWYER OR GAL GUARDIAN AD LITEM
AS DEFINED BY THE NATIONAL RESOURCE CENTER FOR CHILD ADVOCACY PROTECTION*

At a minimum, the child's legal representative should:

-Conduct a comprehensive independent investigation of the case which ferrets out all relevant facts and includes interviews with all potential witnesses, a review of the CPS agency case file, and a home visit (parental or foster home). Establish personal contact with the child. Learn about the parent's background and family history.

-Review all pertinent law and court pleadings. Obtain copies of police reports, hospital records, photos, x-rays and other documentation. If there have been no physical or psychological examinations of the child, request them.

-Attend all staffings and case conferences related to the child. Try to assist in the development of a treatment plan and the settlement of issues which can be resolved without the help of the judge. You may play a key role in any informal adjustment of the case.

-At trial, be actively involved by cross-examining witnesses, calling witnesses (using subpoenas if necessary), and making opening and closing statements when appropriate. Insure that all relevant facts are brought to the judge's attention, and that the child's interests are fully protected at all times.

-At disposition, present the judge with all available dispositional options. You should be familiar with the concept of "least detrimental alternative" as a guiding principle at this stage of the case.

-Determine, with whatever assistance the child can give, what course of action will be best for the child, and vigorously advocate for that position both in court and with the family's caseworkers and treatment professionals. You should not only assure that the agency develops an appropriate treatment plan, but also remain active following the entry of the dispositional order to assure that the plan is implemented.

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*Davidson, H. (1980) "Representing Children and Parents in Abuse and Neglect Cases." Washington, D.C.: American Bar Association, National Resource Center for Child Advocacy and Protection, mimeo.

representation of children. Nor do they address how much detailed knowledge lawyers representing children should have of the statutes governing the proceeding for which they are providing representation. This is a particularly important question for children's lawyers in New York because during the past five years there has been major substantive reform in both child welfare and juvenile justice laws. Hence it is appropriate to question whether in the absence of a real familiarity with the legislation lawyers can provide effective representation.

Further, existing guidelines provide only minimal answers to the question of whether post-dispositional responsibilities of lawyers representing children should be defined differently from post-dispositional responsibilities for adults. Yet this is a very central question, since implicit checks and balances operative in other proceedings to ensure that any disposition ordered is, in fact, carried out are not likely to work for children. The successful party in a civil action, for example, knows when a monetary judgment is paid or other court orders are implemented. In a criminal action, the defendant almost always understands the sentence. Yet this is not the case in juvenile proceedings, either if the child is an infant, or very young, or if the order, as is often the case, is complex, involving a combination of services and or placement.

And, it can also be said that because most of the existing guidelines are based primarily on issues that arise in representing children in delinquency and PINS type proceedings, they address only partially some of the dispositional and other dilemmas likely to arise in the representation of children in custody and child welfare procedures, even when the lawyer is clearly committeed to representing his client's rights.[12] This is

[12]The more general literature does reflect some new efforts to conceptualize these issues. For example, a recent article by Long emphasizes the dilemmas in representing children that do not easily lend themselves to simplistic answers about the lawyer's responsibility. Basing her discussion on three cases (involving an infant, a nine-year-old and an adolescent), she suggests that a functional analysis of each situation that takes into account the traditional legal requirements for effective representation (what we are calling generic lawyering responsibilities), as well as a commitment to family integrity and minimal legal interference with the family, is probably the most realistic approach for children's lawyers. The article also includes a particularly strong critique and rejection of the best interest of the child standard. See Long, L. (1983) "When the Client is a Child: Dilemmas in the Lawyer's Role." 21 Journal of Family Law, University of Louisville School of Law 607-747.

In a similar effort to translate a general rights' orientation to the needs of children involved in non-delinquency actions, Legal Services for Children in San Francisco has defined for itself a "solution-oriented approach" to representation in child welfare proceedings that combines address to the right of the client with attention to the client's outcome needs. See Little, A.D. (1981). "Legal Services For Children: A Replicative Package." In Protecting Children Through the Legal System 897-919. Washington, D.C.: American Bar Association.

particularly significant because in New York State, and probably in many others, as we show in detail in Chapter 6, the greatest increase in petitions coming before the court is in non-delinquency type proceedings.

PROPOSED GUIDELINES

Given this picture, a decision was made to develop specific guidelines for the effective representation of children by law guardians. The law guardian guidelines were developed as part of the project's mandate to study the adequacy of the law guardian system in New York State and after a review of the applicable statutes, caselaw, practice and related background material. Drafts were prepared and reviewed by a project committee comprised of Merril Sobie, Esq., Cheryl Bradley, Esq. and Allan Sussman, Esq., as well as by other interested persons.

The General Approach

The guidelines were not used as a basis for evaluating the law guardians, but rather served as a general framework for focusing on what law guardians should do, and should consider to provide effective representation in the various proceedings in which they represent children. For the complete procedure by procedure guidelines (although without commentary), see Appendix B. Here we briefly summarize the approach used for the guidelines.

First, the guidelines are based on a close reading of the relevant substantive statutes, caselaw and, for those proceedings that impinge upon the Child Welfare Reform Act (including foster care approvals and reviews), the administrative regulations promulgated by the Department of Social Services. Consequently, the guidelines are quite detailed.

Second, for each procedure, steps that either should be taken, or should be carefully considered, are specified for each stage of the proceeding. Thus the guidelines (with some variation depending upon the proceeding) address what the law guardian should do or consider prior to the initial appearance, at the initial appearance, at the fact-finding hearing, prior to the dispositional hearing, at the dispositional hearing, and after dispositional hearing. While the guidelines do not imply that every step must be taken at every stage, in every case, they do suggest that the law guardian should consider whether or not a specific step should be taken in the light of the facts, the child's circumstances, the seriousness of the case, the information from interviews with others and relevant regulatory and caselaw guidelines.

Many of the guidelines are generic in nature, that is, they pertain equally to each type of proceeding in which a law guardian may be appointed, although the emphasis varies from proceeding to proceeding. Thus, regardless of the nature of the proceeding, the law guardian is expected to: interview the child (except if the child is an infant); review the petition carefully; explain the proceedings and the law guardian's role in ways comprehensible to the child; express the child's wishes to the court; actively examine the dispositional orders for accuracy; explain the outcome of the proceeding to the child carefully, including what the child, the parents and the agency are expected to do; and consider whether an appeal should be taken.

But the guidelines also include steps that apply only to specific proceedings (for example, as preparation for every foster care review hearing, the law guardian should review the Uniform Case Record; this, of course would not apply to proceedings for which there is no Uniform Case Record.) And they include steps that should, in the absence of a strong counter rationale, be taken in specific situations. For example, under the guidelines, the law guardians are expected to be active at the dispositional stage, either in rigorously evaluating proposed dispositional plans, or in developing alternative plans. If a law guardian does not invest this level of activity in the dispositional stage, there must be a very good justification. Similarly, if the law guardian does not seek a probable cause hearing in a detention case, there ought to be a very good reason, since this is contrary to the statute and to caselaw. Or, if the law gurdian believes that the court's determination is contrary to the child's interests, after considering the child's wishes, and in consultation with the child, the law guardian should file a notice of appeal and take measures to assure that the appeal is perfected, or have very good reasons for not doing so.

Examples of Guidelines

With this as a context, below are generic minimum standards and in Figures 3 and 4, examples of guidelines for two specific procedures, PINS and foster care review.

Minimum Standards for Law Guardian Representation

A. Prior to Initial Appearance

1. The law guardian should always interview the child (if not an infant) and, if appropriate to the proceeding, the parent, before the initial appearance in court. The interview with the child should be directed to (1) finding out the child's version of the pertinent facts of the case; (2) creating a relationship of trust and openness; (3) insuring that the child understands what the proceeding is all about, what his or her rights are and what procedures will be followed in court, including the role of the various participants (e.g., the judge, county attorney, etc.) and the range of possible outcomes of the case; and (4) setting up arrangements so that the child will have ready, reasonable access for communication with the law guardian until the final determination of the case.

2. The law guardian should begin the process of developing realistic objectives for the ultimate outcome of the case, in consultation with the child, and of a strategy to arrive at that objective.

3. The law guardian should examine the petition and supporting documents carefully to determine the relevant legal issues (including whether the petition is defective) and the factual allegations to assist in formulating an appropriate strategy.

4. The law guardian should explore of the family situation and relevant social history of the child.

5. If the child is a respondent in the proceeding (i.e., JD and PINS cases) the law guardian should consult with the probation department to determine whether the case can be adjusted without further court action.

B. At Initial Appearance and During Pre-factfinding Hearing Stages

1. If necessary, the law guardian should seek an adjournment in order to complete an independent investigation of the pertinent facts, including gaining access to all available official or other agency's records and interviewing witnesses.

2. The law guardian should complete the process of formulating ultimate objectives and strategies, in consultation with the child.

3. If a child is the respondent, the law guardian should examine the pleadings and all the procedures to determine whether they are materially defective or whether there has been any invasion of the child's rights. Appropriate motions, demands for discovery and hearings should be considered, and such action should be taken unless there is an articulable strategic reason in terms of furtherance of a law guardian's and child's realistic objectives for the ultimate outcome of the case. Also, if consistent with those objectives, efforts should be made to negotiate for a disposition short of an actual adjudication.

4. If the child is the respondent in the case, and examination of the documents and evidence has not revealed any legal impediment to a finding, and it appears realistically that an admission to the petition would likely be the best means of obtaining the least restrictive disposition, the making of an admission should be fully explored with the child. This should include full review in terms the child understands of the risks, advantages and disadvantages; should to the maximum extent possible, take into account the likely disposition by the court in the event of such an admission, and should be made only with the intelligent consent of the child.

5. If the child is the subject of the proceeding (i.e., a child welfare, article 10 or custody case) the law guardian should seek permission from the litigants' attorneys to interview them. Again, a determination should be made in consultation with the child as to the desired ultimate outcome of the case. The respective positions of the various parties to the case should be ascertained. The law guardian should participate in any pretrial negotiations and conferences, and express an independent position based upon investigation of the facts and discussions with the child and litigants, to the court and the parties' attorneys. If appropriate, attempts should be made to mediate the dispute between the parties if this is in the interest of the child.

C. Factfinding and Other Hearing Stages

1. If the child is the respondent, the law guardian should play the traditional, full adversarial role of trial attorney throughout the fact-finding process.

2. If the child is the subject of the proceeding, the law guardian's role is, in most cases, less adversarial, but always an active, independent one in insuring that all of the facts necessary for the court to reach a proper, informed decision are developed. This includes cross-examination of the litigants' witnesses and, if appropriate, independently calling witnesses and presenting other evidence.

D. The Dispositional Hearing

1. It is at this stage where the law guardian is required to play a significantly more active role than a trial attorney traditionally would perform in an analogous civil or criminal proceeding. In order to play that role, the law guardian should (1) examine in advance of the hearing the proposed disposition which will be recommended by probation or the social agency involved, together with all relevant reports and documents to be submitted in support thereof; (2) investigate other dispositional alternatives and on that basis make an independent judgment on whether to support or oppose the disposition proposed by the agency; (3) if it is decided to oppose the proposed disposition, complete the investigation of alternative dispositions and consider whether to retain experts to support the alternative chosen; (4) engage in prehearing conferences with the court, probation, and/or social agency involved in an effort to achieve the desired disposition; (5) invoke the right to evidentiary hearing to develop the facts in order to support the desired alternative disposition.

E. Post-disposition

1. The law guardian should explain to the child and his parents (unless the parents are adverse litigants) in terms a child can understand, the disposition and the consequences and the child's obligations under that disposition and the rights to make post-dispositional applications for modifications thereof, and the consequences of violation of the order.

2. The law guardian should scrutinize the dispositional order to insure that it conforms to the actual disposition ordered by the court.

3. The child should be advised of his right to appeal and, if appropriate, an appeal should be initiated.

4. The child should be advised of the law guardian's availability to consult on possible subsequent applications for modification or termination of the dispositional order.

For these guidelines as applied to specific procedures, see Figures 3 and 4.

Figure 3

GUIDELINES FOR THE REPRESENTATION OF CHILDREN IN PINS PROCEEDINGS

A. Prior to the Initial Appearance

1. The law guardian should interview the child to ascertain the detailed facts concerning the petition and the facts surrounding the child's possible involvement. (If the law guardian is not assigned until the initial appearance, the law guardian should request a brief adjournment to carry out these functions.)

2. The child and his parent (unless the parent is the petitioner) should be advised, in terms the child can understand, of the nature of the proceeding, the child's rights, the role and responsibilities of the law guardian, the attorney-client privilege, the fact-finding process and the possible consequences of a finding.

3. The family situation and relevant social history should be explored with the child and his parents, including family relationships, prior court proceedings, school records, mental health history and any handicapping conditions.

4. If the petitioner is a school authority, the school officials should be consulted and every effort made to adjust or ameliorate the situation or provide appropriate family services without continuing the court action.

5. If the petitioner is a parent or other private individual, the law guardian should consult with the probation officer to ascertain why the case could not be adjusted; every effort should be made to adjust or otherwise provide services to ameliorate the situation without continuing the court action.

B. The Initial Appearance

1. The petition and supporting papers should be examined carefully; if any defects are found, as appropriate, motions should be filed, such as a motion to dismiss.

2. The possible substitution of a neglect petition or a referral to a child protective agency should be considered and, if appropriate, the necessary motion should be filed.

3. If the child admits that he did the complained of acts to the law guardian, the case should be conferenced with appropriate officials, such as county attorney, judge, probation officer and petition, to consider alternatives to a finding, such as an adjournment in contemplation of dismissal. If the child denies to the law guardian that he committed the complained of acts, alternatives, other than dismissal or a provision for appropriate family services, should not be considered unless there are special circumstances which render a finding probable and the child agrees fully to the possible alternative.

4. The law guardian should determine with the child whether the child should remain at home, pending fact-finding, particularly when the parent is the petitioner. If removal from home is a possibility, the law guardian should determine and advocate the best alternative, including possible temporary placement with a relative, friend or foster parent.

C. Pre-Fact Finding Hearing

1. If a full fact-finding hearing is a possibility, the law guardian should conduct extensive interviews with the respondent and witnesses, both defense and petitioner. Oral and written statements should be prepared.

2. If efforts to ameliorate the situation without continuing the court action fail, every practical defense should be developed.

3. The law guardian should determine whether habitual conduct can be proven.

4. If necessary, experts, such as mental health specialists, should be retained.

5. The scope of any possible testimony and possible cross-examination should be carefully prepared with the child and major defense witnesses.

6. The full range of appropriate pre-trial discovery, such as school records, should be carefully considered and, where appropriate, filed on a timely basis.

7. If appropriate, additional discussions with the relevant officers should be requested so that an agreed disposition, such as an adjournment in contemplation of dismissal or an admission, can be explored.

8. Dispositional alternatives should be carefully explored at this point, including possible community based non-residential programs, placement with relatives or friends, or other dispositions which involve the minimum feasible loss of liberty. A dispositional strategy should be formulated prior to reaching a negotiated agreement or the fact-finding hearing.

9. The strength and weaknesses of the petitioner's case should be fully evaluated from the point of view of both fact-finding and disposition. The defense strategy should be developed with full consultation, in terms the child can understand, with the child and his parent (unless the parent is the petitioner). The law guardian's position, goals and strategies should be agreed to by the child.

10. The law guardian should not agree to an admission unless a) pre-trial discovery and evaluation has revealed no legal impediment to a finding, b) the disposition is agreed to or there is an agreed upon option, and c) the child has been fully advised, in terms he can understand, of the facts, the alternatives, the consequences and the rights he is waiving; an admission should not be entered without the intelligent consent of the child.

D. The Fact-Finding Hearing

1. The law guardian should present an opening statement.

2. Prosecution witnesses should be cross-examined (unless cross-examination is waived in accordance with valid defense strategy), and an attempt made to impeach such witnesses by appropriate questioning, inconsistent prior statements, and other evidentiary methods.

3. Appropriate expert witnesses should be called.

4. Defense witnesses, including the child, should be questioned in accordance with pre-trial preparation; if necessary, character or rebuttal witnesses should be called.

5. The law guardian should almost always present a summation.

6. If appropriate, post-trial motions and briefs should be submitted.

E. Pre-Dispositional Hearing

1. The law guardian should request the court to order reports which may be helpful, including mental health studies or other evaluations.

2. The law guardian should determine whether the petitioner can prove that the child needs supervision or treatment; if the need for supervision or treatment may not be proven, a defense concerning this element should be prepared.

3. Every realistic dispositional alternative should be explored, including, where relevant, specific placements with residential or non-residential programs; the law guardian should develop a specific dispositional plan to present to the court.

4. If the law guardian's disposition is likely to be contested, potential witnesses, including parents, school officials or neighbors should be interviewed; evidence should be gathered to support the specific dispositional plan.

5. If appropriate, the law guardian should visit the child's home or meet with school officials or other relevant persons.

6. The probation report should be read prior to the dispositional hearing. The report should be discussed with the child and his parent (unless the parent is the petitioner).

7. County attorney or probation officials should be consulted regarding possible dispositional alternatives.

8. The desires of the child should be ascertained and the child and his parent should be advised of the potential alternatives. The child should fully consent to the specific disposition which the law guardian intends to present and argue.

F. The Dispositional Hearing

1. The law guardian should support the least possible restrictive dispositional alternative, including, when appropriate, preventive services, by presenting relevant evidence, including school records, mental health reports, prior history, affidavits and witnesses such as the parent and child. When appropriate, evidence concerning the possible absence of need for treatment or supervision should be presented.

2. If appropriate in light of the seriousness of factual disputes or other reasons, the maker of relevant reports, including the probation officer, should be examined.

3. Petitioner and probation witnesses, if any, should be cross-examined concerning their recommendations and the basis for such recommendations; if appropriate, they should be questioned concerning the possibility of a less restrictive disposition.

4. The law guardian should present and argue a complete dispositional alternative consistent with the needs and desires of the child, including specific programs or dispositional orders and, if appropriate, alternative possibilities.

G. Post-Disposition

1. The law guardian should explain to the child and his parents (unless the parents are the petitioners), in terms the child can understand, the disposition and its consequences, including the rights and possibilities of post-trial motions or requests for new hearings, the consequences of possible violations of the dispositional order, and the continuing jurisdiction of the court.

2. The child and his parent (unless the parent is the petitioner) should be advised of the right to appeal, including the right to appeal as a poor person. The possibilities of appeal should be explored fully, including possible grounds. The law guardian should file a notice of appeal and assure that the appeal hearing be perfected unless the child indicates explicitly and intelligently his decision to waive an appeal.

3. The law guardian should scrutinize the dispositional order to ensure that the order conforms to the agreed disposition or finding.

Figure 4

GUIDELNES FOR THE REPRESENTATION OF CHILDREN IN FOSTER CARE REVIEW PROCEEDINGS*

A. Prior to the Hearing

1. The law guardian should obtain and examine the pleadings and supportive documents to the court in support of the petition seeking a continuation of foster care; the law guardian should also determine whether service of process was made on all necessary parties, such as the natural parents and the foster parents.

2. Prior court records concerning the child's placement should be reviewed, including child protective actions, section 358-a and any prior section 392 hearings -- any law guardian who had previously represented the child should be consulted.

3. The uniform case record (U.C.R.) should be obtained (by subpoena if necessary) and reviewed in detail focusing on permanency plans, family services, goals and amendments to the initial U.C.R.; progress notes, the comprehensive service plan and the goal and objective review sections of the U.C.R. should be examined carefully. The extent of compliance with plans and the time frames for meeting the plans should be carefully scrutinized and any discrepancies noted. The law guardian should also examine the initial placement instrument.

4. After a review of the relevant documents, the caseworker should be interviewed, particularly concerning placement and permanency decisions involving the child; the foster parents or institutional representative should also be interviewed.

5. The law guardian should interview the child to ascertain his desires concerning placement and the weight which should be accorded his wishes, as well as the adequacy of provided services and care. If the child is very young the interview should be conducted at the foster home; if older, the interview should be conducted in neutral environment where the child is free to speak. If warranted, the child should also be questioned concerning possible neglect or abuse.

6. The child should be advised, in terms he can understand, of the nature of the proceeding, the child's rights, the role and responsibility of the

*While representation in this proceeding is now discretionary, when law guardians are assigned, the legislative and administrative mandates pursuant to the Child Welfare Reform Act suggest that the law guardian's essential obligation is to look with a critical eye at any petition filed by the agency seeking to continue the child's foster care placement beyond eighteen months on the grounds that the parents' service needs still persist or that sufficient progress has not been made by the parents toward rehabilitation so that the family can be reunited. The guidelines are based on this interpretation.

agency, the court, the foster parents and the law guardian, the attorney-client privilege and the possible dispositional alternatives available to the court.

7. The parents' attorney should be solicited for approval to interview the natural parents; if possible, the parents should be interviewed -- if they oppose continued placement, their plan concerning the child should be explored by the law guardian.

8. If needed, independent services such as a mental health evaluation should be requested under section 722-c of the County Law.

9. The law guardian should formulate an opinion as to the appropriateness of the dispositional plan proposed by the agency, including any recommendation for continued foster care. If the law guardian disagrees with the agency's plan, a comprehensive alternative plan should be prepared for submission to the court.

B. The Hearing

1. If needed, the law guardian should submit appropriate motions, such as a motion to produce records or a motion for a mental health evaluation of the child or any other party.

2. The law guardian should consider the cross-examination of witnesses called by the parties -- detailed examination is particularly important when the law guardian disagrees with the agency's plan.

3. If necessary, the law guardian should present independent evidence to support the child's position and call appropriate witnesses such as school officials or the foster parents.

4. The law guardian should advise the court of the child's wishes and desires.

5. A complete dispositional plan and recommendations should be submitted to the court, including provisions for any services which may be needed; the dispositional plan should be supported through the introduction of relevant evidence.

6. If appropriate, the law guardian should request periodic reports from the agency or the scheduling of a subsequent review proceeding earlier than the 24 month statutory period.

C. Post Hearing

1. The law guardian should explain to the child, in terms he can understand, the disposition and its consequences, including the rights and possibilities of post hearing motions or requests for new hearings and the responsibilities of each of the parties including the agency and foster parents.

2. If a proceeding to terminate parental rights has been ordered, the law guardian should closely monitor the agency to insure that a timely termination petition is filed.

3. The law guardian should scrutinize the dispositional order to insure that the order conforms with the agreed upon disposition and findings.

4. If the law guardian believes that the court's determination is contrary to the child's interests, after considering the child's wishes, a notice of appeal should be filed and measures undertaken to assure that the appeal is perfected.

It is hoped that these guidelines and the more complete set in Appendix B will stimulate some much needed debate about the details of what law guardians should do. In the past, too often this debate has been framed in global, ideological terms, pitting, in a simplistic way, those who espouse the representation of the child's rights against the child's best interests. As is clear from the guidelines developed for this project, and from the discussion of existing guidelines and the dilemmas posed in the literature, to maintain the debate at such a global and non-specific level is to do a disservice to lawyers who on a day to day basis seek to represent children in the face of complex facts, complex psychological contexts, and sometimes murky legal or service questions.

SUMMARY

This chapter examines existing guidelines (including the law guardian statute itself, relevant national and New York State caselaw, the Canons of Ethics and the American Bar Association Standards governing juvenile representation) to determine what constitutes the effective representation of children. In evaluating existing guidelines several points seem significant. First, taken together, the existing guidelines define a general orientation and approach to representation that emphasizes the importance of basic legal activities (i.e., preparation, investigation and advocacy) and assumes the lawyer's fundamental responsibility is to protect and speak up for the child's interests and wishes.

Second, most of the caselaw and existing guidelines are derived from delinquency-type proceedings and then generalized to all proceedings. While this works up to a point, it does not fully address some of the unique aspects of representing children in child welfare related proceedings, such as custody proceedings and foster care approvals and reviews. The paradigm of the lawyer zealously protecting his or her client's rights does not always fit comfortably into a set of proceedings for which the ultimate goal has to do with ensuring a child a permanent family or determining the most appropriate custodial parent.

Third, the existing guidelines provide minimal, if any, address to the question of how much detailed knowledge the lawyer must have of the particular statute governing the proceeding in which he or she is providing representation, or the extent to which the effective representation of children involves the assumption of post-dispositional responsibilities beyond those traditionally defined for lawyers.

The chapter concludes with a discussion of the specific guidelines for effective representation developed for this project. These guidelines emphasize the importance of the law guardian being prepared, conducting investigations appropriate to each proceeding, and playing an active role at the dispositional stage of each proceeding. They were derived from New York State statutes, caselaw, relevant administrative regulations and analysis of existing guidelines, and are presented in full in Appendix B.

Chapter 4

THE QUALITY OF REPRESENTATION: THE LAW GUARDIANS IN ACTION

This chapter examines the nature of the representation provided by law guardians to children. The findings are based on several different types of data which taken together provide a picture of the law guardians in action. As a context, we briefly summarize the rationale for using multiple data sources, and describe the data sources and how they were analyzed. A more detailed discussion of the methodology may be found in Appendix C.

THE DATA SOURCES

Developing a methodology to evaluate the effectiveness of representation provided by individual lawyers is a difficult and challenging task. Simply observing a lawyer's courtroom behavior, for example, yields some information, but may not always shed light on the amount of preparation or the nature of the strategic thinking done by the lawyer. On the other hand, simply talking to lawyers about cases is also problematic, as such discussions are subject to memory lapses and distortions. Given this, the decision was made to use a combination of strategies to evaluate the adequacy of representation actually provided by individual law guardians. This permits the use of both "hard data," such as courtroom observations and transcripts, and "softer data", such as examples of effective and ineffective representation provided by others. Information was gathered primarily for seven proceedings: juvenile delinquency (JD), including proceedings related to detention; Persons in Need of Supervision (PINS); abuse and neglect, also referred to as Article Ten proceedings; extension of placement hearings related to PINS, delinquency or abuse and neglect proceedings; approval of voluntary foster care, also referred to as 358-A proceedings; review of voluntary foster care placements, also referred to as 392 proceedings; and termination of parental rights (TPR) proceedings. (For fuller definitions, see Appendix G.) Table 1 indicates the numbers and type of data gathered for each type of proceeding.

Observations, Transcripts and Court Files

Three sources of "hard data" -- courtroom observations, transcripts and court files -- were used to gather information about representation.[1] Courtroom observations were gathered in fourteen counties.

The courtroom observations were analyzed in two ways. First, each observation was scored along four dimensions: 1) the pre-court contact between

[1]Identifying information was not used in the analysis of the data, and was recorded only as necessary to request specific case files and transcripts. The project staff was fully aware of the confidential nature of all proceedings and materials.

CONTINUED

1 OF 4

TABLE 1

Summary of Data Sources for Each Type of Proceeding

Type of Proceeding	Case-Specific Interviews	Case Files	Courtroom Observations	Transcript Analysis
JD	34	126	75	26
PINS	17	82	60	16
Extension of JD/PINS Placement	-	-	13	-
(Detention)	-	-	3	15
Article X	22	72	16	15
358-a	5	17	6	1
392	5	25	16	10
Extension of Article X Placement			2	
Termination of Parental Rights	1	13	5	-
Other			3	17*
TOTAL	84	335	199	85

*These proceedings fell into several different categories.

the law guardian and child; 2) the in-court relationship between the child and the law guardian; 3) the level of preparation evidenced during the proceeding about either the facts of the case, the circumstances of the child or the dispositional alternatives; and 4) the level of activity manifested by the law guardian during the courtroom proceeding. (Scores were on a 4-point scale.) Where there was not enough information to make a judgment, this was noted. Second, after the individual components were coded, the entire observation was given an overall score. If the proceeding was very brief or there was not enough information to make a decision, the observation was not coded. (See Appendix C for the fuller description of the coding procedure.)

The detailed criteria developed for this project, and discussed in the preceding chapter were not used as the basis for the coding scheme. Instead, more generic and more basic criteria were used: that the law guardian meet with the client, show evidence of some preparation and/or knowledge of services, be aware of and protect the substantive and due process rights of the client and make contact with the child as a person. It should also be noted that the coding scheme is not dependent upon how long or short a proceeding is and thus to the extent possible takes into account that a short court proceeding may be the result of careful preparation. In all, 199 courtroom observations were made.

The transcript analysis was conducted in three study counties.[2] The eighty-five cases were selected randomly by type of proceeding from the court files, and then transcribed by court reporters. Each case, typically involving multiple transcripts, was reviewed, summarized, and then coded, using basically the same categories as were used for the courtroom observations. (See Appendix F for selected transcript summaries.)

Finally, a sample of court files was reviewed in each of the study counties, and selected relevant information recorded, such as how far in advance the law guardian was appointed, whether any motions had been made, and whether an admission had been entered. Any available voucher information was also noted. In all, 335 case files were reviewed.

Interviews

The more subjective information was gathered in two ways. First, the law guardians themselves were asked to describe how they handled specific cases. Eighty-four such case-specific interviews were conducted. The law guardians were queried about such matters as whether they had interviewed the client prior to the first court appearance, whether they had made motions, or interviewed witnesses, and whether they had proposed any dispositional alternatives. The procedure was modified slightly for legal aid attorneys who were asked to describe a recent case of their own choosing.[3] In addition, most of the law guardians were also asked to give their own responses to two hypothetical situations, one involving a question of how to handle a violation of a client's rights, the other whether and how to seek a changed disposition for a client whose circumstances changed. (See Figure 1.)

Second, others who work with law guardians -- including caseworkers, probation officers, county and district attorneys, as well as foster parents, directors and staff of residential facilities, and detention workers[4] -- were asked to give their general views about law guardians, and to describe specific instances of what they viewed as effective and ineffective representation.

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[2]The limit of three counties was dictated by resources. One county relied upon legal aid and a panel, two counties had only panels. In all, 73 of the transcripts involved panel attorneys, 12 full-time law guardians.

[3]The volume of cases full-time law guardians deal with made it unproductive for the study team to select cases, since if the case were routine, our early attempts indicated the law guardians frequently could not remember anything about it.

[4]As part of our field work, study staff visited four out of New York State's six secure detention facilities. In addition, we reviewed available state data on detention.

Figure 1

Hypothetical Situations Posed to Law Guardians

After a dispositional hearing a child is temporarily placed in a foster home until a bed can be obtained at a residential facility. While awaiting placement, the child adjusts to the foster home, is very happy there and is doing well. When the child is about to be transferred out of the foster home, he calls his law guardian and asks to remain in the foster home. In this situation, is it the law guardian's responsibility to try to prevent his client's transfer? How could this situation be handled?

A juvenile accused of theft is arrested and a confession is obtained without advising him of his rights and without the presence of his parents. The attorney can make a motion to suppress but he is aware that his client has a drug problem and needs treatment. Under these circumstances, would you make the motion to suppress the confession, or would you allow the confession in the interest of helping your client receive treatment?

THE FINDINGS

Courtroom Observations and Transcripts Ratings

The analysis of the courtroom observations, the transcripts and the examples provided by others yields evidence of serious and widespread problems in the quality of representation accorded to children in New York State. Far less widespread, although clearly visible, is the evidence of effective representation.

Consider first the overall patterns reflected in the courtroom observations.[5] (See also Table 2 and Appendix G.)

-In 45% of the observations the representation was either seriously inadequate (30%) or marginally adequate (15%). In 27%, representation was adequate, and in 4% of the cases, effective. 24% of the observations were not codable because there was not enough information.

The patterns with respect to each of the specific dimensions analyzed are also troubling.

[5]The courtroom observations were coded independently by two staff members. The reliability coefficient (that is, the percentage of agreement) was 82%, which is well within the methodologically acceptable range. The transcripts were coded by Merril Sobie only, based on his written analysis of them.

-In 47% of the observations it appeared that law guardians had done no or minimal preparation; in 36% preparation was judged to be adequate and in 6% law guardians had detailed knowledge of the facts. 5% of the observations could not be coded on this dimension.

-With respect to the activity levels, in 17% of the observations the law guardians were silent, had no role, or simply deferred to others; in 20% the law guardians just reacted to what others said; in 43%, they were prepared and made appropriate comments, and in 17% they were active, and in an informed way argued about the facts, or for the child's best interest or rights. 3% of the observations could not be coded on this dimension.

The relationship with the child, as noted above, was coded in two ways; first for any indication of client law guardian contact before court, and second, evidence of client-law guardian contact in court.

-In 5% of the observations it was clear that the client had not been interviewed prior to the court encounter. In another 37% of the observations, it was impossible to tell whether the client had been interviewed. In 5% of the proceedings, the law guardian was either appointed at the proceeding or was representing an infant. In the remaining cases, 31% appeared to involve perfunctory interviews, 16% adequate interviews, and 6% careful interviews.

The pattern with respect to the observable relationship between the law guardian and the child while in court is similar.

-In 35% of the observations the law guardians made minimal contact with the child; (in 9% of the observations no contact was at all was noted). In another 13% of the observations the law guardians seemed familiar with the client, and in 5% they were judged to be especially responsive. In 34% of the observations there was not enough information to make a judgment, and in 13% of the observations, the child was not present.

The transcripts suggested an even higher rate of ineffective representation.

-49% of the transcripts were judged to involve inadequate representation, 10% adequate representation, and 10% effective. 31% were not classifiable based on the information available.

These findings parallel the overall patterns reported in the profiles compiled for each of the study counties. For example:

-In one rural county, in seven out of eight cases the law guardian had no recommendations regarding disposition, and

in two proceedings, the law guardian said nothing during the entire proceeding. In only three cases did we directly observe the law guardian explaining either the proceeding or the disposition to the child. In another rural county, we observed five cases. In only one did the law guardian seem fully prepared and familiar with his client.

-In one medium-sized county, we observed eight cases. In three, the law guardian was not familiar with the child, said nothing, or opposed the disposition but did not propose alternatives. In the remaining cases, the law guardians seemed familiar with the clients, had reviewed the facts, and argued for what the child wished. In another medium-sized county we observed 20 proceedings which were striking primarily for their perfunctory nature. (Nine were under eight minutes, ten were under three.) Similarly, in a third county, in ten of the twenty-three cases observed representation was basically perfunctory, with no evidence the law guardian had any knowledge of either the child or the facts prior to the court appearance; in five the law guardian seemed to have known the child or read reports, but was otherwise passive. (These included a termination of parental rights proceeding.)

-In one highly populated county, 36 cases were observed. In 26, law guardians gave no evidence of having met with the child, or of having done any advance preparation. Nor did they make contact with the child while in court. In another, out of 30 courtroom observations, 11 were either poor or passive. Fourteen observations indicated that the law guardians had at least met their clients, or knew the circumstances surrounding the petition. In only two was the representation seen as very effective. In a third county, of 25 observations, 8 were judged to be clearly inadequate.

Patterns of Ineffective Representation

In seeking to understand more about the problems of representation so strongly suggested by these data, we analyzed both the courtroom observations and the transcripts along with the examples provided by law guardians and others for recurring themes. (The source of each illustration is indicated in parentheses.) Consider first those relating to ineffective representation.

Lack of Preparation

As noted above, according to the rating scale in 47% of the observations, law guardians were judged to have done no or minimal preparation. Consider here what this means for real children:

Table 2

Ratings of Courtroom Observations Involving
Law Guardians in Study Counties

Rating	Composite Score %	Pre-Court Relationship %	In-Court Relationship %	Evidence of Preparation %	Activity Level %
Seriously Inadequate	15	5	9	22	17
Marginally Adequate	30	31	26	25	20
Adequate	27	16	13	36	43
Effective	4	6	5	6	17
Other		5	13	6	
Not Codable/ No Information	24	37	34	5	3
	100	100	100	100	100

*See Appendix G for more detailed tables.

JD The law guardian in this case was surprised by the county attorney's elicited testimony that his client was not aware that the things she had been asked to protect by some adults were stolen. He compounded this by not being able to remember what statute was involved, and by then urging his client to admit. (courtroom observation)

In another case the law guardian for a youth charged with robbery and grand larceny moved to quash the subpoena and argued that his client could not be forced to testify. However, he was surprised to learn that the police already had a confession. He also said he had not seen the respondent's statement, although the county attorney produced evidence showing that the law guardian had in fact seen it. (courtroom observation)

PINS In a very difficult PINS case involving an emotionally handicapped 15-year old the law guardian, appointed on the date of the first appearance, immediately entered an admission to a truancy charge. He could not, of course, have known anything about either the facts or his client. (This law guardian was equally ineffective and inactive at two dispositional hearings.) In fact, in one of his few comments, he actually made matters worse by citing home problems which apparently were not true. The case was saved by the probation officer who said no PINS petition should have been filed in the first place, and that it was a Committee on the Handicapped matter. (transcript analysis)

In another case involving a PINS violation a youth had allegedly threatened his family with a knife. The full-time law guardian had read neither the petition, which alleged the boy had a butcher knife, nor any reports. He only knew his client said it was a small knife. He therefore did no cross-examination of the mother. (courtroom observation).

Extension of Placement In this case, the law guardian thought that he was representing a youth arrested on a warrant. It was actually an extension of placement. The judge told the law guardian to leave the courtroom and not to come back until he at least knew what case he was on. (interview with probation)

Article X In one case the law guardian failed to establish either in his own investigation or in court whether the abuser was the father or a relative, both of whom had the same name. (interview with DSS)

In another county, a DSS worker cited a case in which the law guardian opposed the DSS recommendation for placement, proposing instead placement with the child's

grandparents. The law guardian had failed to discover that the grandfather had sexually abused the child in the past, a fact indicated in both the neglect petition and the caseworker's report. Apparently, the law guardian had read neither. (interview with DSS)

In a third case, midway through the case a new law guardian was assigned. He approached the caseworker for information on the proceeding and was told to agree with whatever DSS recommended. He did. (interview with DSS)

A similarly haphazard, passive approach to dispositional hearings, even when very serious issues are involved, is also visible.

JD In this case, probation recommended out-of-county placement. The mother and child had a close relationship and very much wanted to be together. The law guardian argued vigorously against the out-of-county placement, but had no idea about in-county alternatives. (This was, in fact, a county that had such alternatives, but the law guardian was new and did not know them.) The judge ordered the out-of-county placement, and the law guardian was seen comforting the mother and child. (courtroom observation)

PINS The client was a 13-year-old truant with a serious medical condition. The law guardian knew the facts, (for example one of the boy's parents had recently died) but had failed to explore, and hence was unable to propose, any specialized resources. Someone else in the court by chance was aware of some appropriate services. (courtroom observation)

Article X
LAW GUARDIAN: "Yes, your honor I spoke to the caseworker and to [a respondent parent] by phone yesterday, also to _____, and this morning I met briefly with [the respondent parents] and spoke with [the child] alone for about ten minutes, I'd say, and I'm satisfied that the proposed disposition would be in her best interest." The law guardian had been newly appointed to this case. The petition charged the parents with administering severe beatings to the child. The disposition, which the law guardian agreed to after the above dialogue, was an ACD.

Phantom Representation

In 37% of the observations the law guardians were either silent or simply agreed in a perfunctory manner to what others said. Law guardians in these instances do not acknowledge or protect any rights the children might have, and tolerate without comment or alternative any disposition. One caseworker, for example, noted that in a recent case she had had, the law guardian met with the child in court, couldn't remember the child's name, was reading the

petition in court, and in general, might as well not have been there. This unfortunately is a very typical example, visible in all sized counties and from legal aid and panel law guardians. (The caseworker rather wryly went on to note that, not surprisingly, her recommendation prevailed.)

PINS The law guardian had no role. He indicated he had read the reports but made no recommendations regarding the disposition. (courtroom observation)

Law guardian silent throughout the proceedings. (courtroom observation)

The judge directed the law guardian to participate in a COH (Committee on the Handicapped) hearing. The law guardian had not read any of the reports and said nothing. (courtroom observation)

In this nine-minute proceeding, the full-time law guardian was silent. The judge directed his questions to a nun in court who seemed to know the child. (courtroom observation)

Article X
THE COURT: What is the position of the law guardian?
LAW GUARDIAN: First of all, your honor, I haven't been appointed as law guardian.
THE COURT: At this time the court appoints you.
LAW GUARDIAN: Not having had an opportunity to speak with the young lady in question, the infant, I really don't have too much of a position other than to support that of the child protective service. (transcript analysis)

This case, although filed as a neglect action, was essentially a custody dispute between a grandparent and a parent charged with neglect. The court removed the children from the home and placed them temporarily with the grandparent following a lengthy preliminary hearing, during which the law guardian said nothing. Nor did he at the disposition. (transcript analysis)

On this neglect case the full-time law guardian was, as apparently is customary in this county, appointed after the preliminary hearing. Once appointed, the law guardian did nothing. She even asked the judge to explain the proceeding to the child, apparently thinking it was not her job. (transcript analysis)

358-A In this seven-minute approval of placement proceeding for a 17-year old the client was not present. The law guardian simply agreed with DSS that placement was appropriate. There was no sign that the law guardian had talked with his client. (courtroom observation)

In a 20-minute approval of foster care proceeding for an infant the law guardian said nothing. The judge instructed the law guardian to make sure the father was notified. (courtroom observation)

392 In this case, the law guardian said he had never talked to the children. Since the mother did not appear, the judge asked for a report on the law guardian's effort to locate the mother and to notify the foster parents. The law guardian had made no effort.[6] The judge reprimanded the law guardian and suggested that he commence a termination of parental rights proceeding.

In a variant of this theme, there were also, although less frequently, instances in which law guardians were either not present or substitute law guardians went through the motions of representing a child.

358-A No law guardian was present. A law guardian sitting in the back of the courtroom was asked to stand in. He spoke for approximately 10 seconds with the caseworker and consented to placement. (courtroom observation)

Article X One caseworker cited an instance in which a law guardian asked her for her recommendation, and when told said he would go along with it. He then left the courtroom and was not present for the rest of the hearing. (interview with DSS)

JD A substitute law guardian knew nothing about the case but agreed with probation. (courtroom observation)

Extension A substitute law guardian spoke to the client for five minutes and said his client wanted to be released. The judge ordered continued placement. Obviously, the law guardian was in no position to offer compelling arguments in support of his client's position, nor did he try. (courtroom observation)

In many of these instances of phantom representation, it was not clear whether more active representation would have benefitted the child. Sometimes, even without any involvement of the law guardian, the outcome was appropriate, or even positive for the child. However, there were also instances when the meaninglessness of representation left children in extremely vulnerable positions. This seemed particularly, although not exclusively, true in abuse and neglect proceedings.

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[6]It is questionable whether this is in fact a law guardian's responsibility.

JD Representing a ten-year-old child on a JD petition the law guardian made no objection to either the adjudication or to the disposition. A previous PINS petition for this child had been ACDed, and the judge was in favor of the same disposition this time. The county attorney, however, argued vigorously for a finding. The full-time law guardian did not object. On the previous petition the child had stolen some Easter candy. This time she had stolen cake mix from a neighbor. She had also gone back and left a note apologizing. (courtroom observation)

Article X A law guardian representing a child with a kidney defect whose parent was charged with medically neglecting the child remained totally silent during the fact-finding proceeding. In contrast, counsel for the parent was outspoken and active in seeking to have the case dismissed. He even threatened an appeal, which under the canons of ethics is challengable. Despite this, and the fact that this child had a life-threatening condition, the law guardian treated the hearing as routine. (transcript analysis)

This case involved serious allegations of sexual abuse filed against both parents (the father as perpetrator, the mother as permitting the abuse). Five children were involved. The case was repeatedly adjourned during a five-month period while the children were in a temporary placement. The law guardian's only role was to acquiesce in the repeated adjournments. He never indicated whether the children were receiving appropriate services in foster care, nor did he investigate the possibility of placement with a paternal aunt who requested temporary custody. At the dispositional hearing the children were placed with DSS for one year. The plan seemed a careful one, but there was no indication that the law guardian had any role in its development. (transcript analysis)

392 In this instance a judge wanted to return two children home who had been in care for many years. The mother was mentally ill and lived on the street. The children, who had no relationship with the mother were afraid to go home. The mother's attorney (underlining ours) convinced the judge that it was better to leave the children in care. The law guardian did not take a position one way or the other. He was, in the opinion of the caseworker fully prepared to agree with whatever the judge thought. Apparently no one had ever considered whether termination of parental rights was appropriate for these children. (interview with DSS.)

Other Recurring Patterns

Related to both instances of law guardians' failure to prepare, and to evidence of "phantom" representation are four other patterns that characterize

many of the observations. These involve permitting violations of the clients' rights, not knowing the law, not knowing service alternatives and not knowing how to follow-up to ensure dispositional orders are carried out.

Rights Violations Implicit in many of the examples cited above, and explicit in the examples cited below is casual disregard of even the most obvious due process and substantive rights that should be protected by the law guardians. Not surprisingly, most of these examples are drawn from juvenile delinquency, and to a lesser extent, PINS proceedings, for it is in these proceedings that case law and precedent have been the clearest.

JD In a proceeding in which it was alleged that the youth had made a full admission in the presence of the co-defendant's mother, the law guardian, when questioned about the case, indicated that he did not know where the admission was made, whether the child's mother had been notified, whether the police had obtained a written statement or whether the youth had been read his Miranda rights. (courtroom observation)

At a seven-minute arraignment hearing for a 13-year old, the petition was reduced to attempted assault 3rd degree. The judge did an allocution,[7] and the child said others had done it. The law guardian never said anything. (courtroom observation)

At a first appearance the law guardian entered an admission to the petition. However, upon allocution the respondent denied a part of the allegations. Despite his denial the court entered an admission to the entire petition. The law guardian did not object. At the dispositional hearing, the case was ACDed. (transcript analysis)

In this delinquency case, the respondent admitted. The court accepted the admission without any allocution of the child, his parents or the law guardian, any inquiry as to the circumstances of the case or any statement on the record regarding the respondent's rights. There is an absence of any discussion between the court, the child and the law guardian. (transcript analysis)

In this case one law guardian was representing three co-defendants. He could not remember which of the three was charged with resisting arrest, nor had he talked with any of the parents, one of whom vigorously opposed his request that the case be ACDed. (courtroom observation)

[7]An allocution refers to direct questioning by the court of the respondent. Such questioning is required in certain circumstances, including prior to the acceptance of an admission.

In a five-minute proceeding, the law guardian said he had read the probation report and agreed with it. Probation was recommending a Title III placement.[8] The court clerk was later heard advising the juvenile of his right to appeal. (courtroom observation)

In this delinquency case, the child denied the charge. Yet the court directed that there be a mental health evaluation and a probation investigation. The law guardian consented despite the denial and the consequent lack of a finding. (transcript analysis)

A law guardian for a juvenile waived a dispositional hearing on a three year restrictive placement for a child.[9] He also waived psychiatric, psychological and probation reports. Apparently, the law guardian had represented the child before, and the probation report noted that the youth was dissatisfied with his prior representation. The judge asked the boy, on the record, in an open court whether he was satisfied with the law guardian. In the absence of any privacy, the boy responded yes. (interview with DFY staff)

PINS At the initial appearance, the law guardian admitted his client to two minor and apparently unrelated incidences, throwing a chair and using marijuana. There was no allocution, no statement of rights, and no questioning of the respondent. The disposition was suspended judgment and referral for counseling. The law guardian did not question at all whether the charges met the criteria for "habitual disobedience" required under the statute, nor did he seek a dismissal. (transcript analysis)

Probation officers in a number of upstate counties also reported great concern about illegal police interrogations and confessions, and noted that law guardians rarely challenge these practices in court, even though aware of them. (In addition to the effect upon an individual child, the failure to challenge illegal practices may lead to a perception among police officers that children's rights may be disregarded.)

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[8]A Title III (18 Executive Law §§510-527) refers to placement in a limited secure facility, such as a state training school. A Title II placement (18 Executive Law §§502-509) refers to placement in a rural center or community-based facility, such as a youth center, urban home or foster home.

[9]Under some circumstances, e.g. when certain felonies have been committed, a placement combining different levels of restrictiveness and lengthy time frames (up to three or five years) may be ordered. This is known as a "restrictive placement." F.C.A. §353.5.

There were also several, although infrequent, instances where law guardians sought more restrictive dispositions than did probation, because the law guardians had not talked with probation staff.

PINS A law guardian sought an ACD with six months supervision. Probation sought an ACD without supervision. Probation was aware that the child was making progress and so saw no need for supervision. The law guardian, however, had never checked with probation. (interview with probation)

In another PINS case the law guardian entered an admission without any allocution, statement of guilt, statement of waived rights or explanation of dispositional alternatives. The respondent was silent throughout the proceeding. At the dispositional hearing, the law guardian requested that the child be placed on probation. The probation department recommended a suspended judgment. The court, bowing to the law guardian's request, ordered probation. It was clear the law guardian had not conferred with the probation officer. (transcript analysis)

The interviews with law guardians about specific delinquency cases confirmed what we learned from these other data sources.[10] Law guardians reported that in 77% of the specific cases about which they were interviewed they admitted their clients. Behind these admissions may be a variety of factors; an agreement with the county attorney, a reasoned decision, etc. But our observations also suggest that many admissions are virtually by default in the absence of investigation or negotiation. So, for instance, one law guardian, reflecting upon the case of a thirteen year old who committed arson in the fourth degree, said, "If I'd thought about it longer, I should have admitted to a misdemeanor and denied the arson charge." The law guardians did tell us that in 90% of the cases that were admitted there were allocutions. Our review of the transcripts suggest that full allocutions are far less frequent. Law guardians were also asked whether, if appropriate, they informed their clients of their right to appeal. A startling 50% of the law guardians told us that even when appropriate, they did not.

For juveniles in detention, the absence of effective representation is particularly troubling.

The respondent, charged with a designated felony and two unrelated delinquency charges, had been moved among three secure detention facilities four times in three months, apparently without ever having a probable cause hearing, a fact-finding hearing, or a determination. (This is in total violation of the Family Court Act.) After three months, the

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[10]For some additional data on how delinquency cases are handled in one study county, see Appendix G.

court ordered a probation investigation and a mental health evaluation upon consent, although there had been no admission to the charges. Upon receipt of the reports, the law guardian admitted his client to the most serious charge, second degree burglary. The court accepted the admission without any allocution and ordered the youth into a restrictive placement for 18 months. The law guardian made no objection, despite the fact that the placement was not in compliance with the statute. (The statute requires that a restrictive placement be for a minimum of three years. It also requires that there be a statement of the findings upon which the placement is based. This too was ignored.) Further, the same 18-month placement could have been effected as a non-restrictive, and hence less stigmatizing, Title III placement. In other words, for this client, in detention for three months, the law guardian did nothing except consent to a needlessly restrictive placement, despite the lack of a violent offense, the legal irregularities and a mental health psychiatric report which recommended "individual therapy." (transcript analysis)

A youth who had been detained in secure detention for one day then admitted to a misdemeanor (unauthorized use of a motor vehicle). The child's parent was not present either at the initial hearing or the admission. After the admission, the child was remanded to secure detention for one month. The statutory requirement that a dispositional hearing be scheduled within ten days when a child is detained was neither waived nor even mentioned. The law guardian did request, but not as a matter of right, an expedited probation investigation. (transcript analysis)

Lack of Knowledge About Relevant Statutes New York State, as noted earlier, has enacted innovative and sometimes landmark legislation on behalf of children who come before the family courts. But law guardians are not always knowledgeable about the specifics of this legislation or about how the different statutes can be used to benefit children.

Most glaring is the extent to which law guardians are unfamiliar with child welfare legislation. This surfaced clearly in our interviews. In some counties, none of the law guardians we asked had ever heard of the Child Welfare Reform Act;[11] in others, at best one-third to one-half of the law

[11]The Child Welfare Reform Act of 1979 is designed to ensure that children at risk of out-of-home placement are offered preventive services and that permanency plans are made for children in placement to ensure either their return home or their adoption when return home is not possible. 5 S.S.L. §153, 153d; 6S.S.L.§§387, §398(b),§§409-409h.

guardians were familiar with it. One law guardian described it as a way to get a kid sprung in a year. Another, responding to our questions about whether the Act had been helpful said, "Tell me what it is and I'll tell you if it has helped." This lack of knowledge even extended to full-time law guardians. In one legal aid office two out of five law guardians said they were unfamiliar with the Act; in another, one law guardian had never heard of it. To their credit, several law guardians who did not know were very interested in learning more about it and said they would look it up. The Child Welfare Reform Act was enacted in 1979. But even older child welfare legislation is not always known. A law guardian responding to our mail survey question about foster care reviews (§ 392 of the Social Services Law) for example, asked if it was a "trick question."

Of even greater concern is that even if law guardians have heard of the Child Welfare Reform Act or of foster care review provisions, they either are unaware of the specifics of the legislation or in a fundamental way, do not seem to understand the purpose of proceedings governed by these statutes. The State's statutory framework applicable to children in or at risk of placement reflects a clear commitment to reducing unnecessary foster care, to reuniting children with their own families as speedily as possible, and to ensuring the timely adoption of those who cannot be returned home. Yet law guardians do not seem to know that children at imminent risk of placement are entitled to preventive services, they do not know that the state has issued detailed administrative regulations defining what are appropriate placements; they do not request the Uniform Case Record, on which detailed planning is done for a child; they do not know which children are entitled to reunification services, and for how long; and they do not know the general time frames embedded into child welfare legislation.

The problem is, to put it bluntly, there is very little in the behavior of the law guardians either in- or out-of-court to suggest they understand the critical role they can potentially play in child welfare proceedings, or that they are even aware of the State's priorities. This was most graphically captured in a transcript of a foster care review hearing for a handicapped child.

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THE COURT: Is it ever expected _____ will return to his mother's home?
CASEWORKER: Not in the next 18 months.
THE COURT: I know, but long term?
CASEWORKER: Your honor, she needs a great deal of strengthening. She needs to learn how to deal with such a handicapped child. It is always possible.
THE COURT: Should steps be taken to terminate parental rights here?
CASEWORKER: I don't believe so. No, your Honor.
THE COURT: Why not?
CASEWORKER: There is an enormous tie between mother and son. . .
THE COURT: You don't think he is adoptable.
CASEWORKER: Without question he is adoptable. . .

THE COURT: Is she [the mother] making any plans for the return of the child. . .
CASEWORKER: [Nothing] Except for the visiting.
THE COURT: She is not visiting regularly, only occasional visitation.
CASEWORKER: That is true.
THE COURT: What is the position of the law guardian regarding this matter?
LAW GUARDIAN: Your honor, I read the reports, and my first response to it is I think caseworkers on this case have done a fabulous job and the agency on this is tremendous. This boy has a wide range of problems. And I read the inability/of the mother to deal with them. Every time he goes home, something disastrous has occurred, the illnesses and accidents. I can think of nothing better than to continue placement for 18 months.

This law guardian, despite persistent questioning by the judge, never focused on the child's needs, and never considered what the child's situation would be at the next foster care review or whether there was an alternative to continued foster care. Similarly, another law guardian, revealing the same lack of understanding of the role of the law guardian in child welfare proceedings, told us that he takes a vigorous stand in representing children in delinquency proceedings, but that in foster care reviews, unless the child strongly indicates he wants a change, goes along with DSS.

Courtroom observations also revealed three other areas where knowledge of the statutes seems particularly important and particularly lacking. First, despite the fact that law guardians made frequent comments in court to the effect that the child's PINS or delinquency problems were caused by family problems,[12] or even neglect, they infrequently request (or do not know how to request) that a neglect petition be substituted.[13]

JD The full-time law guardian representing a nine-year old who was accused of shoplifting items worth under $2.00 entered an admission at the first appearance. There was no allocution, statement of waived rights, or explanation of the dispositional ramifications. After the

[12]At the time of the field work, neglect petitions could be substituted for delinquency petitions. Under the new Juvenile Delinquency Procedure Code (F.C.A. Article 3) neglect petitions may no longer be substituted for delinquency petitions although dismissals in the interest of justice and neglect investigations may be requested.

[13]In the course of the study we learned of two such substitutions; only one was initiated by a law guardian, the other by the county attorney.

admission the law guardian then requested that a neglect petition be substituted. However, he provided no facts to support his request. The child was given a suspended judgment. Accordingly, at nine, she possesses a delinquency record for stealing less than $2.00 worth of articles. Her law guardian never questioned the disposition, never pursued the substitution and failed to move for a dismissal or an ACD. (transcript analysis)

PINS On a PINS case, the full-time law guardian strongly opposed placement, arguing that the family was really at fault. However, he did not request that a neglect petition be substituted. (courtroom observation)

In another PINS case, a probation officer described a situation in which a child brought before the court had been causing trouble. His home circumstances were allegedly very bad, and probably the source of his difficulties. The law guardian was aware of this but never considered substituting a neglect petition. The child was placed as a PINS. (interview with probation)

In another PINS case, a child was adjudicated as a PINS, but the disposition involved the parents attending a parenting class, and an order of protection was issued.[14]

In one other PINS case in this same county, it was noted that the county attorney had recommended that a neglect petition be filed, but the law guardian had opposed the recommendation. (case file review)

Supporting this pattern, law guardians responding to questions about specific PINS cases told us that in 13% of the cases, the issue was discussed, but no action was taken.

Second, law guardians seem unable to use, or are unaware of, the New York State statutes regarding the rights of children to special or remedial education, even when they are concerned about a child's educational problems.

PINS A law guardian representing a child with serious educational problems was so frustrated with DSS for failing to help the child that on his own he tried to get her a tutor. But he never raised any questions in court about the child's education. Nor was there any sign that he was familiar with the education laws of this state or the mandate of P.L. 94-142, the Federal Education of All Handicapped Children Act. (interview with law guardian)

[14]Under F.C.A. §759 an Order of Protection binds the parents, not the child.

A full-time law guardian concerned about a bright, truant child who was about to drop out of school reported his concern to the judge and suggested to the judge that the child try out for a sports team. (courtroom observation)

In some ways perhaps, this is not surprising. We know of no law guardian training specifically addressed to the relation between educational laws and those family court proceedings for which law guardians provide representation. Yet the absence of such knowledge clearly limits law guardian effectiveness.

Third, many law guardians lack systematic knowledge about the statutes pertaining to detention. Too often, they do not seem aware that there are differences between secure and non-secure detention, that clients in detention have a right to a probable cause hearing and an expedited fact-finding hearing, and that there is an explicit statutory time frame governing detention.[15]

PINS In this case, a child who had failed to appear was subsequently arrested and, in the absence of any law guardian, placed in detention for eight days. No probable cause hearing (required within three days) was scheduled. When assigned, the law guardian entered an admission. There was no allocution or statement of rights, and at the fact-finding hearing no statement was made by the respondent. The child was remanded to non-secure detention. The law guardian, apparently unaware that secure detention could not be ordered, and in the absence of any indication it was being considered, vigorously argued against secure detention. The disposition for this child was placement with DSS. At that hearing, the law guardian waived a full dispositional hearing. Ironically, the dispositional hearing was by a different judge from the one who conducted the fact-finding hearing. This second judge conducted a full allocution about the waiver, yet the initial admission, which clearly violated the respondent's rights and constituted a reversible error went unquestioned. (transcript analysis)

Lack of Service Knowledge The lack of familiarity of the law guardians with the range of services available to juveniles was reflected in at least

[15]The New York State laws pertaining to detention in effect at the time the data were gathered specified the limited conditions under which detention was permitted; required that if a child was not released before a petition was filed against him, he was entitled to a hearing within 72 hours to determine if the court had jurisdiction over him; (F.C.A. §728) and required a probable cause hearing within a specific time frame. (F.C.A. §739) The laws also specified a time frame for the fact-finding hearing and dispositional hearing. (F.C.A. §§747-749) Even more stringent time requirements apply under the juvenile delinquency statutes as codified in 1983 (F.C.A. Article 3).

three ways in the data we gathered. In the first place, both the law guardians and others reported evidence of confusion or misinformation about general categories of services. For example, one law guardian told us he had only recently learned that non-secure detention was not a permanent placement. DSS workers in several counties reported having to explain to law guardians what residential treatment was. And in at least one county, caseworkers reported law guardians made it harder for both them and their clients by telling the children that they were going to institutions when they were being placed in group homes.

It was our impression, however, that most law guardians do have a general knowledge of different categories of service. What they lack, and what in the absence of access to help in framing and proposing dispositional alternatives makes them so dependent upon others in the dispositional stages, is knowledge about specific services. For example, in counties with particularly innovative child abuse services, the law guardians did not know about them and hence made no referrals to the services. Elsewhere, law guardians did not seem familiar with existing diversion programs or specialized foster home programs. DFY officials felt many law guardians are only aware of institutional rather than community-based placements. Most significantly, we observed very few instances in which law guardians in court proposed specific alternative placements or seemed to know how to create a dispositional plan tailored to the special needs of the clients.[16]

Lack of Follow-Up Given the nature of the service system, it is predictable that, at times, services or placements ordered will not be provided in a timely way. This is particularly likely for children awaiting residential placement or in child protective cases which frequently entail complicated dispositional orders. It is also predictable that at times a child's circumstances will change after disposition, necessitating new planning. And surely, for some children, once in placement there will be a need for a lawyer, particularly for youth placed in New York State Division For Youth facilities.

Under the present system, there is no clear mandate for the law guardian to exercise any responsibility to a child once the proceeding is over.[17] Frequently law guardians do not even review the final orders or explain what they mean to the children. This was observed by us directly and reported by a number of DSS workers, and even more frequently, probation officers. Further, once the proceeding is over there is no reimbursement mechanism for continued

[16]Law guardians also reported both in the mail survey, and in our interviews that it was very difficult to learn about services. One law guardian, when asked specifically how he learned replied, "Boy, you sure touched a sore spot." (See Chapter 2.) Very few law guardians reported actually visiting any facilities. (One facility director told us that in ten years one law guardian had visited, and had found the visit very helpful.)

[17]However, under the 1983 provisions of the Juvenile Delinquency Procedures Code, the law guardian is required to file an appeal. (F.C.A. Article 3.)

follow-up unless the law guardian is reassigned. Not surprisingly, given this fiscal reality, law guardians do not appear to do very much follow-up after the proceeding, even when youth are in detention awaiting placement.

But it also appears that even when law guardians wish to do follow-up, they are not sure about what procedures to use or how to use the court to ensure that the child gets what is needed or ordered. Legal floundering in the face of real concern, for example, comes through clearly (and fairly typically) in the following:

> Article X The law guardian was very concerned because DSS was not providing the required services to a family in an abuse case that had been ACDed with the stipulation that DSS was to provide services. He had been waiting for DSS to act for one month, but did not know what if anything he could do except feel frustrated. He told us that someone had suggested that he "petition the court," but he had as yet taken no action. (interview with law guardian)
>
> Another law guardian expressed great concern about an emotionally disturbed child in DSS' care who needed services, noting that DSS was only concerned with sustaining charges against the parents. He did not, however, take any specific action to ensure DSS addressed the child's needs, for example, by proposing specific services for the child. (interview with law guardian)
>
> PINS One law guardian reported taking a particularly keen interest in a case where DSS was supposed to find placement for a child who was a runner. He tried to keep tabs on the placement process, because he was concerned that the child would run away again unless placement were speedily arranged. However, there was no indication that the law guardian translated this sense of caring into the legal framework, for example, by requesting a review of the court order within 30 days. (interview with law guardian)

With respect to the hypothetical concerning follow-up reported in Figure 1, of the 31 law guardians who responded, five said unequivocally they would seek a modification of the order and seemed to have no problem with the mechanics of so doing; another two said they would follow the same strategy, but only reluctantly as their role really ends at disposition; seven said they would do their own investigation, and if convinced it was in the child's best interest, would ask the court to re-open the case or review the order; three simply said they would seek to have the case recalendared; and seven said they would request the court to review the order, one noting he would leave the decision up to the judge, another saying he would get the child to testify. Three others indicated they would check with probation and or the caseworkers and be guided by what they said; one told us he would never have let it happen in the first place; and three, including two full-time legal aid lawyers said essentially they could do nothing, one because of funding restrictions on foster homes, one because his responsibility ends with disposition, and one because the chances of success were so limited.

Inadequate Law Guardian-Client Relationships

Theoretically, the law guardian is in a position to play an important role in the life of a child in two ways. First, by the nature of the representation provided to the child, he or she can be significant in influencing the outcome of the proceeding itself. Beyond that, the law guardian, by the nature of his response to the child as a person, is also in a position to provide support to a child experiencing stress related to the court proceedings, or the circumstances surrounding the court proceeding. Further, as noted in the previous chapter, the law guardian statute itself adds another dimension to the law guardian's responsibility to the child. It calls upon the law guardian to protect the child's interests and to express the child's wishes to the court.

Our data raise serious questions about the extent to which the law guardians in fact are meeting these obligations to the children they represent. Systematic problems are visible in three ways. First, there is evidence that law guardians sometimes do not even meet children they represent. Second, law guardians fail to express the children's wishes to the court. Third, and most typically, law guardians establish only the most perfunctory relationship with the children, while a small number are simply grossly insensitive to the children they represent. Each of these patterns is discussed more fully below.

Failing to Meet the Child

> Article X When the mother's attorney requested that the law guardian see the child, the law guardian responded in court by saying, "There is no need to see the kid. It's DSS's job to do these interviews." (interview with DSS)
>
> In another instance in this same county the District Attorney insisted the law guardian see the child. The law guardian, however, responded, "There are enough people talking to these kids. I don't see why I should also have to confuse them." (interview with DSS)
>
> 392 The law guardian was representing four children, ages 6, 11, 12 and 14. He had never talked to any of the children. The judge suggested the law guardian seek an adjournment and reprimanded him. (courtroom observation)
>
> One caseworker reported a case of three children, 11, 15 and 17, involved in a foster care review. The 17-year old asked the caseworker in court, "Who is this man, we've never seen him before, how could he represent us?" (interview with DSS)
>
> One foster parent reported to us that in ten years' time, she has never had a law guardian visit her home. (There is a law guardian in her county who does visit the children's homes, but her children have never had him assigned.) She also noted that 99% of her children had had no contact with their law guardians. (interview with foster parent)

These are not isolated instances. Indeed, other examples of the law guardians failing to talk at all to their clients have already been cited.[18] Further, even if law guardians eventually meet their clients, they do not meet them before the first appearance. Our interviews with the law guardians themselves confirmed the pattern. 47% of the law guardians whom we interviewed about specific cases said they had not met their client prior to the first appearance.[19]

Particularly startling is our finding that despite the seriousness of detention, law guardians make no extra effort to go beyond the perfunctory at court meeting so typical of all representation. Law guardians hardly ever make contact with their clients in detention before the date of the initial appearance. For example, in 1981 in one detention facility we visited, 214 juveniles were detained, 81% of them for juvenile delinquencies. During the entire year, three law guardians visited the facility. Yet the county detention facility is only a 10-15 minute drive from the court house. Elsewhere, detention workers indicated that is is rare to have more than one law guardian visit a month, and that often, if the client and the law guardian do have contact, it is at the initiation of the detention worker. The lack of access of detained youth to law guardians is a particular problem for youth in secure detention from counties other than those in which the detention facility is located.[20]

It should also be noted that we heard repeatedly in our county visits that many law guardians simply do not think there is anything to be gained by interviewing younger children, particularly children involved in abuse and neglect proceedings.[21] One foster parent told us with disbelief that a law

[18]Although far less frequent, we also learned of instances in which DSS sought to prevent the law guardians from seeing their clients. One law guardian, for instance, told us a caseworker offered to share the case record in lieu of making the child available. (However, although this problem of access to the children was mentioned several times in the course of the study, it was only mentioned repeatedly in one county.)

[19]The percentage of law guardians not meeting their clients prior to the first appearance as reported by the law guardians varied depending upon the type of proceding. 80% had not met the client prior to providing representation in foster care reviews; 47% had not met the client prior to PINS proceedings; 39% had not met the client prior to the initial JD proceeding and 36% had not met the client prior to the initial abuse and neglect proceeding.

[20]At at least two of the facilities, hearings used to be held on the premises. There detention workers reported that in the past law guardians were more involved.

[21]At least one legal aid society has an informal policy of never interviewng children under ten unless DSS indicates it is a particularly articulate child.

guardian in describing his role to a child abuse committee, never once mentioned talking to the child. When questioned about how he could represent a child without talking to the child, he said he finds out all he needs to know from the county attorney and from the parent's attorney.[22]

Failing to Express the Child's Wishes to the Court

Whether or not the law guardian talks with the child is obviously relevant to the quality of representation. So too is the question of whether the law guardian is aware of what the child wishes. Indeed, under the law guardian statute, the law guardian is required to express the child's wishes to the court. Yet, our data suggest law guardians do not in fact routinely find out and articulate the child's wishes.[23]

> JD Representing a client in non-secure detention, the law guardian did not request release and made no recommendations regarding disposition, except to tell the judge what his client's mother wanted. (courtroom observation)
>
> At a dispositional hearing the law guardian failed to raise in court his client's wishes (strongly supported by a very concerned mother) that a youth be permitted to remain home until the results of a neurological exam were available.
>
> (The question was whether the boy's behavior was just delinquent, or the result of a tumor.) The law guardian made no mention of either the youth's or the mother's views in court. The boy was, in fact, placed in a DFY facility pending the outcome of the evaluation, although the judge was concerned enough to ask the law guardian to

[22]A grand jury in another county, convened after the death of a child, recommended specifically that as soon as appointed, the law guardian should attempt to verify allegations by conversations with the case workers, the child, the parents and schools, and should also reports by physicians, if available. Further, they noted that when the child is of an age to speak with the law guardian, the law guardian should, upon appointment, go see the child in order to assess the charges in the petition. (The law guardian assigned to the child who died had done no investigation, talked with no witnesses, and failed to talk with the child after his appointment. He took the position that as a law guardian, his responsibility was to represent the child only in court.)

[23]In reviewing the data presented below, it should be noted that the question of whether the law guardian has even bothered to find out what his client wishes is a different issue from whether the law guardian views his or her responsibility as representing the child's rights, the child's best interest, or some combination. In the first place, the child's views are relevant regardless of whether the law guardian is protecting the child's rights or the child's best interest. In the second place, the law guardian statute requires the law guardian to express the child's wishes to the court.

review the final order and seek a modification pending the results of the neurological exam. (courtroom observation)

Extension of Placement In an extension proceeding for a 15-year old the law guardian had a brief conversation with the facility representative and based on this agreed with the extension. He had never conferred with the child. He was, in fact quite surprised when the judge showed him a letter from his client. Fortunately, the letter confirmed the law guardian's recommendation.

There is one additional complexity that must be raised; that is, how much probing is necessary to accurately represent a child's wishes. In the instances cited above, the law guardians simply ignored the child's wishes. This appears to be the most frequent pattern. But observers also questioned whether the law guardian was fulfilling his responsibility to express the child's wishes if he simply accepts without further probing the child's words.

PINS One facility director, reporting on the inappropriate placement of a girl, noted that the girl asked the law guardian to help her get this placement. The girl was truant and having difficulty with a very strict family. She chose placement in a facility serving youth involved in far more serious delinquency, but the law guardian accepted her request, and argued for it. At the facility, it became clear that the reason for the girl's choice was that a probation officer told her the alternative was secure detention. The law guardian was not aware of this. (There was no information about whether or not the law guardian was familiar enough with the facility to recognize its questionable appropriateness.)

There were also instances in which the law guardian not only ignored or did not know the child's wishes, but in the absence of this information substituted generalized value judgments. Fortunately, this does not seem to be widespread, but it does exist, particularly, although not exclusively, in child welfare-related proceedings.

PINS In a one-minute dispositional proceeding for a 14-year old, a substitute law guardian said his client was aware of the proposed placement and did not want it but that he, the law guardian, knew it was a good placement and therefore could not oppose it. The observer also noted that the judge seemed to be encouraging the law guardian to seek a dismissal instead. (courtroom observation)

Article X In a case involving visitation between a mother and her ten-year-old son whom she had beaten badly, the boy indicated that he would not see his mother in his own home, but would see her elsewhere. The law guardian, who had never talked to the child, stated in court that parents have rights of visitation and that children should not dictate what happens. (interview with DSS)

Termination of Parental Rights In a termination case, all the mental health reports agreed that the mother was and would be emotionally unable to care for the child and that the child was permanently neglected. Moreover, the child's foster parents wanted to adopt. However, at the dispositional hearing, the law guardian, joining with the parent's attorney, supported a three-month suspended judgment with visitation required. Evidence had already been introduced that the visitation had been tried and resulted in great stress for the child (repeated vomiting, physical illness, etc.). The law guardian in taking his position said he felt DSS could have done more for the mother. He said nothing about the child. (interview with DSS)

392 In a hearing involving a child who had been freed for adoption but never adopted, and whose father several years later wanted custody, the law guardian objected to the father's presence at the hearing on the grounds that he had no legal rights. He did not investigate the possibility that the father was now an appropriate parent, and ignored the boy's wish to be with the father. Reportedly, the boy was overheard asking his caseworker, "How can I fire my law guardian?" (interview with DSS)

Insensitivity to the Child

The vast number of perfunctory, non-relationships between children and their law guardians is well-documented throughout this chapter, and needs no further elaboration here. But even greater insensitivity to children was also visible. Some law guardians, for example, simply do not seem to take the children, or the court experience seriously.

We observed instances in which the law guardian made no contact at all with the child during the proceeding, and several in which the law guardian carried on a conversation while the charges to the child were being read. One law guardian was observed just before an extension hearing interviewing a 17-year-old client in front of six adults. The boy in that instance was vigorously opposed to remaining in his foster home. The law guardian spoke with him briefly, then conferred with the county attorney, and, in opposition to the boy's wishes, supported continued placement.

What was particularly troubling about this last example, which clearly illustrates many of the problems already discussed, was that the reason the boy was so opposed to continued placement never surfaced because the boy was too embarrassed to discuss it in the open interview situation. In this instance, as in most others of insensitivity to clients, there was a question of sexual deviance. Our data suggest that law guardians across the state are particularly uncomfortable interviewing children and adolescents about sexual matters and frequently do a poor job of it.

One caseworker described being present during an interview when the law guardian said to the child, "I realize this is a difficult and embarrassing situation for you. In fact, I'm even embarrassed." Not surprisingly, she noted that the law guardian did not get very much information from the child. (interview with DSS)

Another caseworker described an interview of a child in a sexual abuse case. The child was interviewed by the law guardian across the table. After a brief and rather painful interview, the law guardian turned to the caseworker, in front of the child, and said, "Do you think she is really telling the truth; should we believe her?" (interview with DSS)

Law guardians cannot be totally faulted for their difficulty in dealing with sexual issues; in the absence of specialized training and support, many people would experience similar difficulties. However, it is of serious concern that the law guardians do not get this specialized training. Therefore, very frequently, they do have problems in interviewing the children. Judges and caseworkers, in fact, told us that frequently law guardians try to get rid of sexual abuse cases as quickly as possible. Thus, they seek ACD's of serious cases or do not insist on trials when appropriate. (It was also suggested that this tendency to avoid trials is also related to reimbursement issues. Law guardians report they cannot afford lengthy trials at current reimbursement rates.).

Representation vs. Relationships

In considering the findings on the quality of the relationship between the child and the law guardian it is important to note that while effective representation does require that the law guardian interview the child, and, under the statute, express the child's wishes to the court, there can be effective representation in a legal sense even when the law guardian does not have a warm or supportive relationship with the child. We observed instances, for example, where law guardians appeared to be providing appropriate legal representation while in court, but made virtually no contact with their clients during or after the proceeding. Thus they simply were not there in a psychological sense for the children they represented.

The converse is also true. Even in the absence of effective legal representation, some law guardians appear to be genuinely concerned about their clients.

JD A law guardian representing a ten-year old charged with stealing a small amount of money successfully had the charge reduced to a PINS violation, then agreed to an 18-month placement on the grounds that the child's home environment was bad. The law guardian never sought to substitute a neglect petition, or to raise the question of whether the mother and child needed preventive services available both to children at imminent risk of foster care placement and to PINS children under the Child Welfare

Reform Act. But after the proceeding was over, she was observed comforting the very upset child. (courtroom observation)

That law guardians who do not know the laws, or how to make them work for children, can still show warmth, compassion and concern for them only underscores the impact and tragedy of their failure to use the law to protect their clients' rights or fashion more appropriate remedies.

Patterns of Effective Representation

Our data suggest at best under one third of the representation children receive from law guardians is acceptable or effective. In this section, we focus on the patterns of effective representation.

As would be expected, effective representation frequently reflects the converse of the patterns just described; that is, law guardians are, to varying degrees, prepared, active, knowledgeable, and responsive to their clients. This is visible at both fact-finding and the dispositional stages. However, the examples also highlight one other interesting (albeit not surprising) pattern. The courtroom observations and the transcript analyses tend to emphasize effectiveness as determined by evidence in court of some advance preparation, active involvement in the proceeding, familiarity with the child and knowledge of specific, rather than just generalized facts. In contrast, interviews with non-law guardians suggest their criteria for effectiveness center around the degree to which law guardians actively investigate, suggest dispositional alternatives, or establish a more than perfunctory relationship with the child. To a lesser extent, they also reflect cases in which the law guardians are willing to work with DSS or probation, or independently, and in an informed manner, draw their own conclusions about what should happen.

Effectiveness at Fact-Finding

The examples of effective representation at fact-finding provide a particularly dramatic contrast to those discussed earlier in two ways. First, the law guardians use legal strategies and knowledge much more effectively and extensively. Second, the law guardians are prepared when they come into court. And sometimes, they also know and support their child clients. Consider first cases emphasizing the use of legal skills.

JD The law guardian diligently cross-examined witnesses called by the petitioner, insisted that his client have a psychiatric evaluation, called the court's attention to the information in earlier reports, made a motion for dismissal (denied) and clearly had an already established rapport with his ten-year-old client who sat close to the law guardian and made frequent eye contact with him. (courtroom observation)

Although just appointed, a law guardian assigned to represent a youth referred back to family court by criminal court tried immediately and vigorously to get the boy out

of detention and released to the residential school he had been in previously. (courtroom observation)

A law guardian vigorously, but unsuccessfully, argued for the release of his client who had been in detention for 65 days. He reminded the judge of the difference in the grounds for detention under the Family Court Act and the criminal code. (He succeeded in getting a weekend home for his client.) (courtroom observation)

PINS Two children, caught within a fenced-in-area of a business were petitioned to the court for criminal trespass. The children told the full-time law guardian they had not broken into the yard, but were merely cutting across the lot. The law guardian visited the site and found that there were large gaps in the fence, it was not fishnetted, and it was a very likely spot for kids to use as a short cut across the lot. In fact, children seemed to have been doing it for years. His clients had simply been caught. This simple investigation in his view prevented an entire trial. (law guardian interview)

One full-time law guardian reported calling four witnesses to show how their stories conflicted about a school fight, making it impossible to convict the alleged wrongdoer by the required standard of evidence. (law guardian interview)

Another law guardian put a 14-year-old client on the stand to cast doubt on the child's capacity to understand that he was committing a burglary. As a result, charges were reduced to criminal trespass.[24] (law guardian interview)

The next set of examples highlights the importance of the lawyer being prepared and conducting, when necessary, appropriate investigation.

JD A law guardian representing a boy in detention at fact-finding was very familiar with his client, requested his release from detention, knew the results of a home visit the day before, had read the reports, requested an adjournment to meet with the county attorney, and, for the

[24]Our review of the case files also uncovered evidence of other legal type activities on the part of the law guardians. For example, in one county, a voucher indicated that a law guardian had spent two hours in doing research for a memo of law on a motion to suppress on the grounds that the youth's Miranda rights were violated. (This was in a rural county and was the only such evidence we encountered of a suppression motion, other than that identified in the transcripts.) In another county, this time a large county, our review of the court files uncovered several motions for discovery, and on one neglect case, a writ of habeas corpus.

record, called attention to the boy's learning difficulties and his need for a tutor. The youth was returned home. (courtroom observation)

The respondent first denied the charge and was remanded to secure detention. The law guardian demanded a very speedy fact-finding hearing as a matter of right and the court complied. Within a few days, the law guardian filed a suppression motion. On the date set for fact-finding, the law guardian withdrew the motion and entered an admission, apparently as a result of discussions between the law guardian and the county attorney. The court then conducted a full allocution. Following the allocution the law guardian requested an independent psychological evaluation and, further, requested and obtained the child's parole pending the dispositional hearing. Unfortunately, this is one of the few transcripts which is incomplete, so we do not know what happened at the dispositional hearing. (transcript analysis)

PINS The law guardian was familiar with his client and with the facts of the case. He opposed remand, citing a recent Federal court case, and was aware that the mother was willing to withdraw the petition and take the client home. (courtroom observation)

Article X A law guardian described a case in which DSS filed a petition for physical neglect of a child, but was unable to prove its case. The law guardian did further investigation and found that, indeed, this was an emotionally disturbed child who was subject to a great deal of emotional abuse. She submitted a report to the court and asked for an order to require DSS to file an emotional neglect petition. (interview with law guardian)

In an abuse case in which a child's leg had been fractured, the law guardian interviewed the doctor and carefully prepared him to testify, obtained hospital records, and reviewed the caseworker's notes and records. She also talked with the child and the child's grandmother, who was caring for the child. Further, the law guardian kept the caseworker informed throughout the proceedings of what was needed to sustain the petition. In the caseworker's own words: "He was the one who won the case, not our attorney." (interview with DSS)

Termination of Parental Rights The law guardian in this case was very familiar with the facts, knew statutory law, objected to DSS' failure to notify the mother and appropriately urged an expedited proceeding since there had already been six court appearances. The law guardian later told us he had first urged termination at a foster care review proceeding two-and-one-half years earlier, sadly, not an uncommon time frame. (courtroom observation)

It should be noted that, although many of these examples indicate the law guardian did some advance preparation, some also reflect a kind of "thinking on the feet" effectiveness. Effective law guardians, in other words, know what to do in the situation they find themselves in, and, even in the absence of preparation, act appropriately. This is in fact reflected in the coding of the observations. A substantially higher proportion of courtroom observations were ruled effective along this dimension than any other, although it still characterizes less than one in five cases.

Effectiveness at the Dispositional Stage

Perhaps the most characteristic strength of law guardians who appear to be effective at the dispositional stage is that they are prepared and insistent on behalf of their clients.

> PINS The law guardian successfully opposed placement for a 12-year-old boy. He prevailed against probation's recommendation because he knew more about the boy's family than probation at the dispositional hearing. The probation report indicated that the mother worked and would not be available to supervise the boy. The law guardian pointed out that the mother had actually quit her job and would be able to spend more time with her son. He also talked to the school principal, who supported keeping the child home. (law guardian interview)

> Article X A law guardian actively opposed DSS' recommendations for a 17-year old and instead argued vigorously (although ultimately unsuccessfully) for DSS to license the home of the friend's parents, where his client wanted to be. (courtroom observation)

> A law guardian said she would oppose the return home of a child unless the family were given a series of specific services she identified, including allergy shots and a homemaker. She prevailed. (courtroom observation)

> A caseworker, in general very critical of law guardians, described a sexual abuse case involving children aged 10 and 13. The stepfather agreed to admit if the mother were ACDed. The law guardian, who had interviewed the children very carefully, was opposed. Both he and the caseworker then visited various relatives to try to determine the best placement. The caseworker noted how important it was to have the law guardian's support in the face of pressure from the respondent to agree to an ACD. She also noted that the children called to thank her for getting them the placement they wanted. (interview with DSS)

> A law guardian representing a 12-year-old boy who had locked his siblings in the house and threatened them with a shotgun negotiated the initial charge down from a designated felony. He also insisted that the child be evaluated and

> argued for placement in a residential treatment facility. This was in contrast to the probation officer who recommended foster care. The law guardian's views prevailed, and subsequently, the probation officer acknowledged that the law guardian's judgment was correct. (This was one of the few instances where the law guardian argued for a more appropriate placement that was also more restrictive.) (interview with probation officer)

> PINS In this instance, the full-time law guardian effectively challenged the placement recommendation made by probation for a young, shy PINS child. Probation neglected to bring out in court that initially, both they and the law guardian had wanted a private placement, but that then the parents began to object, and therefore, probation was now recommending DFY. (This was the only instance we encountered of probation representing the parents' wishes.) Further, the law guardian was able to suggest in court, based on what happened during the proceeding, a new alternative (placement with the child's grandmother) that was acceptable to all parties. He also insisted the child get therapy. (courtroom observation)

In this last case, the law guardian was well prepared and creative, and was insistent in ensuring his client got all she needed. Other law guardians exhibited similar vigor and creativity, sometimes alone, sometimes in conjunction with other workers.

> PINS In an instance in which the probation department recommended foster care for a client who had problems with drugs and was truant, the law guardian explored the situation thoroughly and was able to find a relative with whom the child could live. (interview with probation)

> JD Another probation officer described a case in which he and a law guardian representing a young runaway worked especially closely to avoid a JD adjudication and to find a placement for the youth. They were able to do so and both have maintained contact with the youth, who is doing well. (interview with probation)

> In another case, a boy, already in DFY group home placement, broke into a house and was charged with burglary. DFY recommended placement in a training school since the boy had failed in the group home. The full-time law guardian went through the boy's record and discovered that, not only was he drunk at the time of this crime, but that he had been drunk each of the times he had gotten into trouble. Yet DFY had never identified or treated this obvious alcohol problem. The law guardian then brought this to the attention of the probation officer and the child care worker from the group home, and together they

were successful in getting the court to transfer him to a more appropriate program. In fact, the law guardian actually found a facility that could treat the boy, and did all the referral work. (interview with law guardian)

Sometimes, effective representation at the dispositional stage is also marked by the use of legal strategies.

JD The law guardian evidenced knowledge of the case and the applicable principles of law as he fought for the least restrictive alternative, placement in a group home. (transcript analysis)

Article X A law guardian, representing a child who had previously been in foster care, brought an order to show cause why the child could not return to the foster home she had previously been in. The child had been the subject of an abuse petition and had been returned home. However, the abuse continued, and the child needed to be placed. The law guardian was successful, and the child was returned to the original foster home. (interview with court personnel)

Examples cited thus far illustrate that effective law guardians are prepared, knowledgeable about the law, and active at the dispositional phase. But we also learned of instances of effective representation that combine all of this with a sense of caring and concern about the client. Note that most of these are reports by probation workers and caseworkers who are often highly critical of representation.

392 Representing a 16-year old with an extensive placement history, the law guardian seemed especially sensitive to the girl and her needs. The girl's mother had remarried, and basically did not want the girl at home. DSS accepted a voluntary placement of the girl, but then placed her far away from her boyfriend, and refused to allow the girl to visit her grandmother, with whom she had a real relationship. The law guardian established the child's right to have visitation with the grandmother, and gave the girl the opportunity in court to express her wishes. He was also instrumental in helping set up counseling and in insisting that DSS provide transportation for her to participate in after-school activities. In short, he made it possible for this girl, who has been rejected by her mother, to establish as normal a teenage-life as possible. The girl has developed a very close relationship with the law guardian and calls him frequently. (interview with court personnel)

PINS A 13-year-old girl with a serious diabetic condition was petitioned by her mother as a PINS. The relationship between mother and daughter had deteriorated,

and the girl was a candidate for placement. The law guardian spent a great deal of time out-of-court on the case. He got to know the family well and was always available to them on the phone. The probation officer felt that only because the law guardian was so familiar with the family was he able to be an effective advocate for the child and successfully avoid placement. (interview with probation)

The full-time law guardian established a very close relationship with a deaf teenager in need of placement. At the dispositional hearing, the law guardian argued vigorously for a foster care placement instead of the institutional placement recommended by DSS. His views prevailed, and, as reported to us by the caseworker involved, the placement turned out to be very successful. Moreover, both the law guardian and the caseworker have remained in close touch with the teenager. (The caseworker also noted that were law guardians not so overworked, such relationships might be more frequent.) (interview with DSS)

JD This law guardian, representing an adjudicated delinquent child in a rural area became actively involved when the girl's foster care placement deteriorated and the girl had to be placed in non-secure detention. He had his client brought to his office, requested all records, discussed the case at length with the caseworker and the sheriff's department, challenged the appropriateness of non-secure detention, requested progress reports, and stayed in very close contact with the girl. Eventually, the law guardian was convinced that a DFY placement was appropriate, and although the girl continued to be opposed, the law guardian maintained such a supportive relationship with her that she continued to call him with questions. (interview with probation)[25]

One foster parent told us matter-of-factly, there are good law guardians and bad ones. The bad ones she never sees or hears. Recently, however, all of her foster children have been assigned a good law guardian. He meets with the foster mother, has the children into his office to talk, and is very active. He has petitioned the court in instances where there has been a violation of an order or ACD when DSS is not willing to make the effort to take the case back to court. He has even driven to other counties to visit children. (interview with foster parent)

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[25]DFY representatives told us that if children had been well-prepared for DFY placement, very often they made a smoother adjustment.

told us he asks each client to read the petition as a way of seeing if the child has reading problems. Another stressed to us the importance of home visits, citing an instance in which she represented a truant child. She discovered that the child was very bright, and trying to keep herself clean in the midst of a very filthy home, lacking in any supervision. The law guardian was able to use this knowledge to develop a very constructive plan for the child.

Effectiveness at Follow-Up

Finally, there is evidence, primarily from the law guardians themselves, that, although there is no clear mandate to do follow-up,[26] some law guardians in fact do try to see that their clients get the services or placements ordered.

Law guardians in several counties reported follow-up efforts on behalf of detained youth. For example, one brought motions every ten days to have the juvenile transferred from secure to non-secure detention; others reported that they try to bring the cases of detained youths to court every ten days to ensure that they are not forgotten. (The law guardians thought this was required by law, but did not know the statutory basis for this practice.)[27] Still another law guardian reported reviewing her files monthly to be sure nothing is pending, and maintaining contact with her clients through visits, calls and letters.

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[26]One law guardian candidly told us that he thought follow-up was his greatest downfall as a law guardian, and that he felt the court should inform children that they can contact their law guardian if their circumstances change.

[27]F.C.A. §749 (now 350.1) mandates that if the child is detained, the dispositional hearing be held within ten days. A ten-day adjournment (for a total of 20 days from the date of fact-finding) may be granted for a "good cause shown," but any further delay is barred "in the absence of a showing, on the record, of special circumstances."

Another panel law guardian contacts DSS to determine whether the terms of the order are being carried out. This law guardian also requests that the final order include a statement that she is the law guardian for the duration of a placement, and shares the final order with those responsible for carrying out the treatment plans. Several other law guardians also indicated they feel a special responsibility to follow up on cases involving placement. One, for example, writes her clients and occasionally visits them in placement, and has filed petitions to terminate placement. Another calls his placed clients to be sure everything is working out.[28] Several full-time law guardians reported that at times they request the court to order that monthly reports be sent to them, and, on occasion, they have requested a treatment plan from a facility within 60 days.

These examples of effective representation are reassuring. In the face of the more prevalent, and less effective, patterns described before, they confirm how important meaningful representation can be to children both at fact-finding and disposition. But by their very existence, they also underscore the magnitude of the task of ensuring that more children in this state are accorded quality representation.

And, it must also be said, some of the samples also point out how little law guardians must do to be perceived as effective by others. In one county, a law guardian responding to the caseworker's concern about returning an infant home made a home visit with the caseworker and then became convinced the DSS worker's position was correct. Still another caseworker recalled that she had recently had a law guardian call her about an educational neglect case, get the client's telephone number, and ask for information. This law guardian too went to the client's home, described as a most unusual occurrence. One caseworker from a middle-sized county could recall only one instance of effective representation in a case occurring one or two years ago. In that instance, the law guardian went on a home visit, did his own evaluation, was generally very involved, and came to his own conclusion. But the phenomenon of how little it takes is perhaps most dramatically illustrated in the description of an effective law guardian in a rural area who discovered, on behalf of a client charged with grand larceny, that the price of what was stolen was actually far below the amount required for grand larceny. Thus he was able to have the charge reduced.

SUMMARY

Based on the analysis of the data reported in this chapter (courtroom observations, transcripts' analyses, and interviews with law guardians, as well as those who work with them), less than one-third of the representation children receive is adequate or effective. Instead, close to half is

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[28]We also heard from one or two facility directors that on vary rare occasions law guardians will follow-up on a client, although for the most part only if they are asked to do so by the child.

seriously inadequate or only marginally adequate. Beyond these overall figures lie recurring patterns of both ineffective and, although far less visible, effective representation.

Ineffective representation is typically characterized by a lack of preparation, even when serious factual, or dispositional questions are at stake. In these instances, the representation of children has a haphazard, passive quality; if facts or dispositional alternatives are brought before the court, it is often because of other parties, rather than the law guardians. Sometimes, the law guardian's presence is so minimal that the representation accorded to the child can best be described as "phantom"; the law guardian is in court, but otherwise has no impact upon the proceeding.

Within these two broad, general patterns, several other inadequacies are also visible. These include the lack of vigor in trying to keep youth out of, or get them out of detention; the high rates of admission especially in the absence of investigation; the failure to demand an allocution as to the rights being waived; the failure to inform youth that their cases can be appealed and the sometimes subtle, and not so subtle, attitude that it is not good for kids to "get off," regardless of procedural irregularities. So for example, particularly, although not exclusively, in juvenile delinquency cases, there is a casual disregard for both due process and substantive rights. So pervasive are such patterns that appealable errors were found in over half of the transcripts.

Equally troubling was evidence that law guardians lack all but the most general (and sometimes even that) knowledge of relevant statutes, particularly those that relate to children in voluntary placement. Law guardians, for example, for the most part, have little awareness of either how specific proceedings for these children relate to one another, or how the nature of their representation might be impacted by the Child Welfare Reform Act of 1979 which articulates certain service and procedural rights for children in placement through the Department of Social Services. As a result, law guardians too frequently fail to do independent investigations to ensure that each child at risk of placement is receiving appropriate services and planning, or take a strong role in challenging unnecessary initial or continued placements.

Lack of knowledge was also reflected with respect to PINS proceedings, particularly those involving underlying neglect by families, or school-related problems. Also visible with disturbing frequency was the fact that while typically law guardians have a general knowledge of services available to children, often they have little specific knowledge; hence their role at dispositional proceedings is minimal, and they are greatly, and often uncritically, dependent upon DSS and Probation staff.

Uncertainty about how a law guardian might ensure that dispositional orders are in fact carried out was also evident. Finally, there is overwhelming evidence that most law guardians who establish any relationship with the children they represent establish perfunctory ones; frequently it is not even clear whether the law guardian has even seen the child before walking into the courtroom. Further, particularly with respect to young children,

even in serious abuse and neglect proceedings, many law guardians seem to feel that there is no point in talking with the children. And finally, it is noteworthy that, notwithstanding the statutory directive, not all law guardians do, or are even aware that they are obligated to, express the child's wishes to the court, whether they agree or disagree.

These patterns, and the extent to which they characterize the representation of children are troubling. But at the same time it was also clear that some law guardians represent children very effectively. Such law guardians provide a dramatic contrast to their colleagues; they use legal strategies and knowledge more effectively and extensively, and they are either more prepared when they come into court, or, able, even in the absence of detailed preparation to "think on their feet" and act appropriately. Sometimes, they also appear to know and give psychological support to children.

Chapter 5

THE QUALITY OF REPRESENTATION: ADDITIONAL PERSPECTIVES

The last chapter focused on overall patterns of effective and ineffective representation. In this chapter we focus on some additional questions about the quality of representation. First, we consider how specific legal policies affect the quality of representation. Such policies include: a juvenile's access to a law guardian; the substitution of law guardians within the same proceedings; continuity of law guardians from one proceeding to another; the representation of children by law guardians in potential conflict of interest situations, and the level of appellate activity on behalf of children. Second, we highlight the relative strengths and weaknesses of full-time law guardians compared with part-time law guardians. Third, in the light of our data we return to a theme explored in the mail survey of the law guardians, the impact of a rights versus best interest orientation upon representation. And finally, we report on how a small sample of juveniles view law guardians.

LEGAL POLICIES AND THE QUALITY OF REPRESENTATION

First consider problems in the representation accorded to children that are rooted not in what individual law guardians do or fail to do, but in legal policies that directly affect the quality of representation.

Access to Law Guardians

The legislative history of the law guardian statute, and the timing of the original enactment, as noted in Chapter 3, indicate a strong commitment in New York State to according minors representation. In practice, however, our data suggest a number of areas in which children who theoretically, or, as a matter of equity, under current statutes, should have law guardians, may not for either statutory or fiscal reasons. There are four areas of concern.

Children who are involved in custody proceedings in the Supreme Court, as opposed to the Family Court, have no right to a law guardian at state expense. This clearly raises an issue of equity, since children in Family Court do have access to law guardians for the same proceeding. According to an opinion by legal counsel for the Office of Court Administration, in the absence of explicit statutory language authorizing payment to law guardians, a law guardian charge for children represented in Supreme Court is not reimbursable. While there are no data to indicate how many children are affected by this rule, the issue is of serious concern to a number of law guardians and judges with whom we spoke.

Second, repeated concern was also expressed that children in placement typically do not have access to law guardians, either with respect to legal issues relating to the placement order itself or to other matters. This is particularly problematic for those youths who may be illegally placed for terms which are beyond the maximum permitted length. Our review of court files also suggests it may be problematic in abuse and neglect cases that are ACDed with the stipulation that services be provided. In those instances in

which the services are not provided, typically the child is left unprotected, with no one to insist on compliance unless the situation breaks down so totally that a new petition is required. Similarly, situations requiring legal advice or action unrelated to the original proceeding also arise, involving, for example, discipline policies, transfers to different institutions or discharge timing. Ombudsmen within the Division for Youth also expressed concern that sometimes youths in placement were questioned by police in the absence of a law guardian (and or parent).

At present, youth in these situations have very limited, if any access to lawyers. There is no clear mandate for law guardians to remain involved with their clients once a proceeding is over (despite the fact that motions for modifications or for hearings are liberally permitted). Law guardians are assigned to children for specific proceedings; they are not assigned to children. Further, as discussed previously, the fiscal framework itself mitigates against involvement after a disposition is ordered. Once a proceeding is completed, and a voucher submitted, there is no mechanism for the law guardian to be reimbursed for any subsequent contact with the client unless he or she is reappointed (although some law guardians do, as noted earlier, circumvent these constraints). Further, even if the law guardian wishes to stay involved, or is willing to be reappointed for youth in placement, often there is no way to even identify which law guardian represented a youth. The placement forms sent to DFY do not include the name of the law guardian who represented the child when the placement was made, nor frequently, do the court records themselves. Thus, unless the youth remembers, there is little to go on.

Our work in the individual counties also showed some variation in the interpretation of whether law guardians had to be assigned regardless of income, or whether a means test could be imposed. While not frequent, in at least two instances, one as a result of county policy, one at the behest of an individual judge, means tests were imposed to determine whether a law guardian could be assigned. In the former instance, the legal aid office simply applied the county test of indigency, and then sometimes refused to appoint a law guardian. In the other, the judge used his own standard (the fact that the father was employed), and again refused to appoint a law guardian. Neither the statute nor any regulations now provide any guidance as to whether a means test can be applied, and if so, what such a means test should be.[1]

Additionally, it should be noted that administrative policies also affect access, particularly in terms of when a law guardian is appointed. Thus, in at least one study county, we noted that law guardians are not assigned in abuse and neglect cases until after the initial hearing (that is the emergency removal hearing) has occurred. Since many crucial decisions

[1]A recent Family Court decision did take the position that while the court is under statute obliged to appoint a law guardian (in this instance for a youth involved in a delinquency proceeding), it also has the authority to order the parent to pay. [Re: Matter of Cheri H., Dkt. No. D-274/83 (Fam., N.Y.Co. Dec. 1, 1983)]

affecting the client may be made at this point, the fact that a law guardian is systematically not present is troubling. (Unfortunately, we do not have comparable data on the point at which law guardians are assigned abuse and neglect proceedings from other study counties.)

Finally, it is appropriate to point out that at present because representation is permissive in foster care approval and review proceedings, as well as in custody proceedings, whether or not a child has a law guardian in such cases varies as a function of county policy or the judgment of an individual family court judge.

Continuity and Quality

As noted above, the law guardian system is structured so that law guardians are assigned for each proceeding; not to a child. Despite this, many counties relying upon panel law guardians do report formal or informal efforts to assign a law guardian who has previously represented a child to concurrent or sequential court proceedings. In contrast, not one of the four legal aid offices studied has a formal policy regarding continuity of representation and in at least three offices, assignment policies virtually preclude continuity.[2] In Chapter 6 we examine the differences in continuity policies across the state in more detail. Here we focus on the consequences to the children of having and not having the same law guardian in different proceedings.

Our data suggest there are three sets of circumstances in which changes in law guardians may be particularly harmful to children and to the quality of representation they receive. The first involves children who have two or more petitions before the court at the same time. In these circumstances, when children are represented by more than one law guardian, the possibility is rife that legal strategies will not be coordinated and that youth will be confused. For example, one probation officer reported his concern about a boy who was in one part on a PINS charge, and another part on a JD charge. The youth had two different full-time law guardians who disagreed about strategies, leaving him terribly confused. This problem did not seem widespread, but rather, was described primarily, but not exclusively in counties with legal aid law guardians.

Changes in law guardians within proceedings are also problematic for children, and for the quality of representation they receive. One probation officer, for instance, spoke of his concern about a pregnant PINS teenager with a serious medical problem. According to him, the girl had been represented extremely well by the law guardian assigned to her at the first stage of the proceeding. He worried, however, about the girl's capacity to cope with subsequent hearings and changing law guardians. In this county,

[2]This is in contrast to the approach taken by the Juvenile Rights Division of the New York City Legal Aid Society, which in its assignment policies emphasizes the importance of what they call "vertical representation"; that is one lawyer for one case, and the same lawyer for children who have multiple cases.

representation is provided by legal aid law guardians, and here, as was true in all other legal aid offices studied, changes of law guardians in proceedings requiring more than one appearance are frequent.

Just how harmful this can be to the children was perhaps most dramatic in another instance of a child receiving representation from legal aid lawyers.

> In this instance, a boy was represented by three different law guardians. The youth was charged with committing a burglary. He was ordered into secure detention only because his mother stated in an affidavit that her son was beyond her control. The judge then cited as the ground for detention a risk of non-appearance; there was no statement or evidence in support of this, or any other legal ground for detention. The law guardian did not object to secure detention or the use of the affidavit. Nor did he request a probable cause hearing. At a subsequent hearing, one month later, a second law guardian questioned the remand to secure detention, but did not know the basis or any of the salient facts concerning the case. It was clear that the law guardian had neither talked to the client, nor reviewed the record. After the fact-finding hearing, the youth remained in detention for another two months waiting for a bed in the placement facility. The placement was in a private, non-secure facility. However, the law guardians did not question the secure detention while awaiting a bed in a private non-secure program or request non-secure detention. Throughout the entire period the law guardians did not present any alternatives, did not develop a dispositional plan, and did not challenge any of the questionable practices or introduce any evidence. The case was passed from law guardian to law guardian without any knowledge, strategy, or plan. (transcript analysis)

The patterns suggested in the case examples were confirmed by our review of case files in the legal aid counties. On the average, substitution of law guardians within the same proceeding occurred in 61% of the legal aid case files analyzed. (See Chapter 6.)

However, youth represented by panel law guardians in some counties also experience considerable substitution. For panel attorneys, although the average rate of substitution within proceedings was 18%, in five counties, it was between 33 and 67%. Several social workers in these counties commented that substitution was especially likely in drawn out abuse and neglect proceedings. They also noted frequently, it was up to them to inform the new law guardians of what had happened. (See Chapter 6, Figure 6.)

Not having the same law guardian at sequential rather than concurrent proceedings can also have harmful consequences to children. Data from case-specific interviews with panel law guardians on the extent to which the same lawyer represents the same child at different proceedings indicate that in only 35% of the cases where the child had prior court contact did the same law

guardian provide representation. Law guardians themselves at times complained about this lack of continuity. In one county, for example, one noted: "It is purely accidental if you get the same kid again." Another reported with dismay that a child whom she had represented on a serious abuse case was reabused, but, because the new law guardian never checked with her, or the files, he permitted the child to be returned home to a very bad situation.

Particularly troubling was the evidence of missed opportunities in child welfare proceedings because the law guardian involved in the initial placement was not reassigned in subsequent reviews of either voluntary or court-ordered placements.[3] The pattern of changing law guardians from child welfare proceeding to child welfare proceeding is particularly problematic because it feeds into the law guardian's general passivity and sense that whatever DSS proposes is best. This is clearly illustrated in the following two cases, the first involving panel attorneys, the second full-time law guardians.

> -In this instance, four children had been placed in foster care by a mother who subsequently surrendered her rights to the children. The children had been in care for four years. During this time, they had been represented by three different law guardians in three different reviews. This lack of continuity had impacted heavily upon their lives. For example, although the court directed DSS to immediately file an abandonment petition early in the placement, the petition was in fact not filed until two years later. A foster care review scheduled for six months from the date of placement did not occur until two years later. During the three years no law guardian ever raised questions about the fact that the four children were all in separate homes. And, at one foster care review, which was held despite the fact that the law guardian did not appear, the foster homes were abruptly changed. The father, living out of state, has recently filed a petition for custody. DSS has, apparently without investigation of the father's circumstances, opposed the petition. Presumably there will be another law guardian assigned. The likelihood that questions about whether and under what circumstances these children will ever have permanence will be raised in a meaningful way, however, is slim. (interview with court personnel)

The second case illustrates what happens to children when both law guardians and judges change in the middle of proceedings.

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[3]The average length of stay for children in foster care in New York State is now 2.7 years. (This reflects a dramatic decrease from prior years.) 28% of these children, however, have been in care for 2-5 years, 7% 6-9 years and 8% for more than 10 years. (New York State CCRS Quarterly Summary 1/1/83) Thus, over 40% of children in placement are likely to have at least two and often more periodic court reviews. In the absence of concerted efforts to ensure the same law guardian is reappointed, many of these children, if they have law guardians at all, will have different ones at each of these reviews.

In this instance, the facts involve a child who was initially placed in care as a toddler because his mother could not deal with his hyperactivity and medical problems. After two years in care, through the joint efforts of the child's legal aid law guardian, public defender, and attorney for the foster parents, a detailed plan for reuniting the child was worked out, and at a review, a three-month extension to carry out the plan was granted. At the end of the period, the mother had made no effort to comply. DSS filed a petition for another extension. A different legal aid law guardian, and a different judge were assigned to the case. In court, the new law guardian took no position, appeared not to know the facts of the case, and apparently had not conferred with the previous law guardian. Another three month extension was granted to allow DSS to file a termination petition. Yet another judge, and yet another legal aid law guardian were assigned to hear the termination petition. However, since the trial date was set for after the extension expired, another review was scheduled; with yet another law guardian assigned. (If placement is not extended, pursuant to the public defender's motion, the child will be returned home, and the termination issue will become moot.) This four-and-one-half year old child's fourth legal aid law guardian has not taken a position, noting that if the child is returned home DSS can always once again remove him on a neglect petition. (interview with attorney)

It is not unlikely that this child will join the many who grow up in foster care, denied the chance for permanence for a series of reasons that include the passivity, multiplicity of law guardians and their failure to understand the purpose of foster care reviews.[4]

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[4]This is not to say that even an effective law guardian can make the court and service systems respond in a way consistent with state mandates. Recall for example, the frustration of a law guardian effectively representing a child in a termination of parental rights proceeding that he first argued for, two-and-one-half years earlier. Nor is continuity itself a guarantee that a child will be vigorously represented. Sometimes children are represented by the same law guardian for repeated reviews but the law guardian does nothing. This was clear in a case in which the same panel law guardian represented a child in care for five years. The child was initially placed at two, and is now seven. Apparently at the periodic court reviews the law guardian appeared (most of the time) only to tell the court that he wanted what was best for the child. Investigations by others have determined that the current foster home may not be appropriate for the child, and that for at least one-and-one-half years while visitation was supposed to be occurring, DSS took no steps to ensure that it did. There is now a very complex set of facts to address about who shall have this child, and a child who is bound to have a difficult time whatever the court decides. More meaningful representation during the past five years might have prevented this sad, and all too typical situation.

Conflicts

As developed through statute, case law and rules of professional responsibility, it is clear that a juvenile is entitled to counsel who is free from actual or potential conflict of interest. The law guardian statute speaks in terms of "independent legal representation" (e.g. F.C.A. §249). The rules of professional responsibility stipulate, among other factors, that "a lawyer should never represent in litigation multiple clients with differing interests, and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests" (Rule E.C. 5-15). The McKinney commentary to the applicable juvenile delinquency provision notes that in delinquency cases involving multiple respondents"... the court should almost always appoint a separate law guardian for each respondent" (Commentary to 320.3; see also [Matter of Jeffrey M., 62 A.D. 2d 858 (1st Dept. 1970)] where the appellate division reversed a finding because the law guardian represented multiple respondents). In a similar vein, the Family Court Act Commentary suggests that "in a child abuse or neglect proceeding under Article Ten, . . . it must be presumed that there is an actual or potential conflict of interest between the child and his parents" (Commentary to §241).

Court observations, transcript analysis and interviews indicate that the courts and law guardians generally apply the conflict rules. For example, a separate law guardian is appointed in delinquency or PINS cases involving multiple respondents and counsel for the parent does not represent the children in abuse and neglect proceedings. However, we found two major exceptions involving legal aid societies which warrant discussion.

In one county which does not maintain a back-up panel for the legal aid office the representation of co-defendants is virtually assured. When questioned, the staff said they believe there are "real" conflicts in only about 25 cases a year, out of a caseload of over 1,000 delinquency and 700 PINS cases. For these 25 cases the law guardians turn to the Bar Association to seek pro-bono representation. Since there is no law guardian panel, the lawyers who respond are not reimbursed as law guardians nor have they met any nominal criteria for serving.

In another legal aid office, legal aid lawyers represent both the parent and the child in neglect and abuse cases. When questioned about the apparent conflict, the society maintained that the practice could be justified because of separate funding sources and personnel. Yet the society maintains a single supervisory and policy structure and there is considerable movement of

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4 cont. In this context, it should be noted that both within New York State, and to an even greater extent, elsewhere, programs are being developed to improve the process of reviewing the cases of children in placement. Some of these use paid staff acting as part of the court to work with lawyers representing the children, some upon volunteer Court Appointed Special Advocates, some upon citizen review boards, and some a combination of strategies.

personnel between the division. (Even in the absence of a unified supervisory and policy structure, the practice seems questionable). Further, the question has never been placed before the court for decision, nor has the society requested an opinion from the state bar association ethics committee.

Appeals and Special Litigation

Appeals

One of the most disturbing aspects of law guardian practice is the virtual absence of appellate review. The law guardians simply do not appeal adverse decisions or errors. In our mail survey, panel attorneys reported that appeals (initiated either on their part, or by others) accounted for five percent of the total law guardian caseload. (In fact, this seems inflated.) During the 1980-1981 state fiscal year three of the four legal aid societies outside New York City, were, all together involved in only nine appeals cases.[5] We do not know how many of these were initiated by the societies.[6]

Under the statute [7] the right to appeal and the mechanics for instituting an appeal are clear. Any law guardian may appeal a final order or, with permission, an intermediate order, and request that the appellate division appoint a law guardian to represent the child on appeal. (Although the appellate division may designate the law guardian assigned by the family court, it may also opt to appoint a new law guardian). It is even possible for a legal aid society to file a notice of appeal and request the appointment of a panel attorney (for fiscal reasons, conflict or other considerations).

However, although the statutory framework is clear, there appear to be misunderstandings and ambivalence concerning the mandate to appeal and the appellate process itself. Unlike criminal cases, there are no uniform court rules outlining the responsibilities of counsel to advise his client of the right to appeal. Nor is there a statutory mandate, with the notable exception of juvenile delinquency. (Under the recently enacted Article Three the law guardian must advise the child and his parent of the right to appeal as well

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[5]Legal Aid Societies Budget Requests to OCA 1982-1983.

[6]For 1982 we have data on appeals from only one legal aid society outside of New York City. That office, which handles about 4,000 juvenile cases, was involved in 12 appeals.

[7]A law guardian may file as a matter of right a notice of appeal from any order of disposition; interlocutory appeals are permitted from any other order with the permission of the appellate division (see F.C.A. §1112). The Family Court Act further provides that "upon an appeal in a proceeding under this Act, the court to which such an appeal is taken, or is sought to be taken, shall assign counsel to any person upon a showing ... that such person is a minor for whom counsel may be assigned under section two hundred forty-nine of this act and is unable to obtain independent counsel" (F.C.A. §1120). F.C.A. §249 provides for the appointment of a law guardian). There is also a provision for reimbursement for disbursements, which are a county charge (F.C.A. §1117).

as the mechanics of the process and any possible appealable errors; the law guardian must then file a notice of appeal unless the child and parent waive their rights.) In addition, the appeals courts sometimes discourage appeals. In the Fourth Department, for example, a transcript for a juvenile delinquency case, necessary to perfect the appeal, will not be ordered unless the family court judge, who rendered the decision in the first place, certifies that the appeal is meritorious. Although of concern, this questionable practice has not been challenged by either the two legal aid societies in the department or by any panel attorneys.

There also appear to be long delays in the assignment of appellate counsel. One full-time law guardian, for example, complained about a case in which after one year, no counsel had been assigned. His client, who had reportedly stolen $20 worth of goods, had been placed in a state training school for one year, and was released before the appeal was heard. Similarly, in some instances, as when a youth is given an illegal disposition, it is not clear who should initiate an appeal.[8] Finally, it should be noted that there seems to be a reluctance among law guardians to get involved in appeals, either because much appellate work involves out-of-court time (and therefore, lower reimbursement rates) or because law guardians are not aware that there are appealable issues.

The almost total lack of appeals[9] has resulted in several undesirable consequences. First, there is no check on judicial authority - clearly illegal trial decisions are not challenged. The transcript analysis, for example, revealed that close to half the cases involved appealable errors, reflecting either instances in which law guardians did not challenge judicial errors, or law guardians made the errors. Examples of these errors include a lack of allocution or other prerequisite to determine whether an admission is knowingly and intelligently made, lengthy detention in violation of the Family Court Act, placements of greater duration than permitted under the Act, secure placements when the evidence suggested that only a less restrictive disposition was justified, a lack of proof necessary to establish an offense (such as the charging of one incident in a PINS petition), conflicts, and prejudicial statements by the court. To cite another example, a sample of 100 delinquency cases from one county (see Appendix G) indicated that of 35 placements four were for periods in excess of that permitted under the Family Court Act. (Further, in at least four additional cases adjournments in contemplation of dismissal were for periods in excess of the six months permitted by the statute). Yet with rare exception law guardians do not appeal cases in which the judge has failed to follow the law, not to mention

[8]This was a particular concern of the Division For Youth ombudsmen with whom we spoke.

[9]The Juvenile Rights Division of the New York City Legal Aid Society maintains an active appeals and special litigation division. This unit brings about 40-50 appeals a year and is responsible for law reform efforts initiated by the JRD, some of which have led to the promulgation of statewide regulations.

cases in which the existence of error may not be clear or cases which involve questionable interpretations or possible abuse of discretion. The result is an absence of any control on improper or questionable decisions.

Second, the absence of appellate review has widespread ramifications for the system of representation as a whole. It is through appellate caselaw development that statutes are interpreted, constitutional issues are resolved and responsibilities clarified. The absence of caselaw is in part responsible for a lack of uniformity or certainty - each judge must find his own way without guidance from those judicial officials charged with the responsibility of developing precedent and resolving statutory ambiguities.

Last, the absence of appeals results in uncertainty concerning the role and responsibilities of the law guardians themselves. As noted earlier, the important issue of effective representation for juveniles has hardly been addressed; one crucial purpose of an adequate appellate practice would be the development of critical effective representation standards. Many of the ambiguities of the law guardian system, including the importance of due process versus the juvenile's best interests, could be resolved through the appeals process. Thus, in the long run, encouraging appeals may constitute one of the most important law guardian reform for it is the key to the developing effective law guardian practices.

Special Litigation

It should also be noted that just as individual appeals are rare, so too is special litigation. This is significant because some issues affecting the representation of children may not be resolved by an individual law guardian assigned to a specific case but, because they involve system-wide issues, must be litigated as a class action suit or "special litigation." For example, in one suburban county several law guardians advised us that the county department of social services routinely rejects requests to visit or consult with clients. Although a few panel law guardians have successfully moved for court orders mandating DSS cooperation, the required time and effort discourages or precludes a legal challenge for each case. On the other hand, a single class action suit could result in a court order applicable to all cases. Detention too, may involve questionable practices which could form the basis of litigation. For example, the practice of detaining a child hundreds of miles from home for lengthy periods has never been challenged (the lack of closer facilities is of course the major reason, but a legal challenge might lead to the construction of additional regional facilities or a greater use of non-secure detention). So too, a county detention facility may be overcrowded, may maintain questionable disciplinary policies, or may not provide required medical and educational services. However, in the absence of any special litigation capacity, these issues often remain unchallenged.

LEGAL AID VS. PANEL REPRESENTATION OUTSIDE OF NEW YORK CITY

Children in New York State are represented by law guardians assigned from a special panel of attorneys as one part of their practice, or by full-time law guardians working in legal aid offices. Given the fact that there are two

methods of providing representation, a central question is whether there are any systematic differences in the quality of representation accorded to juveniles by part-time, that is, panel law guardians as compared to that provided by full-time, that is, legal aid law guardians. Below, we highlight our findings from the four non-New York City legal aid offices and the law guardian panels studied.

Courtroom Observations

Both the coding of the courtroom observations, as well as the comments of others, revealed some systematic differences in the representation provided by the panel attorneys and the legal aid attorneys. Overall, there seemed to be greater variation among the panel attorneys. A higher percentage of panel law guardians were coded as seriously inadequate, compared to legal aid attorneys, 19% compared to 8%; but more panel attorneys were also judged to be effective as compared to legal aid attorneys, 6% compared to 1%. However, taken together, 45% of both observations involving legal aid law guardians and panel attorneys were judged to be either seriously inadequate or marginally adequate. Somewhat more legal aid attorneys, 37% as compared to 21% of the panel attorneys, were determined to be providing acceptable representation.

The results of the coding along the four specific dimensions singled out for observation (whether or not the child had been interviewed before the court proceeding; whether the law guardian and the child interacted either immediately before, during, or after the court-room proceeding; whether the law guardian was prepared for the proceeding, and whether the law guardian played a passive or an active role at the proceeding) also highlight some interesting differences among the panel and legal aid law guardians. (See also Appendix G.)

Pre-Court Involvement

With respect to the pre-court involvement between the child and the law guardian, panel attorneys appeared to be more likely not to have even interviewed the child at all. This was true of 7% of the panel attorneys in contrast to 1% of the legal aid attorneys. On the other hand, evidence of perfunctory interviewing (the three minute encounter just before court) seemed more prevalent among the legal aid attorneys, 36% as compared to 28%. It was also more difficult to determine whether the legal aid attorneys had interviewed the child; coders could not tell whether or not the child had been interviewed in 46% of the legal aid observations, compared to 29% of the panel observations. However, parallelling the pattern with respect to the overall assessment of the observation, panel attorneys were more likely to have carefully interviewed the child than legal aid attorneys; 7% of the observations involving panel attorneys were so judged, compared with 1% of the observations involving legal aid attorneys.

Child-Law Guardian Relationships

With respect to the observed relationship between the law guardian and the child during the court proceeding, legal aid attorneys seemed to be somewhat more likely to make no contact with the child, 12% as compared to 7% for the

panel attorneys. On the other hand, 33% of the observations of the legal aid attorneys as compared with 21% of those involving panel attorneys reflect some, albeit perfunctory, familiarity with the child. There was no variation, however, in the number of observations in which legal aid and panel law guardians were judged to be especially responsive to their clients (6% and 5% respectively).

Preparation

With respect to preparation, overall, panel attorneys compared to legal aid attorneys seemed somewhat more likely to do no preparation, (26% compared to 19%). But levels of preparation observed to be either seriously inadequate or uneven were very similar, 46% for legal aid and 49% for panel attorneys. In a variation of the pattern already discussed, legal aid attorneys were more likely to be judged as having done acceptable levels of preparation. 43% compared to 30% of the panel attorneys, but 10% of the panel attorneys were judged to have done effective preparation, as compared with only 1% of the legal aid law guardians.

Level of Activity

In relation to the level of activity at the hearing, legal aid attorneys were judged to be more active than panel attorneys. 23% of the panel attorneys were virtually silent during the proceedings observed, compared with 10% of the legal aid attorneys, although about the same percentage (20% for legal aid attorneys, 21% for panel attorneys) were judged to be marginally active (either by simply agreeing in a passive way with what others said, or by actually seeming to represent a party other than the child). However, unlike the other dimensions observed, almost an equal percentage of legal aid and panel attorneys were judged to represent, in an informed way, either the child's rights or the child's best interests; 16% for legal aid attorneys, as compared to 18% for panel attorneys. Particularly with respect to the legal aid attorneys, this seems to reflect the thinking on the feet quality discussed in the previous chapter.

In sum, the courtroom observations suggest that legal aid attorneys are more likely to give perfunctory or acceptable representation, while panel attorneys are more likely to give either poor or effective representation. This pattern does not readily lend itself to compelling arguments that either delivery approach, panels or legal aid, as currently structured in the counties studied is superior to the other. Rather, it suggests that both delivery approaches need to be strengthened in different ways to improve the overall level of representation accorded to children.

Views of Others

Interestingly, in those counties studied that have both legal aid and panels, the reports of others very much parallel the mixed picture that emerged from our data. In one of these counties the legal aid law guardians are seen as having an advantage over the panel law guardians because they have a staff to conduct investigations, but this is mitigated by concerns about turnover and inexperience within the legal aid office. In a second county,

one probation officer commented that he loved panel law guardians because "They're easy, they never challenge a disposition," implying that legal aid attorneys do challenge dispositions and are effective at it. (Our own courtroom observations, however, did not bear his generalization out.) In the third county, there was some feeling that panel attorneys were more willing to go to trial than legal aid attorneys. (We have no evidence as to whether in fact this is true or not.)

Our own impressions suggest that full-time law guardians observed may be, in fact, more likely to "think on their feet," and may in fact be more familiar with a range of dispositional alternatives. Their caseload levels, however, and their lack of non-legal support staff are so great that it makes preparation, investigation and the formulation of careful alternative dispositions virtually impossible.

It should also be noted that in those counties that do not have a legal aid system there seems to be a deeply held skepticism about legal aid lawyers, and a conviction that only panel attorneys really spend time with their clients. As with many of the general perceptions about law guardians, this was not fully supported by our data. It may be true that when panel attorneys do spend time with clients they may, in fact, spend more time than legal aid attorneys. Far more typical of both panel and legal aid attorneys, however, is the brief encounter just before court or no contact at all.

ROLE ORIENTATION AND REPRESENTATION

In Chapter 2 we report the law guardians views, based on our mail survey about the law guardians' overall approach to representation. Specifically, we examine the extent to which, in different proceedings, law guardians represent the child's rights or the child's best interest, and how they handle conflict between what their client wishes and what they perceive to be in their client's best interest. Here, based on our courtroom observations, the transcript analysis and the interviews with law guardians, we re-examine the impact of a rights versus a best interest orientation upon representation.[10]

[10]We are aware of only one other effort that seeks to relate the lawyer's self-defined role orientation in representing children to what he or she actually does. Based on interviews with 18 Connecticut lawyers assigned to represent children in divorce proceedings the authors concluded that "the proferred role conceptions [that of the advocate and that of the neutral fact-finder] are both theoretically inadequate and poorly responsive to the problems faced in actual custody litigation." p. 1126. More specifically, they note: "more than half the attorneys volunteered a theoretical label for their role, yet every one of these attorneys took on responsiblities inconsistent with his characterization. Their conclusion, that "the abstract conceptions of the role thus had only partial and sometimes misleading implications for practice" (p. 1145-1146) could also be said of our findings. It is also interesting that the lawyers in this study expressed doubt about their role in many of the same areas visible in our study: (1) how worthwhile it would be to talk to the child - particularly a young and inarticulate one;

Reported and Observed Rights Orientation

A number of differences between the findings from the counties and those from the survey are notable. First, although law guardians report that they view juvenile delinquency proceedings as analogous to criminal defense proceedings, in fact, the majority of law guardians that we observed or interviewed do not take a strong rights' oriented stance in court. Nor do the transcripts reflect a vigorous widespread commitment to protect the due process rights of juveniles charged with delinquency.

Instead, as is repeatedly documented in the last chapter, representation of juvenile delinquents appears to be surprisingly casual, with procedural violations rampant. Admissions, unchecked even by allocutions in which the judge queries the youth, occur frequently. Sometimes, even when denials are entered, law guardians fail to object to admissions; sometimes, even in the face of denials, further action in the form of probation investigations is condoned. Notification to the juveniles of a right to appeal, at least according to the sample of law guardians we interviewed, occurred in only half of the cases in which, by their own report, they felt it would have been appropriate. Perhaps the greatest indication of the "loose" nature of representation is the fact that our transcript analysis suggests as noted earlier, the presence of appealable error in close to half the cases.

Frequently, it was not clear that the law guardians were aware that rights were being violated. However, we also observed a few situations in which the law guardian clearly was in conflict about how to balance rights versus perceived best interest orientations. These were most visible in how the law guardians handled violations of due process.

> JD Faced with a 14-year old who destroyed some property, the law guardian had the child admit to the crime, and then told the court that the police had violated his client's rights. The law guardian indicated that he did not believe it was in the best interest of the child to let him go. If, however, the child insisted on using this technicality the law guardian felt the bottom line would have been his obligation to make a motion to suppress. (Case specific interview)

The responses of the law guardians to the hypothetical situation we posed pitting a child's need for services against a due process violation also

10 cont. (2) whether asking questions and conveying information on such a sensitive subject would upset the child; (3) how the lawyer could penetrate literal statements to find out the child's "true" feelings; and (4) how the lawyer should assess the child's preference if expressed, and what he should do if he found himself disagreeing with the wisdom of the child's choice p. 1159. Landsman, K.J. & Minow, M.L. (1978) "Lawyering for the Child: Principles of Represntation in Custody and Visitation Disputes Arising from Divorce," The Yale Law Journal, 87 (6), 1126-1190.

elicited considerable conflict on the part of the law guardians. (See Chapter 4, Figure 1 for the hypothetical.) In response to this hypothetical, 50% of the 44 attorneys responding said they would suppress the motion.[11] There was, as was true in the law guardian survey, virtually no variation as a function of geography. Nine percent indicated that they would allow the statement. Forty-one percent said that they would seek a compromise solution, such as allowing the client to admit to a reduced charge, requesting an ACD, or reaching a decision based on the characteristics of the client. One law guardian, for example, said, "If the client really insisted and was 'streetwise,'" then he would make a motion to suppress. Another law guardian, also said that in response to a streetwise client he would make a motion to suppress, but he would also tell the client that the police would always be watching.

What comes through from this data is that at least half, and probably more of the law guardians, when confronted with the choice of protecting the child's rights, or representing what they view as the child's best interest opt for the latter. Even more interesting, the child's best interest in relation to delinquency-type proceedings frequently is defined as not letting the child get off. This suggests at least one factor to be considered in explaining the high number of admissions in delinquency cases, and the many youth in detention who are ignored by law guardians may be a belief on the part of the law guardians that it is not right to let juveniles off on technicalities, that somehow the court experience or the detention experience will be good for them. This was in fact reflected quite clearly in comments that the law guardians made to us. One law guardian, for example told us, "If I can't be convinced detention is good for the client, I will work to get him out." Others made similar comments.

> One law guardian told us that he experiences a great deal of pressure from judges who routinely want 72-hour hearings for juveniles in detention. This particular law guardian did not feel that such hearings were always the best thing for the juvenile, therefore, he normally waives the right to a hearing, given the understanding that when the social investigation report is ready, DSS will bring the case promptly. Another law guardian noted that in many cases it is a good idea for a child to remain in detention, so he does not hurry to get them out. A third law guardian, noting that if juveniles are in detention, there is usually a pretty good reason, told us he tries to persuade his clients to waive their rights to detention hearings. In a very large urban county, one law guardian said if a detained youth wanted out, he could call her and

[11]To place this in perspective it should be noted that in our observations, review of court files and transcripts, we encountered at best only a handful of suppression motions.

> she would, if the youth were remanded, ask for a probable cause hearing, but she noted, "It is a real pain."[12]

The absence of a rights oriented philosophy is perhaps not surprising. What was surprising was our finding that some law guardians use legal strategies in order to protect what the law guardian perceives as the child's best interest, rather than the child's rights.

> One law guardian described a case involving a boy who had gone to a friend's house for the afternoon. The friend's parents returned, found him "playing rough" with their fish and hamster, and filed a petition. The law guardian demanded a Bill of Particulars, took it to fact-finding and succeeded in getting it dismissed. In commenting upon the case, the law guardian said that because he was a good kid, there was no use admitting him to a lesser charge and having him get probation; instead, he should avoid an adjudication altogether. The law guardian added, "I felt good about this one because I used a little bit of law." (case specific interview)

> In a serious assault case, a 14-year-old girl with an extensive family court history was charged, along with three other co-defendants, with assaulting another girl. The girl maintained her innocence to the law guardian who requested an ACD. Due to the severity of the injury, the court would not allow the case to be settled. Therefore, the law guardian requested a fact-finding hearing. He subpoenaed two of the co-defendants as witnesses, and after a full fact finding hearing, was able to secure an ACD for his client. He stated that he could have secured a dismissal, but he felt that an ACD would be in her best interest because the court would continue to be involved. (case specific interview)

Handling Child-Law Guardian Disagreements

The data on how the law guardians handle conflict between their own views and the explicit wishes of the juveniles based on the courtroom observations and the transcripts, as well as the juveniles own reports is consistent with what the law guardians said in the mail survey. It shows clearly the prevalence of a best interest orientation among New York State's law guardians.

[12]The reasoning behind the law guardians' willingness to waive a probable cause hearing is questionable, since a major purpose of such a hearing is to test the charge. It may also provide a forum to raise questions about continued detention, hence even if the law guardian thinks continued detention is appropriate, the probable cause hearing should not be waived.

What came through in the survey is that with the exception of 10 to 15% of the law guardians, most would argue for what they view as best, not what the child wishes. This same pattern is visible when law guardians actually represent children. Law guardians simply do not give as much weight to the child's wishes as might be expected based on New York's own statutory language, the rules of professional responsibility and on the fact that the law guardian is the child's lawyer.

But the data about representation also shed light on how many subtleties there are in what the law guardians do. Some law guardians, for example, do not even bother to find out what their clients wish; they simply make their own decisions, sometimes based on facts, sometimes, although less frequently, just based on their own values. Sometimes, aware that there is some obligation that they represent the child's wishes, they speak in court as if they were representing these wishes, but in chambers, or to the judge privately indicate that they do not agree. Although we have no hard statistics, this appears to be a typical pattern.

> PINS This law guardian seemed reasonably familiar with the child's wishes and in court expressed them to the judge. However, in chambers before the court appearance, he told the judge that what the child wanted was against his best interest. Further, the county attorney had already agreed to argue for the child's best interest in order to prevent the law guardian from being put in a compromising position. (courtroom observation)
>
> In a PINS proceeding, probation recommended placement for eighteen months, and the law guardian for one year. The 12-year-old child, however, did not want to be placed. In what we later learned was a strategy to help the child accept the idea of placement, the law guardian put the DSS worker on the stand and asked her to describe the facility, essentially to help the child feel more comfortable. (courtroom observation)

The best interest stance is so compelling to some law guardians that, as noted earlier, even when representing older adolescents, it supercedes a view that the client has a right to have his or her own wishes be determinative as is the case in representing adults. In a particularly interesting manifestation of this in the case cited below, the law guardian's own judgment happened to coincide with his client's. More typically, there is conflict.

> -A 17-year-old girl, who had been adjudicated PINS and placed, expressed her wish at an extension of placement hearing to remain in placement. After meeting with the mother and caseworker, the law guardian came to the conclusion that it was in her best interest to remain in care, and he successfully advocated for her.

It is also interesting that there appears to be some consistency within individual counties as to how the law guardians handle a conflict between their own views and the child's. This suggests their approach may be overtly

or covertly influenced by the judge. For example, in one county the law guardians deal with a conflict by expressing the child's wishes in court, but if they do not agree, they do not actively oppose DSS' recommendations. In another county, provoking criticism from many that we spoke with, the law guardians agree with DSS in chambers and then object in court. (Several who commented on this also questioned the ethics of the law guardians' failure to tell the children that they agreed with the DSS position.)

Taken together, the data from the law guardians survey and the on-site county study suggest that many of New York State's law guardians experience considerable personal conflict in representing juveniles in delinquency and PINS proceedings. They feel some pressure, as a group to <u>say</u> they are representing their clients' rights, but in fact, in practice, often do not. What is perhaps even more surprising, especially in view of the language in the law guardian statute is the absence of variation among the law guardians, as a group, about how significant the child's wishes are. Basically, most law guardians appear to give very little credence to this aspect of representing children.

CHILDREN'S VIEWS OF LAW GUARDIANS

Twenty-four children in placement in four different facilities[13] across the state were interviewed to see how well they felt they had been represented.[14] The youth responded to questions about whether they remembered their law guardians and knew how to contact them, whether they felt the law guardian had been on their side, and had explained what was happening

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[13]Youths were interviewed at four private facilities - three upstate and one downstate. Seventeen males and seven females placed as both JD's and PINS were interviewed. Their average age was 14. Two facilities were for boys, one was for girls and one was coed.

[14]We were able to find only two recent articles focusing on how the juveniles view either the court process or their lawyers. In one, the author, based on interviews with four neglected and abused children coming before the Los Angeles Juvenile Court examines the children's understanding and expectations of the court process; their relationship to others in the court process; their participation in the decision-making process; and their satisfaction with the results of the court process. She found the children to be generally confused about what was happening and how the court could help them solve their problem. Frequently, no one introduced the children to any adults, or explained what was happening. (This group of children had neither assigned lawyers, nor guardians ad litem.) The children interviewed, as was true in our sample, expressed a wish to be heard and to be taken seriously by the court. The author concludes that although the children are the subject of the court proceedings, they are not necessarily the focus of attention. Wiig, J.K. (1981) "Toward a Focus On Children in the Court Process" <u>In Protecting Children Through the Legal System</u>, Washington, D.C. American Bar Association, 937-955.

clearly and whether, if they were fearful about the court experience, the law guardian helped to alleviate some of their fears. Since the interviews were limited to children in placement they are clearly not representative of all the juveniles who come before family court. Further, it is a very small sample, even of placed children. Nonetheless, the interviews dramatically capture the perspective of the juveniles, and highlight what representation typically does, and ideally could mean to them.

To set the stage, the juveniles were asked what the law guardian's role is. In a comment that clearly cuts through some of the confusion about a rights versus best interest orientation, one youth said the law guardian is supposed to "help me make the right choices and give me clues about what is happening;" another said a law guardian's role is "to help me out because I don't understand all they say." At least two of the youth we spoke with reported being scared in court, and said that the law guardians made it easier, by explaining what was happening. Still another said the lawyer was there "to try to stand up for you." Several youths also gave the more predictable responses, that the "law guardian was supposed to get you out of trouble," and "defend you."

Overall, three of the youth were really enthusiastic about their law guardians; one of these had had the same law guardian on several occasions. He described the law guardian as having a lot of patience, and never giving up on him, even when he kept getting into trouble. He felt she was always on his side. Another youth, clearly very experienced, said his last law guardian had been the best. The boy "did not even lie to him." This law guardian had postponed his vacation to finish the proceeding, and had called the youth's mother to see how placement was going. A third youth, this time a girl from upstate, spoke about how important her law guardian had been to her in helping her get through the court experience. She said the first time she was in

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14, cont. The second article reports on a pilot study of 22 children coming before Canadian courts on charges of delinquency who were assigned "duty counsel". The authors sat in on the interviews between the children and counsel and recorded in check list form the lawyer's activities. They also observed in court, and after the hearing, conducted interviews with the juveniles. They found, (as did we) that lawyers' conversations with juveniles were very perfunctory. (One child, at the end of the interview asked the lawyer when he would meet his lawyer.) Only one told the child his name, and none explained that he was the child's lawyer. Five of the 22 juveniles did not even realize they had a lawyer. Only two lawyers made any attempt to explain the court process to the child. During the hearings, in six of the 22 cases, the lawyers said nothing. The authors also noted that although, "During the hearing duty counsel, for the most part played an undeniably passive role...the interviews indicated that most juveniles while not expecting much of duty counsel [also] did not express resentment that he had not done more." (p. 22) Catton, K. and Erikson, P. (1975) "The Juvenile's Perception of the Role of Defense Counsel in Juvenile Court: A Pilot Study." A Working Paper of the Centre of Criminology, University of Toronto.

court the law guardian talked with her for a full hour first, and that helped a lot. She said it helped her smile and it got her relaxed so that when she got into court, because she was smiling, she felt the judge liked her. The judge even told her she had a pretty smile.

Ten other youth reported satisfaction with their law guardians. One, for example, noted that the law guardian made it easier for him because he told him what to do and what was going to happen. The law guardian was also able to explain in some detail what to expect at the facility, which the youth seemed to appreciate. Another youth felt that the law guardian had spent a good deal of time talking to him, had met with him in detention, and was on his side in court. However, he expressed some disappointment because recently the youth had called the law guardian, but the law guardian had not called back. Still another youth falling in this satisfied category noted that he had spent 30 days in detention without a visit from his law guardian, saying, "You sit there waiting for someone to come see you. You sort of feel abandoned." He did say that although a law guardian never came, his mother and his probation officer did. Nor was this a huge problem, because he did get to go home on weekends. And finally, one girl, in a careful analysis, noted that she was satisfied with her law guardian because, although he was not successful in getting her placed with her aunt, which is what she wanted, he tried and he cared what happened to her.

Among those less satisfied, one youth was not sure if he had had a law guardian. He remembered only being chastised by the judge for chewing gum, and said that nobody told him not to. Ten children viewed their law guardians negatively. In three instances, the law guardians violated the youths' sense of fairness. One girl told the law guardian she did some of the things in the petition, but not all, but the law guardian did not say this in court. Moreover, in court, the girl felt the law guardian was "really against me." She told the judge that the girl not only needed placement (which the girl did not want), but needed it for 18 months. In the girl's words: "I felt like her and the judge were really ganging up on me." The girl also spent two weeks in detention without any contact from the law guardian. Another youth, who felt the law guardian was not on his side, explained that the law guardian talked only to his parents before the proceeding, and said nothing at all in court. A third reported that his law guardian had talked to his mother and seemed to be trying to represent them both. He responded yes and no to our query about whether the law guardian was on his side, saying the law guardian did tell the judge that some of the allegations in the PINS petition were wrong, that they had happened two years ago, and that his mother had exaggerated them. But the law guardian also told the court some of what the boy's mother had told him, which upset the boy.

One angrier youth noted that "everyone in court is against you." However, in this instance, the law guardian got the girl out of detention, and into the placement she wanted, so her assessment did not seem as credible as many of the others. A 12-year-old boy more charitably commented to us that although he did not feel that the law guardian was on his side, or had spent enough time talking to him, or told the judge what he wanted, or helped him get sent

home, in response to a question about whether the law guardian cared what happened to him, he said, "Well, it's hard to tell." He did, however, seem especially angry that the law guardian argued for placement without even talking to him. Two other youths were moderately negative, complaining that, although the law guardians had been fair, they had not spent enough time talking to them, or explaining what had happened, or was to happen after court.

Among the group who viewed the law guardians negatively, in addition to a sense on the part of the youths that the law guardians simply were not on their side, two other types of criticisms were raised. First, one youth was critical because the law guardian just disappeared in the middle of the proceeding. (This parallels what some caseworkers and probation officers said to us.) Nor, according to the boy's report, did the law guardian appear for the dispositional hearing. Second, two youth complained about constantly changing law guardians. One had his lawyer's card (as did many of the youth) but did not remember his name. This was his last attorney, he indicated that every time he came to court he had a different attorney (all legal aid attorneys). The second boy said he had had "a lot of law guardians, two or three," and noted, "you get tired of re-explaining everything." This theme of how important continuity of law guardians is to the youth came through very strongly.

How little these youth expect from their law guardians also came through. One girl noted to us that the law guardian had spent a lot of time talking with her - about ten minutes. Another noted that although she felt the lawyer was on her side in court, after the proceeding, he did not explain what happened, "but he probably did not know exactly what was going to happen."

One additional theme visible in a number of interviews was the juveniles' wish to be able to contact someone, particularly someone they feel they know "as a person." Two girls, for instance, reported that they really wanted to talk to their lawyers, but felt they couldn't, one noting that staff at the facility were so busy, and that they really didn't know very much about what happened in court; the other that she would like to get to know her law guardian better in case she needs him. She added that, in fact, she was very confused, because her placement has expired, the facility has suggested she finish the school year, and she is not sure what she wants to do. She did not feel, however, that she knew her law guardian well enough to contact him.

The perspectives of the juveniles are useful for several reasons. First, they confirm, in many respects, the patterns of effective and ineffective representation discussed in the preceeding chapter. Second, they highlight the reality that from the youths' perspective the most important factor in their representation is not the outcome, but whether or not they perceived the law guardian to be on their side. The most negative comments, in fact, were reserved for the law guardians who either ignored what the youth said, or reported both the youth's views and the parent's views in court. And, finally, they underscore what so many we interviewed said: in the absence of careful and simple explanations by law guardians to children, much of what goes on goes above their heads, leaving them alone and confused.

SUMMARY

This chapter focuses on the quality of representation from four perspectives. The first section examines how legal policies regarding access to law guardians, substitution and continuity of law guardians, assignments in the face of potential conflict of interest, and appeals affect the quality of representation accorded to children. The findings suggest an uneven pattern. Access to law guardians is particularly problematic for children involved in custody matters before the Supreme Court, for children in DFY or other placement situations, and potentially for children in one county studied that systematically uses a means test before a law guardian is appointed. The lack of continuity is perceived as particularly problematic for children represented by legal aid law guardians, although in a few counties relying upon panel law guardians, including one very high population county, the law guardians themselves expressed serious concern about the lack of continuity. Assignment of law guardians in potential conflict of interest situations seems again, limited to two of the legal aid societes. In contrast, the absence of appellate activity is widespread, visible in counties relying upon either legal aid or the panel system.

In the second section, differences in representation that are systematically attributable to full-time, non-New York City legal aid law guardians as compared to part-time (panel) law guardians are examined. Overall, based on this review, there seems to be a close parallel in the proportion of effective as compared to ineffective representation by full- and part-time law guardians. No one approach results in clearly more effective representation. In general, however, representation by legal aid attorneys is more likely to be perfunctory, while representation by panel attorneys seems more uneven, reflecting both better and worse representation.

In the third section, we re-examine the question of the law guardians' underlying orientation to representing children, and highlight how this orientation actually impacts upon representation. The data suggest that the law guardian's orientation with respect to his or her obligation to protect the juvenile's due process and statutorily defined rights, and to express the child's wishes often clashes with a fundamental belief on the part of a large number of law guardians that the law guardian's role is to represent the perceived best interest of the child. This clash appears to account, at least in part for the rather casual attitude toward protecting the rights of juveniles vigorously in delinquency and PINS proceedings, or taking seriously the wishes of the children at dispositional proceedings.

The last section of this chapter reports on interviews conducted with twenty four children in placement seeking their views about law guardians. Their accounts confirm many of the patterns of both ineffective and effective representation identified in the previous chapter, and in addition underscore the importance to the children of a feeling that someone is on their side, and, for some of them, that the law guardian be available to them as a person. The importance to the children of having the same law guardian represent them at different proceedings was also evident.

Chapter 6

PROVIDING LAW GUARDIANS TO CHILDREN: AN EXAMINATION OF THE DELIVERY SYSTEM

The past chapters have focused on the law guardians themselves, on the quality of representation that they as individuals provide, and on the impact of selected county policies on representation. In this chapter we focus on the delivery system itself and how it facilitates or impedes the delivery of effective representation by individual law guardians. The discussion is organized in three sections. First, we report the study findings about panel-related policies and practices at the county and state level; second, we report on legal aid-related policies and practices at both the county and state level, and third, we review the findings highlighting the issues and dilemmas that they raise in relation to questions of state policy and legal quality.

AN OVERVIEW OF THE LAW GUARDIAN SYSTEM

Under the provisions of the law guardian statute (F.C.A. §243) law guardians may be provided in a county in one of three ways: (1) "the Office of Court Administration may enter into an agreement with a legal aid society ... to provide law guardians;" (2) "the appellate division ... may enter into an agreement, subject to the regulations as may be promulgated by the administrative board of the judicial conference, with any qualified attorney or attorneys to serve as ... law guardians;" or (3) the appellate division ... may designate a panel of law guardians [and ... may invite a bar association] to recommend qualified persons ...." According to the statute, the choice of how law guardians are provided rests with either OCA or the Appellate Divisions.

Four counties and New York City have chosen to provide representation through legal aid societies, fifty-three counties through the panel system. No county in the state has appointed law guardians using the contract mechanism permitted under the statute. Under the legal aid model, law guardians are essentially full-time children's lawyers. Under the panel model, attorneys are assigned in individual cases, and, as discussed in Chapter 2, most represent under 20 children a year.

Consistent with the statutory mandate, the Office of Court Administration (OCA) has assumed responsibility for negotiating contracts with the legal aid societies. In addition, it submits appropriation requests to the legislature for the entire cost of the law guardian system and oversees the reimbursement process. The Appellate Divisions are responsible for promulgating rules for the panels, certifying law guardians, and most recently, for setting up departmental advisory committees for the law guardian program. In addition, they have some responsibility for approving reimbursements for panel law guardians.

The data reported in this chapter are based primarily on field work in 14 New York State counties, selected to reflect varied geography and

populations.[1] Ten of the sample counties rely exclusively on the panel system; three have legal aid offices with back-up provided by a panel, and one has only a legal aid office. (See Figure 1 for an overview of the study counties.) In addition, appropriate staff from the Appellate Division and the Office of Court Administration were interviewed, along with members of departmental level advisory committees. Relevant county and state data were also reviewed.

PANEL-RELATED POLICIES AND PRACTICES

The fifty-three counties relying on the panel system account for over half of the statewide petitions in which representation is either mandatory or discretionary.[2] Counties relying upon the panel system range in population between 21,000 and 1,200,000. Three study counties with panel systems have populations of 400,000 or more.

Statewide, approximately 2,300 attorneys serve as panel law guardians,[3] representing about four percent of the bar.[4] Within individual counties the percentage is more variable. For example, in the counties studied for this project, anywhere from two to 58% of the bar served as law guardians.

There are no statewide criteria defining the qualifications and expertise necessary to be a law guardian.[5] Instead, each Appellate Division has issued

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[1]In view of the fact that New York City does not have distinct law guardian panels and hence is not comparable to the rest of the state, and that the Juvenile Rights Division of the Legal Aid Society, which represents the vast majority of New York City youth, was not included in the original study mandate, New York City was not included as a field site. However, for comparative purposes, selected information was gathered from the Juvenile Rights Division, from the Appellate Division, First Department, from the administrators of the panel system in New York and from the New York County and City Bar Associations.

[2]The legislative committee report addressing the need for the law guardian statute in 1962 envisioned that the legal aid society would be the model of choice. The report noted: "By turning to Legal Aid Societies, the program increases the opportunities for creating a professional staff familiar with the special workings of the Family Court and therefore better able to render assistance at the point of 'intake' at hearings and in the shaping of orders of disposition. It also draws on the vast experience of an on-going organization. Report of the Joint Legislative Committee on Court Reorganization, 2 McKinney's Session Laws 3431, (1962).

[3]This is based on information from the counties and the Appellate Divisions.

[4]Attorneys are required to register with the Office of Court Administration every two years. This data is published in the Annual Report of the Chief Administrator of the Courts, 1982, table 4-16.

[5]See Chapter 2 for a discussion of what relevant qualifications and expertise the law guardians actually have.

Figure 1

PROFILE OF SAMPLE COUNTIES

	Judicial Department[1]	Total County Population[2]	System Type	1979 Rate of JD and PINS Petitions per 1,000 Children[3]	1980 Rate of Indicated Cases of Abuse and Neglect[3]	1979 Rate of Admissions to DFY per 10,000 Children[3]	1980 Rate of Children Placed in Foster Care per 1,000 Children[3]
High Population Counties							
C	4	1,015,472	L.A.	6.8	5.1	13.9	7.7
J	4	463,920	Panel	6.34	10.8	8.26	6.8
K	4	702,238	L.A. & Panel	6.1	7.3	10	6.3
N	2	866,599	Panel	5.44	3.7	3.61	-
O	2	1,284,231	L.A. & Panel	6.19	3.37	.96	2.73
Medium Population Counties							
B	4	227,354	Panel	3.8	3.9	19	3.7
E	4	113,901	Panel	1.2	6.7	5.4	4.5
H	3	114,254	Panel	-	7.4	3.2	4.8
L	2	259,603	L.A. & Panel	6.79	4.31	9.41	3.95
M	2	259,530	Panel	3.7	2.3	1.43	3.7
Low Population Counties							
A	3	97,656	Panel	6.85	19.4	22	5.2
D	3	44,929	Panel	4.5	15.5	11.8	9.2
F	4	59,400	Panel	4.5	12.8	9.5	7.6
G	4	21,459	Panel	.29	4.2	2.5	7.7
STATEWIDE			5	6.6	6.6	N/A	7.2

[1]No field site county was from the First Judicial Department.
[2]1980 Census of Population, Characteristics of People and Housing, N.Y. State Data Center, N.Y. State Department of Commerce.
[3]New York State Department of Social Services, Office of Program Planning, Analyses and Development, "Statewide Analyses of Indicators of Service Needs in New York State Facilities" April, 1981 (mimeo)

Figure 2

APPELLATE DIVISION RULES REGARDING ADMISSION TO LAW GUARDIAN PANEL*

First Judicial Department

Applicant required to: be a member in good standing of the Bar of the State of New York State; be certified by the Bar Association; serve as counsel or co-counsel in two JD or PINS proceedings, two Article X proceedings and one Article 5 or 6 proceeding. (This requirement can be waived if the applicant has substantial trial experience.)

Second Judicial Department

Applicant required to: be a member of the in good standing of the Bar of the State of New York ; serve as counsel or co-counsel in at least three JD or PINS proceedings and three Article X proceedings. (This requirement can be waived if the applicant has substantial experience.)

Third Judicial Department

Applicant required to: serve as counsel or co-counsel in three family court proceedings; be familiar with recent case law and legislation, the Family Court Act, relevant sections of the Domestic Relations Law, Social Service Law, Penal and Criminal Procedure Law; have knowledge of child development and behavior and of the existence and availability of the community-based and residential resources.

Fourth Judicial Department**

Applicant is required to:
be a member in good standing of the Bar of the State of New York; serve as counsel or co-counsel in three family court proceedings, or complete a law guardian training program. (The last two requirements can be waived if the applicant has substantial experience.)

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*Source: 22N.Y.C.R.R. Sections 611.6, 679.8, 835.2(b), 1032.2(b).

**Prior to 1981 the Fourth Department required that all attorneys joining the panel complete an affidavit swearing to their thorough familiarity recent case law and legislation, the Family Court Act, and relevant provisions of the Domestic Relations Law, Social Service Law, Penal and Criminal Procedural Law. As a result of opposition to this requirement it was deleted from the rules and a provision requiring each family court to provide training to law guardians was substituted.

rules that include requirements for joining the panel. The requirements vary somewhat across each of the four Judicial Departments in the state. (See Figure 2.)

County Policies and Practices

Recruitment, Certification, Recertification and Removal

No study county has any formal mechanism to ensure that the criteria specified by the Appellate Divisions are applied. In fact the process of recruiting lawyers to serve as law guardians appears to be a highly informal one. In the high population study counties, when recruitment occurs, it is done by the judges. In the other counties, it is done by either judges or clerks. Recruitment in the rural counties seems particularly difficult. One judge described the process as "twisting arms;" a clerk told us he "grabs anybody he can."[6]

No county visited had any written directions to potential law guardians about what to do in order to join the panel. Potential and current law guardians in both low and medium population counties reported that they found it very difficult to get information from either the family court or the Appellate Division about what was necessary in order to become a law guardian. Several commented that they found it especially frustrating to try to arrange a co-counsel experience, and most were unsuccessful. Further, a few law guardians indicated that despite the formal requirements, the real criteria in their counties seemed to be political affiliations.

The informality visible in the recruitment process is also the pattern with respect to the reappointment of law guardians to the panel and the removal of incompetent ones. The court rules of the First and Second Judicial Departments explicitly state that appointment to the law guardian panel is for one year. The rules of the Third and Fourth Judicial Departments implicitly indicate the same term of appointment, referring to the "annual law guardian panel." In fact, continuation is routine[7] and no study county that we visited has any formal recertification process. Further, no county reported any formal mechanism for removing incompetent law guardians from the list. Almost without exception, judges told us they simply would not assign an incompetent lawyer to a case. (One judge who did try to have a lawyer officially removed from the panel reported he was discouraged in his efforts by the Appellate Division.)

It should be noted however, that there is a beginning effort within the Second Department to move from paper applications and require that new applicants to the panel be interviewed by a member of the departmental advisory committee. Similarly, within New York City, the County Lawyer's Association is working on a proposal to implement a meaningful recertification effort.[8]

[6]In the Fourth Judicial Department ensuring that there are enough law guardians has been so difficult that departmental court rules were recently modified to permit law guardians from adjoining counties to be used if none are available in the county holding the hearing.

[7]Even lawyers who have actively requested that their names be removed from the panel are sometimes kept on the lists. In our mail survey, for example, we found that about 11% of the surveys returned to us were from attorneys who were no longer on the panel, or had never been on the panel.

Assignment Practices

Practices with respect to how, by whom, when, and for what cases a particular law guardian is assigned vary within each county and from county to county. No county in the sample had any written policies regarding any aspect of assignment practices.

Basically four different approaches to assigning panel law guardians were reported to us. In one, a matching process occurs. Either the judge or his clerk assigns a law guardian based on knowledge of the child and the law guardian.[9] In the second, the judge or the clerk follows a system of rotation based on the list of law guardians. In the third approach, the rotation system is modified in one of two ways: in rural areas, a law guardian is assigned a cluster of cases all at once in order to minimize transportation time and costs to the law guardian; in the other, the rotation system is adjusted for special cases, as when a judge wants an experienced law guardian assigned to a serious abuse case. In the fourth approach the law guardian is selected by the judge based on unspecified criteria.

Among the ten study counties relying solely on law guardian panels to provide representation to children two counties reported using primarily modified rotation, one child match, four rely on the judge's choice, and three report

[8]The Association has developed and proposed a plan that would require an attorney seeking recertification as an 18-B lawyer (and thus able to represent both juveniles and adults in family court) for either the trial or appeals panel to be approved by a majority vote of a subcommittee of the Association and to meet specific requirements to serve as either a trial or an appellate lawyer. A trial lawyer must meet seven of the following requirements: (1) Thorough knowledge of Family Court Law and procedure. (2) Belief in zealous representation of client. (3) Effective use of motion and discovery practice. (4) Effective trial skills. (5) Effective use of consultants and expert witnesses. (6) Perfecting of appeals and/or obtaining of appellate counsel and stays for clients, when appropriate. (7) Effective use of ancillary proceedings. (8) Effective writing and argument skills. (9) Diligence in interviewing clients. An appellate lawyer must meet three of four following requirements: (1) Thorough knowledge of Family Court Law and procedure. (2) Belief in zealous representation of client. (3) Perfecting of appeals and/or obtaining of appellate counsel and stays for clients, when appropriate. (4) Effective writing and argument skills.

The proposal does not say what methodology will be used to determine whether the criteria are met.

[9]This matching process has been criticized on the grounds that some judges use it to avoid appointing law guardians whose style of representation they do not like. In our own data we heard systematic complaints about favoritism by the judges in only one county. Elsewhere, only a handful of law guardians expressed complaints that they had not been reappointed because the judge did not like them, or their politics, or felt their representation was too vigorous.

using some combination of judge's choice, rotation and child match. There is no clear pattern as to who actually makes the assignment, the judge, the clerk or a combination. Moreover, even within counties, assignment policies vary, depending upon which judge is hearing the case. So, for example, in one county, one judge reported making assignments based on rotation, one on matching between the child and the law guardian, and one lets his clerk do it.

We also sought information about three other aspects of assignment practices; how the law guardian is notified of his appointment, whether the law guardian or the court is responsible for notifying the client (and/or the client's parents), and at what stage in the court process the assignment is made. In general, except for emergency assignments, law guardians were notified by mail, often following a phone call. In most counties, except for the largest ones, judges told us they thought the petition was mailed along with the assignment papers.[10] With respect to notificaton of the assignment, in the three low population counties, one judge indicated that both parent and child are notified, one indicated that the child is not notified, and one did not comment. In the medium population counties, three out of four judges responding said that the parents were notified; in only two counties were the children notified directly by the court. Similarly, four judges in the most heavily populated study counties indicated that parents are notified, and three that the child also receives notification. As was true of the responses to the question of who makes the assignment, the responses with respect to both whether the petition was mailed to the law guardian and whether parents and child received notification were confused; the judges told us one thing, the court clerks another. Sometimes, judges in the same county had different impressions of the local practices.

On the average, based on our review of 335 court files, cases are assigned 12 days in advance of the initial hearing. All of the low population counties in our sample report that law guardians are pre-assigned in juvenile delinquency, PINS, and abuse and neglect proceedings, including those where the youth has been detained. Medium and high population counties, however, are much less likely to pre-assign cases. Only four of the eleven medium and high population counties pre-assign in all proceedings.

With respect to the cases for which assignments are discretionary, in six of the ten panel counties, at least one judge reported assigning law guardians routinely in foster care review proceedings; in four of the ten panel counties at least one judge reported routinely assigning in custody proceedings and in five of the ten at least one judge reported routinely assigning in foster care approval proceedings.

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[10]In at least one county with both legal aid law guardians and a panel system, the petition is not mailed; the attorneys are expected to go to a special room to read the files. It was noted that sometimes the files are not requested. The court official with whom we spoke indicated that he guessed the law guardians had some other way to review the file.

Practices Regarding Continuity and Substitution of Panel Law Guardians

The importance of continuity of representation for children involved in either child welfare or juvenile delinquency proceedings has already been discussed. Here, we report on the administrative efforts to maximize the likelihood of continuity. All but one of the sample counties with panel systems reported trying to assign the same law guardian to the same child. Eight of the ten counties indicated there was a formal check, such as reviewing an index card or the court files, to see if the child had been in court previously, and who the law guardian had been. (In one of the eight counties, however, the judges did not agree on whether a formal or an informal system was used.) The remaining two counties indicated that they used informal methods, primarily memory, to ensure continuity. However, even among the counties reporting formal efforts to ensure continuity, not all the court case files even indicate the name of the child's law guardian.

Substitution of law guardians within proceedings, as noted in the previous chapter, is also a problem. Yet, no study county has a formal policy seeking to restrict the substitution of law guardians within proceedings, and only one reported an informal policy. Based on our review of 153 case files, the overall rate of substitution among panels is 18%, but this masks considerable variation depending upon the county. Thus, in four counties there was no evidence of substitution in the case files while three counties had a substitution rate of under 15%. In the five remaining counties with panels, however, substitution occurred in over 30% of the case files reviewed. One of these counties utilizes a "law guardian of the day" where one law guardian takes all the cases that come in on "his" day.

Substitution occurs as frequently in medium population counties with panel systems as in high population counties with panel systems, but is far less frequent in low-population counties. For example, substitution occurred in five of the nine medium and high population counties more than 15% of the time, while occurring under 15% of the time in all four of the low population counties. (See Figure 6.) Substitution rates also vary by type of proceeding. For example, in the case files reviewed, substitution in PINS proceedings were about two times as frequent as substitutions in JD proceedings (27% as compared to 13%). Though less of a problem than with PINS proceedings, substitution also occurred with some frequency in abuse and neglect proceedings (15%), extension of placement, foster care review, foster care approval and custody (20%) proceedings. (See Appendix G.)

Training

Under court rules, three of the four Judicial Departments specify that training shall be provided and identify who is responsible for providing the training. The Third Department does not mandate training but does specify the knowledge law guardians "shall" have. (See Figure 3.) Yet, only one of the ten counties relying only on panels reported any county-based training effort during the year of and the year preceeding, our study. In that county, a heavily populated one, several training sessions were conducted under the auspices of the local Bar, with the full support and encouragement of the

Figure 3

APPELLATE DIVISION RULES REGARDING TRAINING OF LAW GUARDIANS*

First Judicial Department	Bar Association shall provide continuing program of training and consultation that at a minimum includes a continuing co-counsel program and a professional course in family court advocacy.
Second Judicial Department	The Departmental Advisory Committee shall establish and supervise a training and education program subject to Appellate Division approval.
Third Judicial Department	Law guardians shall be expected to be thoroughly familiar with (i) provisions of the Family Court Act and relevant provisions of the Domestic Relations Law, Social Service Law, Penal Law and criminal procedure law, (ii) basic principles of child development and behavior, (iii) the existence and availability of community-based treatment resources and residential facilities, and (iv) recent case law and legislation relating to the foregoing.
Fourth Judicial Department	The family court in each county in conjunction with the local Bar Association, local law schools or any other competent organizations shall provide a continuing program of law guardian training and education which will allow applicant attorneys to satisfy requirements for designation to the panel and assist panel attorneys to improve and maintain their professional competence in Family Court Law.

*22 N.Y.C.R.R. Sections 611.7, S679.7, 835.2(d), 1032.2 (d).

administrative family court judge. The training sessions were well-attended and well-received. To our knowledge, no other county-initiated formal training was held in any of the other nine panel study counties, although several counties did report informal efforts to orient new law guardians. We are aware that some of the law guardians attended regionally-based training that was held in several parts of the state during this same time period. However, at the county level there does not seem to be either compliance with Appellate Division Rules or a mechanism for encouraging compliance.

Access to Support Services

Despite the fact that in many cases dispositional questions have great significance for the lives of children, panel law guardians do not have access to any professionals for help in evaluating children, or in framing their own, or reacting to the dispositional proposals of others. As noted in Chapter 2, few law guardians make use of §722-c of the County Law, either because they are unaware of it or because they have had a request for expert services denied. Nor has any panel study county established another mechanism for law guardians to consult with mental health or other professionals. As a result, as was frequently reported by law guardians themselves as well as others, and visible in the courtroom observations, law guardians are almost totally dependent upon the dispositional planning of DSS or Probation workers.

Appeals and Special Litigation Capacity

No study county that relies solely on law guardian panels has developed any formal mechanism to ensure appellate counsel is available for individual children or to address system-wide problems. (The one study county that does have a formal mechanism to provide appeals counsel is discussed in conjunction with legal aid policies, see p. 164.)

Role of the Bar

Except in the Second Department, the Bar Associations have, under Appellate Division Court Rules, some role in relation to the law guardian panels. In the First Department, the Bar Association must certify a law guardian before he or she can be approved by the Appellate Division and must provide law guardian training. In the other two departments, theoretically, before a lawyer can be appointed to the panel, he or she must be recommended by the Family Court Judge to the Appellate Division after consultation with either the president or a representative of the county Bar Association.

In fact, in most counties, the local Bar Association has at best a perfunctory involvement with the law guardian system. The real responsibility for seeing that there is a law guardian panel rests primarily with the judges. Of the ten panel study counties, for example, only one Bar Association even had a committee targeted solely for juvenile law. That county, in fact, has sponsored the most extensive law guardian training. In the other study counties, most of the local Bar Association officials we spoke with indicated that they do not have the monetary or staff resources, or

interest, to organize training.[11]

State Responsibility for the Panel System

There is no clear locus of overall responsibility for the panel system at the state level. According to the law guardian statute both the Office of Court Administration and the Appellate Division have some administrative responsibility for panel law guardians. OCA's responsibility is basically fiscal. It prepares the budget requests for the panel (as well as legal aid) law guardians, develops and approves the statewide voucher forms used by the law guardians to request payment, and compiles information from the Appellate Division on caseload, numbers of vouchers and voucher costs for the law guardian system. In addition, OCA's Office of Counsel monitors legislative developments with respect to law guardian matters, and may initiate legislative proposals.

OCA, however, has no formal responsibility for developing guidelines of either a fiscal or non-fiscal nature with respect to the panel, for providing funds for, or stimulating the development of training programs or providing materials to keep panel law guardians up to date, such as the JRD newsletter, for developing long-range projections about the supply of law guardians, or for responding to initiatives to try out alternate delivery models for representation. In practice, despite the absence of a broader mandate, general questions about the panel are informally addressed to the OCA staff person most directly responsible for fiscal law guardian matters.[12,13]

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[11]There are exceptions. For example, the Association of the Bar of the City of New York has been very active in consistently setting up high quality and well-received law guardian training programs. Further, the State Bar Association has been actively involved with law guardian issues through its special committee on juvenile justice. This committee meets several times a year to discuss and take action on issues concerning juvenile justice. (It also, along with a special Technical Advisory Committee, provided on-going advice and support to the staff of the Law Guardian Study.) However, the State Bar Association has never developed any specialized training programs or manuals for law guardians, although it has an active training program in many other areas of the law.

[12]For example, we learned of instances (albeit infrequent) in which either judges, or others in the county turned to OCA to ask whether they could change from a panel system to a legal aid system, or to explore other approaches, such as subcontracting with a private group of law guardians. In the absence of guidelines, OCA uses an ad hoc system of consulting with the county administrative judge, and with the Deputy Director of OCA to respond to such questions. OCA has an advisory committee made up of Family Court judges which presumably does provide advice on a range of issues, including law guardian matters. However, neither panel nor legal aid law guardians serve on the committee.

[13]Some of OCA's broader responsibilities also impact on the law guardian system. For example, OCA is required to collect information on Family Court caseloads. There are, however, serious problems with the data collected and

The Appellate Divisions are responsible for approving the panel lists submitted by counties, promulgating rules, ensuring that the advisory committees required by the rules exist and for appointing law guardians to serve as appellate counsel. In addition, the Divisions have recently assumed the responsibility for reviewing the vouchers of law guardians, a function previously carried out by regional OCA staff. Most significantly, however, only one Appellate Division has staff specifically assigned to the law guardian program to deal with other than voucher or panel list questions.[14]

On paper, the Appellate Divisions' responsibility for the oversight of the panel system has been considerably strengthened in the past few years. In 1980, pursuant to the Rules of the Chief Judge,[15] new rules were promulgated for each of the Appellate Departments defining their responsibility for the panel law guardians.[16] The rules address such areas as the appointment process, the membership of departmental advisory committees, and the nature and auspices of the training that should be available to law guardians. (For a detailed analysis, see Appendix H.) Further, since 1981, the Appellate Divisions have been required to submit annual reports on the operation of the panel system to the Chief Judge of the Court.

Under the new Appellate Division rules, the departmental advisory committees bear a major responsibility for the quality of representation. (See Figure 4.) They now exist in all departments, although the Second Department Committee only serves five counties: Dutchess, Orange, Putnam, Rockland and Westchester. However, the committees are advisory, they meet

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13 cont. their usefulness for planning and oversight of the law guardian program. In the course of the project data on Family Court caseloads was obtained from two OCA sources but these figures were not consistent with one another. Further, for seven counties, four of which have high populations, a new caseload data system is being tested. As a result, data from these counties are not comparable to other state data, making it impossible to determine accurately how many petitions are filed in Family Court in New York State in one year.

[14]For several years the Presiding Justice of the First Department has supported the continuation of an Office of Project Development for special projects and permitted its staff to devote considerable time to the law guardian program. As a result, the office has worked closely with Association of the Bar of New York City in the development of training efforts, has developed manuals for law guardians on child abuse and termination and has developed proposals to make the administration of the panel system more efficient in New York City.

[15]22 N.Y.C.R.R. Section 7.1.

[16]22 N.Y.C.R.R. Sections 611, 679, 835, 1032.

infrequently, and they lack access to any on-going staff to gather information, or provide needed follow up.[17]

Further, the committees are not all equally active, nor have their efforts been directed toward the same issues. For example, the departmental advisory committee to the First Department at the time we met with the chair was in the process of developing a manual for new law guardians. But the chair changed and the completed manual was never distributed to panel members. In the Second Department, the efforts of the committee have focused on trying to strengthen the process of joining the panel. More specifically, in that department, rules now provide that any new panel attorney must be interviewed by a member of the Departmental Advisory Committee. However, since only one committee serving five of the counties has been established, the new interview requirements apply only in these counties. In the Third Department, to date the committee emphasis has been primarily on assessing the most appropriate mechanism for assigning panel attorneys. In this department, all counties have been asked to implement a rotation, rather than a matching assignment process. In addition, the committee was particularly instrumental in initiating and planning a well-received multi-county training session sponsored by the Appellate Division, Third Department, in the fall of 1983.

In the Fourth Department the committee initially conducted a brief survey of the judges and has recently surveyed the law guardians themselves. As a result of the initial survey, Fourth Department Rules were modified to encourage greater participation in the panels. A blanket restriction against the appointment of district attorneys, county attorneys, corporation counsel, judges or justices of towns and villages as law guardians and the affidavit attesting to the attorney's knowledge of relevant laws were eliminated. Instead, the burden has been shifted so that now each family court is responsible for determining if a conflict exists and for providing orientation and continuing training to the law guardians. (See Figure 3.)

The recent changes in Appellate Division responsibility represent an effort to provide greater structure to the panel law guardian system. Further, they do seem to have focused attention on the law guardian system within each of the four Judicial Departments. It is questionable, however, whether relying on advisory committees, in the absence of any overall plan and or staff, can provide the sustained leadership that appears necessary to reverse some of the problems we have identified. It is also questionable whether the fact that reports must now be submitted by the Appellate Divisions to the Chief Judge marks a change in the ultimate source of responsibility for the quality of the panel. As far as we could tell these reports are not now used in any formal or informal way to monitor the quality of the legal representation accorded to juveniles, although in several judicial departments, the process of compiling the reports has led to Appellate Division initiated changes.

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[17]Several of the Departmental Advisory Committee members we interviewed spoke of their own frustration with the lack of staff or resources. Indeed, one committee that is charged with evaluating adequately the effectiveness of panel law guardians in their department acknowledged in their annual report their inability to carry out this function. Annual Report Operation of Law Guardian Panels Fourth Department (1981).)

Figure 4

APPELLATE DIVISION RULES REGARDING ADVISORY COMMITTEE RESPONSIBILITIES*

First Judicial Department Committee must:	-Oversee the operations of panel plan and matters pertaining to the performance and professional conduct of law guardians. -Annually file with the Appellate Division a written evaluation report of the panel plan and panel attorneys, with respect to efficiency of the panel plan, problems that exist with the plan and procedures that have or will improve the quality of legal representation in the family court.
Second Judicial Department Committees must:	-Oversee, subject to Appellate Division supervision, the operations of the panel plan, evaluate the performance of each panel member, make recommendations to the Appellate Division for improvement of the operations of the panel plan, and recommend removal of attorneys from the panel.
Third Judicial Department Committee must:	-Oversee the operation of the law guardian program and annually make recommendations to the Presiding Justice with respect to promulgation of standards and administrative procedures for improvement of the quality of law guardian representation.
Fourth Judicial Department Committee must:	-Evaluate the panel law guardian program in each county in the Fourth Department with respect to: adequate number of members, adequate training, the existence of adequate removal procedures, general efficiency of each panel, and procedures necessary to improve the operation of the panels throughout the department. -Evaluate the performance of panel members in each county with respect to: the provision of effective representation, and ensuring that panel members are assigned fairly and impartially (having regard to to the difficulty of the case and special qualifications of panel members).

*22 N.Y.C.R.R. Sections 611.5, 679.2, 835.1, 1032.1.

The Supply of Panel Law Guardians

It is very difficult to get a clear picture of the adequacy of either the current or future supply of panel law guardians. Recent changes in court rules promulgated by the Fourth Department suggest that at least in that department, there has been considerable concern about whether there are enough panel attorneys. By contrast, in our study counties, the judges generally tended to see the supply of law guardians as adequate, although the judges in higher population counties relying on panel systems were more likely to express concern. (Only one judge in a low population county reported serious problems in the numbers of law guardians available to him.) However, regardless of county size, a number of judges indicated that if representation were to become mandatory in proceedings for which it is now discretionary, their supply of law guardians would not be adequate. Their concern is particularly significant when considered in relation to the data that suggest that most of the increase in juvenile cases coming before the court is in cases for which representation is not now mandatory; particularly custody cases and in foster care reviews. (See Table 1.)

Unfortunately, it is very difficult to relate these data on caseload patterns to the adequacy of the supply of law guardians in any meaningful way. It is possible to say that if representation were mandated in all proceedings in which it is not now, this would increase the number of cases in which law guardian participation is mandated by 36%. However, this overstates the impact by some unknown percentage since children are already receiving representation in such proceedings. (Unfortunately there is no aggregate information either through individual courts or OCA about how many children are actually assigned representation in discretionary proceedings.)[18]

Fiscal Policies and Cost Data

Reimbursement Levels and Procedures

Law guardians are reimbursed at the rate of $15 per hour for out-of-court time and $25 per hour for in-court time. This payment level reflects an increase mandated by the legislature effective September 1981. As a result of

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[18]In an attempt to come to grips with this very important question we reviewed printouts of recently collected voucher information from OCA. In the first quarter of 1983, law guardians sought reimbursement for representing children in 86 foster care reviews, 28 approvals of voluntary placement and 222 custody proceedings. This suggests that on an annual basis, law guardians represent children in about 6% of all foster care reviews, 1% of foster care approval proceedings and 5% of custody proceedings. (This is based on 1981 caseload data, which is the most recent available). Since it seems highly unlikely that this includes all vouchers for representation provided during this period, these percentages are at best very rough estimates. In addition, with respect to the custody projections, they do not include cases heard before the Supreme Court. (The data do suggest, however, that representation is not as frequent in proceedings where it is not mandated than reports from the judges regarding assignment policies suggest.)

Table 1
Average Change in Caseload Levels in Study Counties
(By Population Groupings)
and for the State as a Whole 1979-1981[1]

	% Change 79-81 Total Juvenile Caseload[2] %	% Change in Caseload 79-81 Where Representation Is Mandatory[3] %	% Change 79-81 Foster Care Reviews %	% Change 79-81 Foster Care Approvals %	% Change 79-81 Custody %	Total % Change 79-81 Where Representation Is Not Mandatory[4] %
High Population Counties	-10	-15	+22	-19	+ 67	+11
Medium Population Counties	No change	-18	+ 7	-12	+106	+45
Low Population Counties	+29	+33	-82	-61	+ 76	+25
Average for All Study Counties	- 7	-14	+18	-20	+ 84	+20
Statewide	+ 4	- 9	+28	-29	+ 51	+30

[1]New York State Office of Court Administration, "Original & Supplementary Petitions, Petitions Added, Deducted and Actively Pending by Type of Proceeding" - Table 2, 1979, 1980, 1981 (mimeo). The State data include both counties relying upon panel representation and counties using legal aid. However, they do not reflect information from the counties of Genesee, New York, Onondaga, Rennselaer, St. Lawrence and Westchester counties. Calculations by project staff. See Appendix G for further information.

[2]Includes juvenile delinquency, PINS, abuse and neglect, termination of parental rights, custody, foster care review and approval proceedings.

[3]Includes juvenile delinquency, abuse and neglect and termination of parental rights proceedings.

[4]Includes foster care reviews, approvals and custody proceedings.

the increase, reimbursement rates for law guardians are now comparable to reimbursement rates for assigned counsel in other civil and criminal proceedings, although even with the increases levels remain low.

The reimbursement process itself is also a source of great frustration to almost all of the law guardians we interviewed or surveyed. There are reportedly long delays between the submission of the voucher and receipt of payment (sometimes up to eight months). Further, law guardian uncertainty about what is and is not reimbursable, and particularly in certain counties and departments, anger about voucher reductions is common.

As the process is now structured, after the voucher is completed by the law guardian it is submitted to the family court judge who reviews it for errors in math, incorrect charges and other inaccuracies. Judges have the authority to disallow expenses and reduce amounts as they see fit. Once the judge has signed the voucher, it is forwarded to the appropriate Appellate Division where it is again reviewed for math errors and allowable expenses. Only after clearance by the Appellate Division is the voucher forwarded to the Office of the State Comptroller.

Presumably, this cumbersome approach was envisioned as a fiscal control to guard against improper charges by the law guardians. However, how effectively it works or whether other checks, such as periodic audits, would be equally or more effective has never been explored. A number of clerks and judges indicated to us that the local level review is seen as a mechanical task and the review is carried out by a secretary. Further, some judges find their role in the voucher process demeaning and inappropriate.

Of perhaps greater significance, the three tiered process clearly maximizes the likelihood of long delays in reimbursement, although there are some time-lines. The Appellate Divisions, for example, do report an informal policy of trying to review the vouchers within a week and forwarding them promptly to the State Budget Office, while the State Budget Office reports that by its own rules it must make payment within 30 days.[19] However, there is no time frame for the approval of vouchers by the family court judge. Some view this as the source of many of the delays. In the rural counties, for example, we learned that some judges simply wait for the vouchers to accumulate before signing them. In fact, in an attempt to discourage this practice, one Appellate Division has refused to accept more than 75 vouchers at one time.

The absence of clear fiscal guidelines also creates problems. Neither family court judges nor Appellate Division staff have guidelines on which to base their initial approval or disapproval of vouchers. Not surprisingly, differences in practice result both at the local level,[20] and apparently

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[19]New York State Accounting System User Procedure Manual, Vol. III, Sec. 7.0100, page 2.

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within each Appellate Division.[21] At our request, the Office of Court Administration surveyed each Appellate Division with regard to their individual reimbursement policies. The responses indicate clear differences in Division policies. For example, in two departments courtroom waiting time is reimbursed at the higher in-court rate, in two at the lower, out-of-court rate. In two Divisions travel time is reimbursed, in two it is not. In another Appellate Division it was reported to OCA that time and mileage are both reimbursable, yet law guardians in those areas told us that only one or the other was permitted.[22]

Reimbursement Policies and the Quality of Representation

There appear to be three significant ways in which panel reimbursement levels and procedures impact upon the quality of representation. In the first place, the level of reimbursement is viewed by many law guardians as inadequate, particularly since administrative expenses, such as overhead and secretarial assistance are not covered. One law guardian whose views capture the feelings of many commented that because of the reimbursement levels he views law guardian representation as "a sideline, almost a hobby." For him, as for many others, law guardian work is essentially pro bono, and few can afford to accept a large number of cases.

In the second place, the reimbursement structure itself seems to have a direct relationship to some of the problems in representation identified in Chapter 4, particularly the widespread lack of preparation evidenced by the law guardians. The law guardians, when they commented on this, noted that they simply cannot afford, at $15 an hour, to do the kind of preparation that they know is warranted. One law guardian, for example, told us that because he cannot afford to prepare, he asks questions in court to which he does not know the answers just to get the issues raised.

As noted at other points in this report, fiscal policies also have a chilling effect on the law guardian's post-dispositional role. In at least one Appellate Division, for example, only one voucher may be submitted for each case. A second voucher is permitted only if the law guardian has been

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[21]The law guardian survey, for example, as reported in Chapter 2 indicated particular problems in one of the four departments. Similarly, in our field work, some judges were very concerned about what they perceived to be arbitrary reductions on the part of one Appellate Division.

[22]It should also be noted that the law guardians surveyed and those interviewed also reported some frustration with the new voucher forms recently developed by OCA, as well as, in some jurisdictions, problems in getting the forms. It is difficult however, to sort out how much of the difficulty was a function of the newness of the forms, and thus a time-limited problem versus a more substantial one. Our own comparison of the new and old voucher forms suggests that although it is somewhat confusing to complete, the new voucher does not require substantially more information than the old. Unlike the old form, however, this one can be computer analyzed, and in fact OCA anticipates doing periodic data analyses.

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within each Appellate Division.[21] At our request, the Office of Court Administration surveyed each Appellate Division with regard to their individual reimbursement policies. The responses indicate clear differences in Division policies. For example, in two departments courtroom waiting time is reimbursed at the higher in-court rate, in two at the lower, out-of-court rate. In two Divisions travel time is reimbursed, in two it is not. In another Appellate Division it was reported to OCA that time and mileage are both reimbursable, yet law guardians in those areas told us that only one or the other was permitted.[22]

Reimbursement Policies and the Quality of Representation

There appear to be three significant ways in which panel reimbursement levels and procedures impact upon the quality of representation. In the first place, the level of reimbursement is viewed by many law guardians as inadequate, particularly since administrative expenses, such as overhead and secretarial assistance are not covered. One law guardian whose views capture the feelings of many commented that because of the reimbursement levels he views law guardian representation as "a sideline, almost a hobby." For him, as for many others, law guardian work is essentially pro bono, and few can afford to accept a large number of cases.

In the second place, the reimbursement structure itself seems to have a direct relationship to some of the problems in representation identified in Chapter 4, particularly the widespread lack of preparation evidenced by the law guardians. The law guardians, when they commented on this, noted that they simply cannot afford, at $15 an hour, to do the kind of preparation that they know is warranted. One law guardian, for example, told us that because he cannot afford to prepare, he asks questions in court to which he does not know the answers just to get the issues raised.

As noted at other points in this report, fiscal policies also have a chilling effect on the law guardian's post-dispositional role. In at least one Appellate Division, for example, only one voucher may be submitted for each case. A second voucher is permitted only if the law guardian has been

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[21]The law guardian survey, for example, as reported in Chapter 2 indicated particular problems in one of the four departments. Similarly, in our field work, some judges were very concerned about what they perceived to be arbitrary reductions on the part of one Appellate Division.

[22]It should also be noted that the law guardians surveyed and those interviewed also reported some frustration with the new voucher forms recently developed by OCA, as well as, in some jurisdictions, problems in getting the forms. It is difficult however, to sort out how much of the difficulty was a function of the newness of the forms, and thus a time-limited problem versus a more substantial one. Our own comparison of the new and old voucher forms suggests that although it is somewhat confusing to complete, the new voucher does not require substantially more information than the old. Unlike the old form, however, this one can be computer analyzed, and in fact OCA anticipates doing periodic data analyses.

reappointed, as on a violation petition, or an extension of placement. Consequently, a law guardian who submits a voucher after the court proceeding and then is called upon by the child will not be reimbursed for any follow-up unless there is another formal proceeding.

The Cost of the Panel System

The panel attorneys, based on the best available (but incomplete) data, represent juveniles in at least 67% of the juvenile petitions brought before the court.[23] The best fiscal data available suggests that in 1981 the state paid about $1,766,559 a year to purchase this representation, about 24% of the total cost of the law guardian system that year.[24] (See Appendix G.)

An analysis of all law guardian vouchers submitted to the State for payment during the first quarter of 1983 done by the Law Guardian Study staff reveals that the amount spent on each case varies significantly between counties and among Appellate Divisions. Law guardians in the Second Department spend the most per case. Their average cost per voucher is $143, compared to the Third Department average of $72 and the Fourth Department average of $58. In our sample, low population counties spend an average of $78 per case and medium population counties $97. High population counties spend an average of $122 per voucher.[25] The costs result primarily from time spent by the attorney on the case, and not from other expenses, such as mileage or long distance. The average amount spent on expenses of representation in this sample was $1.69 per case.

The amount of time spent on each case also varies from proceeding to proceeding. The average amount of time spent on all juvenile delinquency cases in the sample was 5-1/4 hours, compared to 4-3/4 hours on PINS proceedings, 8 hours on abuse and neglect proceedings, 2-1/4 hours on guardianship proceedings and 3-3/4 hours on foster care reviews. It should be noted, however, the total time spent on a case includes court waiting time, not just time actively involved in the case.

LEGAL AID-RELATED POLICIES AND PRACTICES

The four legal aid offices included in the on-site study for this report together provide representation in about 9,500 cases a year. This is 11% of all petitions in New York State for which representation is either mandatory or discretionary.[26] The four offices are staffed by a total of 20 full-time law guardians, three investigators and one part-time social worker. (See Figure 5.)

Back-up panel law guardians are needed to assist if caseloads become too high, to provide representation in non-mandatory proceedings and to provide representation in cases of conflict, such as those involving co-defendants in juvenile delinquency proceedings, or instances in which legal aid is representing adult members of the family in a child abuse and neglect petition. Three of the four offices have panel law guardians available for back-up. The legal aid office in the largest county studied, however, has none. In other counties, although panels exist there is no apparent rationale for the panel size. In the largest county with both a legal aid office and a panel, the panel is composed of 30 members;[27] in the second largest, the panel has 110 members, and in the smallest county with a legal aid office, the panel has 52 members.

Policies and Practices Within Individual Offices

Selection Criteria

As is the case with the panel attorneys, there are no uniform criteria that must be met by legal aid attorneys assigned to represent children. In fact, several law guardians we interviewed said that at the time they took the job they had no particular interest or experience in juvenile law; they were simply assigned to the unit.

Caseload Patterns

Caseload pressures on the full-time law guardians vary from office to office. At the highest end, two offices report actual caseloads between 750-800. In two other offices, caseloads are just over 300. (See Figure 5.) No legal aid office has developed any internal guidelines about when the caseload is too heavy to provide effective representation.

Assignment Practices

Three of the four legal aid offices provide representation in all types of proceedings. In the fourth, the legal aid attorneys are used primarily in delinquency and PINS proceedings, and when assignments are made, in foster care approval and review proceedings. Panel attorneys are used primarily in abuse and neglect proceedings (although some judges in this county also prefer to assign full-time law guardians in these cases as well).

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[23]New York State Office of Court Administration, Fourth Annual Report of the Chief Administrator of the Courts 1982, Table 49 "Family Court: Original and Supplementary Petitions, Petitions Added, Deducted and Actively Pending by Type of Proceeding." The data are missing for seven counties: Genesee, New York, Onondaga, Rennselaer, St. Lawrence and Westchester.

[24]O.C.A. Annual Budget Request 1981-82.

[25]These calculations were done by project staff based on information supplied by the Office of Court Administration about all law guardian vouchers submitted during the first quarter of 1983.

[26]If the caseload of the Juvenile Rights Division of the New York City Legal Aid Society were included legal aid offices represent about 33% of all petitions in which representation is either mandatory or discretionary.

[27]The names of the members of this panel have apparently not been resubmitted to the Appellate Division since approximately 1973.

Figure 5

STUDY COUNTY
LEGAL AID SOCIETY PROFILES

County	Total Law Guardian Caseload 81-82[1]	Number of Law Guardians 81-82[1]	Individual Law Guardian Caseloads[2]	Number Professional Support Staff Members[1]	Attorney-Staff Ratio[2]
O	2,685	7	384	1	7:1
K	1,967	6	328	1	6:1
C	4,086	5[4]	817	1	5:1
L	1,027	1	1,027[5]	1.5	1:1.5

County	Law Guardian Youth Ratio[3]	Total County Population[6]	Panel Size	Budget Requested for '83-'84[1]
O	1:57,961	1,284,231	30	$372,398
K	1:31,971	702,238	110	297,817
C	1:54,028	1,015,472	0	237,835
L	1:79,238	259,603	52	74,599

[1]As reported in OCA 83-84 Budget Request. Included in professional support staff are paralegals and social workers.

[2]Calculation by project staff.

[3]Youths under Age 17, 1980 Census

[4]According to OCA information this legal aid office has four attorneys and one investigator. In actuality, the investigator is an attorney carrying a full caseload, and does no investigative work.

[5]This law guardian estimated his actual caseload to be 750 cases, not 1,027 for this year since other Legal Aid attorneys occasionally assist him. It should be noted at the time of our visit one full-time law guardian and one half-time law guardian were assigned to this office.

[6]1980 Census.

Procedures by which specific cases are assigned also vary. In one legal aid office studied, law guardians are assigned each day to cover one part of the court. The office receives abuse and neglect, guardianship and PINS petitions a week in advance of the first appearance but no attempt is made to contact the client or begin preparation of the case. Delinquency petitions are not received in advance of the first appearance and legal aid does not represent the youth until they have the opportunity to establish indigency.

In a second legal aid office studied, law guardians are assigned to a judge for one year. Petitions are not available to the law guardians prior to the day of the first appearance, thus client interviews are conducted on that day. The Family Court Clerk's office notifies parents in advance of the first appearance that a legal aid law guardian will be available to represent their child, but legal aid does not contact the child.

In a third legal aid office studied, each law guardian routinely covers one part of the court. Petitions are received in advance of the first appearance and the legal aid investigator contacts and interviews the child before the court date.

Finally, in the fourth legal aid office studied, law guardians are assigned to cover a part of the court each day. Only PINS petitions are received in advance of the first appearance. All others, including delinquency and abuse and neglect petitions, are available at the first appearance and children are interviewed at that time.

Practices Regarding Continuity and Substitution

There appears to be a direct and dramatic relationship between legal aid assignment policies and the likelihood that a child will have the same lawyer represent him or her throughout one proceeding, or at concurrent proceedings. None of the legal aid offices studied has a written policy on continuity of representation, and although law guardians in all offices mentioned efforts to foster continuity, in practice, success is limited.[28] In the three counties on which assignments are made the day of the proceeding, the likelihood of continuity within the same proceeding, unless the proceeding is completed in one appearance, is slim. So too is the likelihood of any preparation time, a problem of critical proportions in at least one of the legal aid offices.) The law guardians we spoke with did indicate that if one of them is particularly interested in the case, he or she may ask for the same child. This approach, however, makes continuity of representation the exception rather than the rule.

In the legal aid office in which a law guardian is assigned to a judge for a year, this means that for a youth whose case involves multiple appearances,

[28]In the Juvenile Rights Division of the New York City Legal Aid Society there is a strong, although unwritten, policy to try to assure continuity in all concurrent proceedings and in all subsequent proceedings if the attorney is still on staff. Staff report the effort is largely successful, primarily because of limited turnover.

the likelihood of continuity depends upon the point in the year that the case begins. Further, the system of one judge, one law guardian clearly works against continuity of representation for youth involved in concurrent proceedings or sequential proceedings before different judges.

A review of 214 case files (61 from legal aid counties and 153 from panel counties), involving more than one appearance, revealed that substitution occurred on the average in 61% of the legal aid county case files reviewed and in only 18% of those from panel counties. (See Figure 6.) The percentage of cases in which substitution occurred among legal aid offices ranged from 41% to 76%. Assignment practices may account for this range. The county with the lowest rate (41%) assigns law guardians to one judge for a full year. In the legal aid county with the highest rate of substitution (76%), assignments are made daily, on a random basis.

Policies Regarding Conflicts

Policies in three of the four legal aid offices regarding potential conflict of interest situations are problematic. In the largest legal aid office studied, since there is no panel except in the most unusual circumstances, the same law guardian represents co-defendants in delinquency cases. One of the other legal aid offices studied permits legal aid attorneys to represent both children involved in neglect and abuse proceedings as well as their parents. There, the staff has concluded that because the state pays for the child's lawyer, and the county for the parents' this does not pose a conflict.[29] Several other questionable policies were also identified. For example, in one office, law guardians are asked to represent adults. Indeed, the law guardians estimate that such assignments take from one-third to one-half of their time. Two offices also permit their attorneys to have an outside private practice, although in fact, only the lawyers in one office actually have time to do so. As noted previously, one of the four legal aid offices also applies a means test.

Training

No legal aid office in the study had any formal in-service program for the law guardians. All learning is "on the job." At least one office reported a buddy system for new law guardians for about a week. Law guardians in each office however, did express interest in continued training, and several have been active in working on training efforts in their own county, or made special efforts to participate in available training experiences outside of the office.

Three of the four legal aid offices report they have routine access to the JRD newsletter published by the Juvenile Rights Division of the New York City Legal Aid Society.

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[29]Again, this is in contrast to the Juvenile Rights Division in New York City which will not represent children whose parents are represented by lawyers from other divisions within legal aid.

Figure 6

RATES OF SUBSTITUTION WITHIN PROCEEDINGS[1]
BASED ON COURT FILE ANALYSIS

County[2]	% of Substitutions in Legal Aid Files Reviewed %
C	76
K	41
L[3]	70
O	44

Average rate of substitution 61%.

County	% of Substitutions in Panel Files Reviewed %
(High Population)	
J	0
N	36
K	0
O	33
County	
(Medium Population)	
B	0
E	13
H	43
L	43
M	67
County	
(Low Population)	
A	7
D	13
F	0
G[4]	

Average rate of substitution 18%.

[1]This table is based on a review of case files in 214 proceedings in which there was more than one appearance. 153 files involved panel attorneys, the remainder, legal aid law guardians. For a more detailed analysis by type of proceeding, see Appendix G.

[2]Note that counties K, O and L have both Legal Aid and panels. Substitution rates are therefore listed in two categories.

[3]At the time of our visit, County L had one full-time and one half-time lawyer assigned to law guardian work. Further, these law guardians are at times assisted by legal aid attorneys not specifically assigned to this office.

[4]None of the case files collected for this county involved more than one appearance, therefore the rate of substitution could not be calculated.

Access to Support Services

A very important rationale for public-defender type offices is that they can include lawyers, other professionals such as social workers, and legal support staff. The potential importance of such a multi-disciplinary approach for children, where dispositional decisions can have life-long consequences for the developing child, is obvious. Indeed, as noted in Chapter 3, the initial legislative committee report recommending the law guardian legislation envisioned that the legal aid model would be the preferred approach to providing representation to juveniles throughout the state because among other reasons, the legal aid model would make it easier to provide the needed range of staff. This premise has not been fulfilled in the legal aid offices we studied.

In the largest legal aid office studied, theoretically there is one investigator. In fact, a lawyer was hired for this position so the staff includes only attorneys. Each of two other legal aid offices studied has one paralegal investigator and no social worker. Ironically, the smallest legal aid office has the most support staff: a full-time investigator and a part-time social worker who conduct all the initial interviewing of the children, and as necessary, make home visits.

Appellate and Special Litigation Capacity

If it is not surprising that the counties relying upon the panel system lack a capacity for appeals or special (class action) litigation, it is surprising that the legal aid societies also lack such a capacity. Only one of the four legal aid offices studied even has a lawyer assigned to appellate cases, and none the capacity to mount class action litigation.[30] One county with legal aid does have, however, a special juvenile appeals panel. That panel was established by the county Bar Association (with the assistance of the Office of Court Administration), in response to a lack of appeals. However, since the first year, when several appeals were perfected and decided, the panel has been under-utilized (despite the fact that there are attorneys on the panel who are willing to accept assignments).[31]

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[30]In this office, there is a full-time juvenile appeals attorney (not reflected in the legal aid law guardian budget of that office). As reported in the annual report this staff member has brought ten appeals in 1982, filed one memorandum of law and made one miscellaneous motion.

[31]Individuals who were instrumental in the formation of the panel cite several reasons for the continuing paucity of appeals. The most basic is that attorneys are not accustomed to filing appeals in juvenile matters, and are often reluctant to do so. A second factor is a 1982 Appellate Division ruling which held that Appellate Division will not hear a right to counsel motion filed pursuant to F.C.A. §1120 unless the law guardian first separately moves in Family Court for Poor Person Relief. Law guardians' concern over the added work created by this bifurcated procedure and the possibility that the trial judge could stop attempts to appeal have added to the law guardians' reluctance to file appeals.

The Institutional Presence

Our interviews with both senior legal aid law guardians and the staff uncovered two somewhat surprising themes. First, we had anticipated that law guardians in legal aid offices would identify in a positive way with other law guardians in other legal aid offices and or with legal aid as an institution. We did not find this. Full-time law guardians in one office have no sense of identification with those in other offices.[32] There is no association of either full- or part-time law guardians in the state and no meetings of all legal aid law guardians are routinely held. Similarly, the fact of being part of the larger legal aid organization is perceived as an asset in only one office (primarily because the chief law guardian has been a stable figure in the organization and is perceived as able to interact effectively within the larger legal aid context). In two other offices, the staff did not have strong views either way. In one office, it is viewed as a clear liability.

The second surprising finding is that full-time legal aid attorneys for the most part did not express strong views about what could be done to improve the quality of representation to children. Moreover, almost none expressed complaints about the lack of support staff or caseload pressures. Several even made comments suggesting that they had not been vigorous advocates for budget requests submitted to OCA. In one legal aid office where attorneys represent both juveniles and adults, the attorneys do not even consider themselves to be juvenile specialists.

It is also important to note that staff turnover in two of the offices is routine. In one of these offices, none of the attorneys except the chief law guardian has been on the staff for more than two years. In one county, the problem was attributed to the limited career advancement possibilities within legal aid, compared to those for county attorneys. In the other, it was noted that often attorneys start out as law guardians, then move into other parts of the legal aid office.

The Role of the Bar

The role of the Bar in the study counties with legal aid law guardians parallels the patterns identified in study counties with law guardian panels. In three of the four counties with legal aid offices, the Bar has minimal, if any involvement with law guardians. In the fourth county, the Bar has played a very active role. There is a strong juvenile law committee which has participated actively in training (indeed, by agreement between the Bar and the Administrative Judge of Family Court, the Bar is now responsible for training new panel law guardians), has conducted a study of the effectiveness of law guardians in the county, and was instrumental in the formulation of the appeals panel just described.

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[32]There was apparently one meeting, called by OCA, of all the chief law guardians. At least one of those attending reported it was very useful because of the information shared and, however temporary, of the sense of support established.

State Responsibility for Legal Aid Offices

Neither the statutes nor the court rules give the Appellate Division any specific role in relation to the legal aid offices. Instead, whatever centralized responsibility there is exists within the Office of Court Administration. Even within OCA, however, the specific mandate is a weak one. The statute charges OCA only to conduct the contract negotiation process; it says nothing about oversight, planning or leadership responsibilities. As a result, OCA has interpreted its responsibility narrowly. While it does conduct the negotiation process, neither this mechanism nor any other is used to ensure uniformity in either the administrative or legal policies and practices in the different legal aid offices. Further, OCA has never provided any guidelines for the contract negotiating process with respect to appropriate caseload levels, staffing patterns, or continuity requirements, nor do they see it as their role to do so. Even with respect to budget decisions, OCA staff point out that with very few exceptions, they generally approve the budget requests from the four offices studied.[33] (They noted too, that they had had very few requests for non-legal staff from these offices.)

Fiscal Policies and Cost Data

Just as the panel reimbursement policies impact upon the quality of representation so too do legal aid fiscal policies. It is clear, for example, that caseload levels combined with the absence of social workers and paralegal support staff effect what legal aid law guardians do. Indeed, the law guardians themselves provided specific examples. One noted that she had only made one home visit in two years for a very special case. Several from one county noted that they believe the absence of the capacity to fully prepare for and investigate a case, particularly a delinquency case, means the children are inappropriately adjudicated. Another legal aid law guardian noted that in the absence of staff to go out, identify, and track down witnesses, she must rely on her youthful clients to provide correct names and addresses, an approach that often fails to work. In yet another office, a legal aid law guardian noted that they never file expungement motions because they simply take too much time. Perhaps the most telling comment about the pressure that full-time law guardians work under, however, was made by a law guardian who said that when she really feels burned out she tries to spend more time talking to her clients to get to know them as people.

The Cost of Legal Aid Law Guardians

The operation of the four legal aid law guardian offices studied cost about $573,000 in FY 80-81. For FY 83-84 $982,649 has been requested. (See Appendix G.) The budgets for the individual offices are inconsistent with

[33]We were not able to review over time the initial budget requests for new legal or support staff from the four legal aid offices, but as already noted, in several offices, those we spoke with suggested that perhaps they had not been as active as they should have been in seeking new staff.

their caseloads with some having much more money per case in their budget than others. In order to compare the differences in the resources available to each legal aid society studied we divided the amount of funding requested by each society in 1983-84 by the projected caseload for 1983-84.[34] The funding provided to each legal aid society clearly is not based on caseload. The largest and smallest upstate counties had $42 and $55 respectively in funding per case. The two remaining upstate counties with legal aid societies had $92 and $130. (See Figure 7.)

THE LAW GUARDIAN SYSTEM IN PERSPECTIVE: ISSUES AND DILEMMAS

The picture that emerges from this review of how law guardian panels and legal aid offices are structured, funded, held accountable and provided with necessary back-up support must be considered in relation to the most fundamental issue of all; the evidence of serious, systematic inadequacies in the ways individual children are represented.

Administrative Structure and Oversight

While there is no question that in theory New York State has a long-standing and firm commitment to protect the rights and interests of the children who come before its courts, it also appears that the current bifurcated and essentially ad hoc administrative structure does not facilitate the delivery of quality representation from either panel or legal aid law guardians.

The problems center in three areas. First, there are important weaknesses common to both the panel system and the legal aid model as they are now implemented. In particular, neither approach ensures either a minimal level of competence among the law guardians or facilitates law guardian access to basic legal or service related information, to periodic updates, to on-going training experiences, or to needed ancillary staff. Given that most panel law guardians represent only a few children, and that the fiscal incentives for so doing are minimal, placing the entire burden of keeping informed on the panel law guardians themselves seems particularly inappropriate. Similarly, caseload levels for legal aid law guardians make time for active research and seeking out of new information unrealistic. In addition, there is minimal capacity with the existing approaches to stimulate appellate activity.

Second, there are weakenesses specific to each approach. For example, the reimbursement process for the panel law guardian system seems particularly cumbersome and inefficient. Further, some reimbursement policies undermine the likelihood of panel law guardians providing effective representation. For the legal aid offices, both the assignment policies that preclude preparation and continuity, and the acceptance of case levels in the absence of support staff virtually ensure perfunctory representation.

[34]The actual 83-84 caseload was not available for each individual legal aid society, therefore we used the caseload projections provided in the OCA Budget Request.

CONTINUED

2 OF 4

Figure 7

PANEL[1] AND LEGAL AID[2] AVERAGE COSTS PER CASE

By Department (Panels)	Average Voucher Costs
First Department	Not calculated
Second Judicial Department	$143
Third Judicial Department	$ 72
Fourth Judicial Department	$ 58
Average	$124

By Population Levels (Panels) (in study counties)	Average Voucher Costs
Low Population	$ 78
Medium Population	$ 97
High Population	$122
Average	$111

By Legal Aid Office Studied	Average Case Costs
County C	$ 42
County K	$130
County L	$ 55
County O	$ 92
Average	$ 72

[1]These data were obtained from an analysis by Project Staff of all vouchers submitted to Office of Court Administration during the first quarter of 1983.

[2]The resources of each Legal Aid Society studied were calculated by project staff from data in the 1983-84 Office of Court Administration budget requests. The costs of maintaining a Legal Aid Society office, including salaries, rent and other expenses, are included. Caseload data is based on projected caseloads for 1983-84.

Third, and in many ways, most importantly, there are serious weaknesses in the capacity at the state level to provide leadership to and oversight of the law guardian program. Neither OCA nor the Appellate Division give law guardian matters high priority, and neither has a full-time staff person working on law guardian issues. As a result, if planning or training occurs, it occurs in one jurisdiction, at one point in time, largely through the interest of an individual or a small group of committed individuals rather than as a matter of routine policy. No one has mandated responsibility for planning for changes or ensuring on-going training for law guardians.

Nor are there any clear guidelines for determining what criteria should be used to make decisions about whether legal aid or panel systems are more appropriate in counties seeking changes. Moreover, the Appellate Divisions, which apparently have the most paper responsibility for the effectiveness of at least the panel system, must rely on volunteer advisory committees without staff to carry out this crucial monitoring task. With respect to the legal aid offices, there is no clear line of authority outside of the individual offices for identifying and taking corrective action when policies or practices are dysfunctional.

Need for Change

From the perspective of individual judges and law guardians this ad hoc fiscal and administrative system is not perceived as seriously problematic, although there are areas of complaint and frustration. In fact, many judges and lawyers alike view the representation of juveniles as basically a pro-bono effort, and therefore feel it is inappropriate to ask too much of the law guardians, or impose any requirements. Viewed in relation to the widespread evidence that the quality of representation children actually receive is seriously inadequate, the ad hoc nature of the system is more disturbing. It also raises two important policy questions that have not been raised adequately. New York State in 1982 spent about ten million dollars a year for law guardian services, many of which were not very well spent. (See Appendix G.) A central question, therefore is whether the state is getting its money's worth with this ad hoc approach, or whether the investment would be more worthwhile if there were a more coherent, accountable delivery system. Can the system in other words, be restructured to make it easier for both the panel and legal aid law guardians, even in the face of predictable continued fiscal constraints, to do a better job. It is to this question we turn in the next chapter.

SUMMARY

This chapter examines the practices and policies that govern the provision of representation through both law guardian panels and the four legal aid societies outside of New York City, based on on-site visits to 14 counties, interviews with state officials, and a review of all available written materials.

With respect to the panel, policies tend to be fairly informal. This is visible in the recruitment, reappointment and recertification of law guardians, which are not governed by any county written policies, nor any

formal efforts to meet requirements set forth in the Appellate Division Rules. Assignment practices are variable, both with respect to the timing of the assignment and the appointment to the law guardians in cases in which representation is not mandated. Within the panel sample counties, at least four indicated the judge appoints based on his own criteria, and one assigns law guardians based on individual decisions about the match between the law guardian and the child and three use some combination of these methods. There is some concern within these counties about the adequacy of the overall supply of law guardians, particularly if representation is mandated in additional proceedings.

Policies and practices within legal aid offices also reflect local decisions rather than any uniform requirements. Caseload size varies considerably from office to office. Law guardians in the largest legal aid office represent on the average, 800 cases a year, and do so without any paralegal or social work support staff staff. In the smallest offices, the caseload is also about 800, although there is support. In the other offices, caseload size is between 300-400. No legal aid ofice has any formal continuity policies; as a result it is the exception rather than the rule for a child to be represented by the same law guardian at different proceedings, and in three of the four offices, unlikely that a child will have the same law guardian throughout even one proceeding. Further, policies with respect to representation of children in potential conflict of interest situations are questionable in one office with respect to abused and neglected children, and in another office with respect to co-defendants in delinquency proceedings. Three of the four offices have back-up law guardian panels available to them; the largest legal aid office, however, has none. Both panel and legal aid law guardians report only limited access to on-going training, although a number of judges report holding informal orientation sessions for new law guardians. Local bar associations, with a few exceptions have not been active either with respect to general issues of juvenile law or training for law guardians.

State-level involvement with the Law Guardian Program is fragmented, and focused primarily on fiscal rather than programmatic issues. Neither the Family Court Act nor any other statute has clearly ascribed centralized administrative responsibiity for law guardian services. Instead, responsibility for the law guardian system is loosely divided between the Office of Court Administration and the Appellate Divisions. OCA has responsibility primarily for budget-related issues; it has developed voucher forms, contracts with each of the legal aid societies and submits a budget request for both panel and legal aid law guardians as part of its overall budget. The Appellate Divisions review and approve the vouchers for payment after they have been reviewed by the counties; assign appellate counsel, develop court rules pursuant to the law guardian system and work with newly instituted volunteer Departmental Advisory Committees to strengthen the panel systems. Neither OCA nor the Appellate Divisions, however, give law guardian matters high priority in staffing or fiscal resources. As a result, the system seems to just go along. No one has mandated responsiblity for planning or stimulating the development of accessible training for law guardians or for ensuring appropriate appellate activity occurs. Nor are there any clear guidelines for determining what criteria should be used to make decisions about whether legal aid or panel systems are more appropriate in counties seeking changes, or whether entirely new approaches should be tried.

Chapter 7

CONCLUSIONS AND RECOMMENDATIONS

Taken together, the central findings of the law guardian study are very sobering. Most significant is that all the data point to extensive inadequacies in the general level of representation accorded to children, regardless of whether the children are involved in delinquency type proceedings, or as is increasingly the case, in child protective and child welfare related proceedings. These findings, in turn, must be considered in relation to the picture of the law guardians that emerged from the data. Those data show that the majority of panel law guardians do not view themselves as experts in juvenile law, do not have the opportunity to become so through pre-appointment experiences or continuing training, and in fact, handle relatively few juvenile cases a year. Legal aid law guardians in the four offices studied handle many cases a year, but do so in the absence of both support staff and continuity policies. In many instances, this significantly limits their capacity to provide effective representation.

The administrative and fiscal structure of the Law Guardian Program appears to compound many of the problems identified in the representaton of children. The core of the problem seems to be that there is simply no clear locus of responsibility for New York's Law Guardian Program. Indeed, most telling, there is not even one full-time staff person in the entire state assigned to the Law Guardian Program, in either the Appellate Divisions or the Office of Court Administration. This results in a system that is, at best, ad hoc. There is now no one place where all the issues pertaining to a coherent and effective law guardian system can be addressed. Further, the current structure does not appear to lend itself readily to strengthening those functions (such as standard setting, training, monitoring and encouraging appellate activity) that are essential to any effective legal services delivery system.

If the representation accorded to children were adequate, this would not be problematic. But overall, the representation is not adequate; close to one half of the representation appears to be seriously or marginally inadequate. Part of this may be attributed to differences among individual law guardians. But the data in this report also suggest that neither panel nor legal aid law guardians get much help in carrying out their responsibilities to children. For panel attorneys reimbursement levels are minimal and for both panel and legal aid law guardians access to support services, on-going information about relevant legal or service developments, caselaw and legislative updates or guidelines is limited. This places a great and perhaps unfair burden on the law guardians themselves. But it places an even greater burden on the children of this state for it is the children who often bear the most serious consequences.

It is in this context that we consider how to improve the law guardian program in the most efficient, effective way. We begin by considering some of the functions that, in a planned, integrated and coherent way, must be carried out, and conclude with a discussion of how these might be implemented.

TOWARD CREATING A STRONGER LAW GUARDIAN PROGRAM

Based on the findings of this report, there are six critical goals for any proposed changes. First, and most significantly, changes should be designed to improve and more effectively monitor the overall quality of representation, as the current level is simply not consistent with the statutory intent, nor acceptable for the children who are dependent upon law guardians. The second is that the recommendations should be designed to build on, not replace, the existing approaches. In view of the fact that our data do not show that either the panel or legal aid representation, as currently implemented in the offices studied, is systematically more effective, changes should be structured so that new or targeted dollars can build on the strengths and correct the weaknesses evident in both approaches. Third, any changes should provide a clear, visible focus for enhanced state-level leadership of the Law Guardian Program. It is clear that for a more effective program, the current administrative fragmentation must be eliminated and the now almost invisible accountability lines strengthened. Fourth, one goal of any change must be to ensure that those activities, such as training and appeals, that are now so seriously inadequate and that are so crucial to effective representation are strengthened in a uniform way throughout the state.

A fifth goal, related to the fourth, is to relieve the burden now placed on both full and part-time law guardians to be informed and expert in the absence of adequate support services, information about relevant legal or service developments, caselaw and legislative updates or guidelines. And finally, in view of how little re-examination there has been in any on-going way of the Law Guardian Program over the past twenty years, despite the fact that there has been tremendous substantive attention focused on questions of children's rights, there should be an enhanced capacity within the structure of the program to stimulate demonstration and other efforts to test out ways to improve specific aspects of representation and to encourage the development of alternative approaches to ensuring that the rights and interests of the children who come before family court are effectively protected.

WHAT MUST BE DONE

The Essential Functions

In order to accomplish these goals there must be capacity within the Law Guardian Program to:

-develop consistent program guidelines for the operation and management of the panels and the legal aid societies;

-strengthen the quality, accessibility and scope of training and other related materials available to law guardians and develop mechanisms to ensure law guardians have access to non-legal support services;

-review and clarify current fiscal policies to ensure that the policies are equitable, efficient, and supportive of effective representation;

-expand the appellate and special litigation capacity outside of New York City and ensure children in placement have access to law guardians;

-stimulate, within counties, within Departments, and on a statewide basis efforts to improve the quality of representation and administration of the Law Guardian Program;

-monitor, on a periodic basis the overall quality of representation to children, as well as the appropriateness of fiscal levels and reimbursement procedures;

-ensure the collection of meaningful data about the Law Guardian Program, such as the adequacy of the supply of law guardians and the frequency of their assignment in discretionary proceedings;

-strengthen the overall leadership, planning and decision-making capacity for the Law Guardian Program.

Below we discuss the activities needed to carry out each of these essential functions in greater detail.

Develop Program Guidelines

While there is no need to burden the Law Guardian Program with unnecessary guidelines, it is clear that there needs to be greater uniformity and clarity than now exists in the program's operations. Guidelines covering the following areas are needed.

-guidelines for panel law guardians regarding appointment, recertification and removal, assignment policies and reimbursable expenses, (including circumstances under which post-dispositional activities may be reimbursed);

-guidelines for appointment to either county, departmental or statewide appellate law guardian panels;

-guidelines for the approval of contracts with non-profit or private attorneys providing full-time representation. These should include assurances of the capacity to provide adequate levels of legal and support staff in relation to caseload; provisions for maximizing continuity of representation and mechanisms for handling conflict of interest situations;

-guidelines for grievance procedures for law guardians seeking redress regarding voucher, appointment, or other problems related to the representation of children.

Strengthen the Training and Related Support Services Available to Law Guardians

Among the most troublesome study findings is that there is no statewide capacity to make it feasible for law guardians to keep up to date on legislative, caselaw and service developments. Given that most law guardians represent under 20 children a year, this is likely to be difficult for them. To this end the Law Guardian Program should:

-develop and implement a plan to ensure that law guardians are provided with on-going training. Training should be targeted for both new and more experienced law guardians and should cover, at a minimum, interviewing children, dispositional planning and options, legal strategies and tactics in juvenile law, and appeals. In addition, procedure specific training should also be available. Training strategies to be considered might include the identification (and plan for reimbursement) of senior law guardians in each county (or group of counties) charged to stimulate local training and/or the development of videotaped or other curricula that could be used flexibly by local counties across the state. (This would alleviate the burden on law guardians in less heavily populated areas to travel long distances for training.)

-develop and circulate, at least quarterly, a law guardian newsletter summarizing legislative, legal, regulatory and service developments. (The possibility of using law students in the process might be explored.)

-consider the feasibility of establishing a brief bank easily accessible to law guardians throughout the state.

-ensure that law guardians, either on a local or state level have access to advice from knowledgeable mental health, social service and education experts either regionally or on a statewide basis. (For example, the feasibility of having a special 800 number to call for advice might be explored.)

Review, Clarify and Modify Existing Fiscal Policies

In addition to generally low levels of reimbursement, current fiscal policies sometimes overtly discourage effective representation. Further, with respect to the legal aid offices, budget allocations have not been contingent upon meeting any specified performance levels. Efforts to examine current fiscal policies, generate alternatives and when appropriate, institute administrative or seek legislative changes are haphazard. The only clear fiscal responsibility now rests with OCA which is required to prepare an annual budget. Therefore, within the Law Guardian Program, there must be increased capacity to:

-identify, on an annual basis, all costs associated with the Law Guardian Program, including the cost of mandated

and discretionary representation, appellate services, training and other administrative costs;

-evaluate and, if necessary, modify existing reimbursement procedures for panel attorneys to reduce delays in reimbursement time;

-seek selective modification of current reimbursement policies for panel law guardians. Particularly in need of review are policies with respect to the difference in in-court and out-of-court reimbursement rates that discourage preparation and appellate activity and the policy of not reimbursing law guardians for the time spent in training;

-assess the feasibility of seeking increased reimbursement levels for panel law guardians;

-develop and disseminate fiscal guidelines for panel attorneys to reduce existing confusion about reimbursable expenses;

-contract for full-time law guardian services through either legal aid societies or other legal programs after consultation with appropriate local officials and lawyers, provided specific performance criteria are met. (The existing restriction limiting contracts to either private attorneys or legal aid societies should be rescinded; other non-profit legal programs besides legal aid societies may have the interest and skills to provide effective representation to children.)

-review contracts after a specific, limited time period to ensure the agreed upon quality of representation has been provided; there should be no automatic assumption that contracts will be renewed year after year if representation does not meet desired performance standards.

Expand the Appellate and Special Litigation Capacity

At present, outside of New York City there is very little appellate activity or special litigation on behalf of juveniles. As a result judicial or law guardian errors go unchecked, unclear statutory provisions remain unclarified, and the courts remain relatively silent on expectations for law guardians. To remedy this, the Law Guardian Program should:

-develop and implement strategies to increase the availability of counsel willing to conduct juvenile appeals. Such strategies should ensure that: law guardians are aware of their responsibility to initiate appeals in appropriate cases; and that there is sufficient capacity throughout the state to conduct individual appeals and special litigation responsive to systemwide problems. This might be done

through the development of county or regional panels, statewide staff, or both. Consideration should be given to eliminating the current fiscal disincentives to conducting the out-of-court research involved in appeals, as well as to developing a special team of lawyers willing to provide advice to local attorneys involved in appeals cases.

-identify ways to ensure that children in placement have easier access to counsel, including statutory authorization to permit reimbursement for the continuing representation of a child.

Stimulate More Effective Ways to Provide Representation

Basically, the law guardian program has been static since its inception; one of the options provided for in the legislation, the use of contracting with private attorneys, has never even been tried; by law, no other non-profit legal organization except legal aid societies can even consider providing law guardian services. Such a static system is not likely to generate the models and levels of commitment necessary to provide effective representation to children. Therefore, there must be the capacity to:

-determine, based on specific criteria, whether the existing approach used by a county is appropriate, or whether alternative forms of representation would be more appropriate;

-encourage counties, non-profit legal organizations and qualified private attorneys to submit proposals for providing representation through other than law guardian panels or legal aid offices.

-develop and publicize clear criteria for evaluating alternatives to existing approaches. These criteria should include: the likelihood that the quality of representation will be improved, the cost effectiveness of the proposed approach, the extent to which there is needed support from the judges and the Bar Association, and where appropriate, the stability of an organization proposing to provide representation.

-generate approaches to respond to specific problems in representation, such as testing the merit of specialized subpanels of law guardians for child welfare and child abuse proceedings, and developing special initiatives with law schools in New York State.

-evaluate the potential positive and negative impact of requiring all law guardians to show a certain level of competency or requiring law guardians to participate in a specific retraining as a condition of recertification.

-encourage the continued involvement of Departmental Advisory Committees. (This might be done either by

providing staff to them or by making grants available to them.) Work with local Bar Associations, other local committees, and law schools to encourage more effective representation of children.

Monitor the Law Guardian Program

As is repeatedly documented in the pages of this report one of the most obvious inadequacies in the Law Guardian Program is the absence of effective oversight of the law guardians themselves and of the law guardian system, either programmatically or fiscally. There is at present minimal, if any, monitoring locally or at the state level. The Departmental Advisory Committees, with the clearest mandate to carry out this role, lack staff and resources to do so. Therefore, within the Law Guardian Program there must be:

-periodic evaluations of the general level of law guardian effectiveness. Strategies to improve specific widespread problems should be developed, for example, through special training. Initial efforts should be directed toward the major problems idendified in this report. (Monitoring might be done through periodic on-site reviews of individual counties with the advice and involvement of the Family Court Judges and the local Bar Associations.)

-periodic fiscal audits of the law guardian programs to control for fiscal irregularities on the part of individual law gurdians or law guardian offices.

-procedures governing the removal of law guardians who fail to meet minimal criteria, including referrals of appropriate cases to the district attorney or state attorney general.

Collect Meaningful Data

While OCA has recently made an effort to collect more useful data about the Law Guardian Program (as reflected in the recent revision of the voucher forms) and the representation of children generally (as reflected in its annual reports), it is still very difficult to piece together a complete picture, and thus to use cost and programmatic data for program planning and troubleshooting. Therefore, there must be increased capacity to:

-work cooperatively with OCA and the Appellate Division to develop a new table or tables on the Law Guardian Program to be published annually in the Office of Court Administration Reports;

-publish an annual report of the law guardian program, including data on representation in non-mandatory proceedings, cost of representation, continuity of representation, appellate and training activity, and an overall assessment of the improvements in the Law Guardian Program, as well as priority issues for the coming year.

Increase the Capacity for Leadership of the Law Guardian Program

From an administrative perspective, the fact that there is no core staff or agency with full accountability for the Law Guardian Program, coupled with the current division of selected responsibilities among different agencies, virtually ensures a fragmentation of effort that is counterproductive.

Interdisciplinary staff, able to respond to the legal, social, fiscal, and administrative aspects of the Law Guardian Program, must be designated and given the authority and support to make the necessary programmatic, fiscal and administrative changes in the Law Guardian Program.

Establishing A Law Guardian Office

Given the need to strengthen the Law Guardian Program by ensuring that the eight essential functions described above are carried out, a Law Guardian Office should be created. More specifically:

> -A Law Guardian Office should be established by statute charged to carry out, on behalf of the Law Guardian Program, the necessary fiscal, programmatic, planning, guideline development, training, educational, monitoring and appellate activities, as well as such other functions as may be needed. The Office should not provide any direct trial level representation, but should be viewed as a back-up and supervisory unit for the Law Guardian Program.
>
> To ensure that the Office can make the needed changes it should be accountable to an independent Executive Board composed of seven to ten legal and non-legal members, appointed for fixed terms. This Board should be responsible for setting policy, carrying out the needed changes in the Program, overseeing the appellate activity and hiring the Director of the Office. Because of the substantive nature of the Board's mandate, the majority of the appointments should be made by the Chief Judge of the State, the Governor and the President of the New York State Bar Association. The most appropriate location for the Office should be worked out with the Governor and the Legislature. The Office should receive basic support from state funds, but for special projects, outside funding should be permitted.

In making this proposal, several comments are appropriate. First, the establishment of such an office would provide an immediate and direct way to modify the current bifurcated administrative structure of the Law Guardian Program, which so clearly is detrimental to ensuring a strong legal service program for children. Centralizing overall responsibility for the program would go a long way toward facilitating needed improvements. Thus, the Office could assume responsibility for such tasks as ensuring that all needed standards were drafted, reviewed and approved, organize the training, and develop the appellate and support service components that are now so obviously missing.

This is, however, not to suggest that the Office itself has to carry out all needed functions. Its role is to ensure they are carried out, either by working closely with others, such as the Appellate Divisions, the Departmental Advisory Committees, the Office of Court Administration, the local and State Bar Associations, and the Family Court Judges, or by assuming full responsibility itself.

At the same time, it should be clear that such an Office will be effective only if it is sufficiently independent to provide overall leadership in a program that has, for a long time, functioned on an ad hoc basis. For this reason, the Office should not merely be incorporated into an existing agency, but should be protected by a strong Executive Board representing legal, judicial, service and citizen perspectives from across the State, with full authority for policymaking, supervision and monitoring of the Law Guardian Program. This would include the responsibility to make decisions about the most appropriate type of representation for a county after consultation with the Family Court, Bar Associations and Departmental Advisory Committee. Such an approach would preserve the local character of the Law Guardian Program, but would also provide a format for rational decision-making about changing from one type of representation to another.

The call for a new Law Guardian Office is made in full recognition of the fact that some of the responsibilities that will be assigned to it, such as budgetting, are in fact now being carried out in some form, although not in a way that relates to programmatic outcomes, by the Appellate Divisions or the Office of Court Administration. Other functions, however, such as stimulating appellate activity, are simply not now being carried out at all. Still others, such as training, are sometimes addressed either locally or at regional levels, but in the absence of an overall analysis of what law guardians need on an on-going basis. Under the Law Guardian Office, all of these functions can occur in a more integrated, purposeful manner.

It should also be noted that in making the recommendation for a Law Guardian Office, a number of other alternatives were also considered, such as the creation of an independent commission, providing staff to the Appellate Divisions, and strengthening the role of the Office of Court Administration. Each of these, however, seems limited in a significant way.

Creating a permanent independent commission is politically difficult, and there is always a danger that partisan politics will make it difficult to maintain a focus on the substance of the Law Guardian Program. Providing law guardian staff to the Appellate Divisions involves emphasizing a regional, rather than a state-level strategy. Yet our data strongly suggest that most of the problems in the law guardian program are not geographically determined, but rather, are visible throughout the state. Even more importantly, training needs are statewide, and can best be addressed with a state level approach. (This, of course, should include the involvement of the Appellate Divisions and particularly, the Departmental Advisory Committees, as well as counties to ensure specific local needs can be met). In addition, a focus on strengthening the Appellate Divisions would be responsive primarily to problems in the panel system, not to those in the legal aid societies. Nor would it further developing a mechanism to stimulate counties to review and, as appropriate, move from a panel system to contracting with private attorneys, legal aid, or, as should be permissible, other non-profit legal organizations.

Strengthening the role of the Office of Court Administration, on the other hand, would involve a state-level agency. In addition, to some extent the Office of Court Administration has been involved with both legal aid societies and the panels. However, OCA does not see its responsibility as including monitoring of the Law Guardian Program except as related to the disbursement of funds. This is consistent with its view that its role, as an administrative body for the courts, should not intrude in the day to day provision of legal services to one class of litigants who use the courts.

There is also one additional alternative; trying to coordinate the functions now being carried out on behalf of the Law Guardian Program more effectively. However, such a coordinating strategy works only if all the necessary pieces of a system are in place. In fact, for the Law Guardian Program, some of the most essential components, such as services and training to the law guardians, are not now in place.

These realities, coupled with our data, make it clear that a Law Guardian Office is vitally needed. It is also appropriate in a program that is now, by virtually any standards, administratively underfunded. Moreover, the relatively minimal costs of staffing such an office and providing needed funds for the now missing training, informational, educational, monitoring, and appellate services should result in the better use of monies required to support the entire Law Guardian Program. Those monies, as this study shows, are not now always used in ways that ensure either the State or the children their money's worth. Therefore, legislation creating a Law Guardian Program Office should be immediately enacted. The Office should be charged to carry out the fiscal and programmatic planning, training, informational, monitoring and appellate activities just described, as well as such other functions as may be needed.

Other Actions to Improve the Law Guardian Program

While the findings from this study point strongly to the need for an increased state-level focus on the Law Guardian Program, they also highlight the need for others to take steps as well. In particular, action by the State Bar Association to address the widespread confusion about what a law guardian is actually supposed to do in the varied proceedings in which law guardians represent children, and by the individual counties themselves could also be extremely helpful. To this end:

> The New York State Bar Association should develop guidelines with commentary, about what the law guardian's responsibilities are. Such guidelines should be procedure-specific, and should identify what the law guardian must do, as well as what factors the law guardian should consider in developing a legal strategy and/or dispositional plan. They should be made available to all law guardians and should be periodically updated in the light of any relevant appellate decisions. (For one proposed set of guidelines, see Appendix B.)
>
> Each county should review its own practices and policies critically, take steps to improve areas of weakness, and/or plan for alternatives to the current approach to providing law guardians. Such efforts should involve the local Bar Associations, as well as Family Court Judges and others who work with the law guardians.

THE IMPORTANCE OF IMPROVING THE LAW GUARDIAN PROGRAM

The key recommendations just described, the creation of a Law Guardian Office charged to carry out eight specific functions, coupled with provision of guidelines to law guardians from the New York State Bar Association offer a feasible approach to improving the quality of representation provided to New York's children. Taken together, the recommendations are designed to strengthen the Law Guardian Program by implementing changes in programmatic structure and responsibilities and by maximizing the likelihood that the appropriate professional bodies, particularly the New York State Bar Association and the courts, will become more active in defining the parameters of effective representation to children.

The recommendations grow directly from the study findings. They assume that the problems in the Law Guardian Program can be corrected without massive restructuring of the way law guardian services are provided. Instead, they seek to build on the strengths of both the panel system and the legal aid model, as well as the examples set by law guardians who even under existing constraints can and do represent children effectively. But the recommendations also assume, based on over twenty years experience, that patchwork changes here and there will not be sufficient to effect, in any significant way, the overall quality of representation. Thus, they envision a coherent state level approach to providing leadership and initiating changes. And finally, while the recommendations assume that fiscal reforms are appropriate and necessary, they also acknowledge that providing more funds, in the absence of other actions, will not correct the problems.

The changes called for in the Law Guardian Program will not solve all of the problems facing children who come before the courts or indeed, all of the problems in the Family Court system. Outcomes to children are affected not only by law guardians and the quality of representation they provide, but by the way the family courts function, by the judges, and by the extent to which the child welfare and juvenile justice service networks have the capacity to meet the range of needs manifested by the children requiring their intervention.

These realities, however, in no way limit the urgency of improving the Law Guardian Program itself. No more compelling reason is needed than the fact that as the Law Guardian Program is now implemented, substantial numbers of children are not receiving representation that is consistent with New York State's statutes and case law. This is particularly unacceptable in a state that has traditionally had, and continues to enact, some of the finest substantive laws governing juvenile justice, child welfare and special education. Nor is it insignificant that the absence of effective representation continues to mean that for some children, dispositions may be needlessly restrictive, inappropriate, or lengthy. This is neither good for the children nor for the state coffers. Therefore, it is urgent that the changes recommended in this report be made in a timely and comprehensive manner in order to make the Law Guardian Program more responsive to the children it serves.

APPENDICES

APPENDIX A

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Appendix B

PROPOSED PROCEDURE SPECIFIC GUIDELINES FOR LAW GUARDIANS

Drafted by Merril Sobie Esq.
With the Assistance of Cheryl Bradley Esq.

Juvenile Delinquency
PINS
Abuse and Neglect (Article Ten)
Foster Care Approval (358-a)
Foster Care Review (392)
Termination of Parental Rights

Law Guardian Guidelines: Delinquency Proceedings*

A. Prior to the Initial Appearance

1. The law guardian should interview the child to ascertain the detailed facts concerning the crime charged and the facts surrounding the child's arrest and questioning. (if the law guardian is not assigned until the initial appearance, the law guardian should request a brief adjournment to carry out these functions.)

2. At the initial interview the law guardian should carefully ascertain the child's involvement, if any, in the alleged crime; the child's possible involvement should be examined on a confidential basis without the presence of the parents.

3. The child and his parents should be advised, in terms the child can understand, of the nature of the proceedings, the child's rights, the role and responsibilities of the law guardian, the attorney-client privilege, the fact-finding process and the possible consequences of a finding.

4. The family situation and relevant social history should be explored with the child and his parents, including family relationships, prior court proceedings, school records, mental health history and any handicapping conditions -- if detention is a realistic possibility, evidence to support parole should be gathered, including school or social records and supporting affidavits.

5. The law guardian should ascertain, to the extent possible, the reason the case was not adjusted; if county attorney or court approval is required for adjustment, that possibility should be explored.

B. The Initial Appearance

1. The petition and supporting papers should be examined carefully, if any defects are found, appropriate preliminary motions should be filed, such as a motion to dismiss.

2. If the charge is not serious and the child admits his guilt to the law guardian, the case should be discussed with a county attorney (and perhaps probation) to consider alternatives to a finding, such as a dismissal, substitution of a PINS petition or an adjournment in contemplation of dismissal (the timing of a conference depends, in part, on local customs). If the child denies guilt to the law guardian, alternatives, other than dismissal, should not be considered unless there are special circumstances

*Since these criteria were developed, the Juvenile Delinquency Procedures Code (F.C.A. Article 3) has been enacted. In a few instances the guidelines for Article 3 would be somewhat modified. For example, under Article 3, the law guardian should assure compliance with the time limitations as set forth in the Article as well as the sealing provisions if the case is dismissed.

which render a finding probable and the child agrees fully to the possibility of alternatives such as adjournment in contemplation of dismissal.

3. If detention has been requested, a strong argument for parole should be advanced, including the introduction of any facts ascertained through interviewing of the child or others. Alternatives to detention or, at least, secure detention should be argued. If the child is nevertheless placed in detention, a probable cause hearing should be requested.

4. If helpful to the defense, firm dates for discovery and fact-finding should be established.

C. The Probable Cause Hearing (Detention Cases)

1. The law guardian should attempt to interview major witnesses, such as the complainant or victim who may testify at the probable cause hearing and to obtain copies of any statements such witnesses may have made.

2. The respondent should again be interviewed.

3. Evidence, if any, which militates against continued detention should be gathered, including school records, affidavits, and witnesses who could testify concerning the lack of probable cause or present alternatives to detention.

4. In cases where the factual allegations may be disputed the law guardian should actively participate at the hearing by, for example, cross-examining witnesses, presenting evidence and presenting a summation.

5. If continued detention is ordered, the law guardian should demand an expedited fact-finding hearing date and request the expedited service of appropriate discovery materials.

D. Pre-Fact Finding Hearing

1. If a full fact-finding hearing is a possibility, the law guardian should conduct interviews with the respondent and witnesses, both defense and prosecution. Oral and written statements should be prepared. If helpful, the scene of the crime should be visited and the alleged acts reenacted.

2. Every possible defense, including incompetency or lack of intent, should be considered.

3. If necessary because the case is unusually complicated or for other valid reasons, an investigator or experts, such as mental health specialists, should be retained.

4. For serious cases or other reasons likely to result in a full hearing, the scope of testimony and possible cross-examination should be carefully prepared with the child and major defense witnesses.

5. The full range of appropriate pre-trial motions (e.g. discovery, suppression, inspection, Wade, Huntley) should be carefully considered and, when relevant, filed on a timely basis. Similarly, appropriate pre-trial hearings should be requested.

6. If appropriate, additional conferences with the county attorney should be requested so that an agreed disposition, including an adjournment in contemplation of dismissal or an admission, can be explored.

7. Dispositional alternatives should be carefully explored at this point, including possible community based programs or other dispositions which involve the minimum feasible loss of liberty. A dispositional strategy should be formulated prior to reaching a negotiated agreement or the fact-finding hearing.

8. The strength and weaknesses of the prosecution case should be fully evaluated from the point of view of both fact-finding and disposition. The defense strategy should be developed with full consultation, in terms the child can understand, with the child and his parent. The law guardian's position, goals and strategies should be agreed to by the child.

9. The law guardian should not agree to an admission unless a) pre-trial discovery and evaluation has revealed no legal impediment to a finding, b) the disposition is agreed to or there is an agreed upon range or limitation and, c) the child has been fully advised, in terms he can understand, of the facts, the alternatives, the consequences and the rights he is waiving; an admission should not be entered without the intelligent consent of the child.

E. The Fact-Finding Hearing

1. If appropriate, pre-trial motions which are not heard prior to the fact-finding hearing (e.g., suppression) should be filed.

2. The law guardian should present an opening statement.

3. Prosecution witnesses should be cross-examined (unless cross-examination is waived in accordance with a valid defense strategy), and an attempt made to impeach such witnesses by appropriate questioning, inconsistent prior statements, and other evidentiary methods.

4. Appropriate expert witnesses should be called.

5. Defense witnesses, including the child, should be questioned in accordance with pre-trial preparation; if necessary, character or rebuttal witnesses should be called.

6. The law guardian should almost always present a summation.

7. If appropriate, post-trial motions and briefs should be submitted.

F. Pre-Dispositional Hearing

1. The law guardian should request the court to order reports which may be helpful, including mental health studies or other evaluations.

2. Every realistic dispositional alternative should be explored, including, where relevant, specific placements with residential or non-residential programs: the law guardian should develop a specific dispositional plan to present to the court.

3. If the law guardian's dispositional plan is likely to be disputed, potential witnesses, including parents, school officials or neighbors should be interviewed; evidence should be gathered to support the specific dispositional plan.

4. If appropriate because of the case's complexity or for other valid purpose, the law guardian should visit the child's home or meet with school officials or other relevant persons.

5. The probation report should be read prior to the dispositional hearing.

6. County attorney or probation officials should be consulted regarding possible dispositional alternatives.

7. The desires of the child should be ascertained and the child and his parent should be advised of the potential alternatives. The child should fully consent to the specific disposition which the law guardian intends to present and argue.

G. The Dispositional Hearing

1. The law guardian should support the least possible restrictive dispositional alternative including, when appropriate, preventive services, by, if necessary, presenting relevant evidence, including school records, mental health reports, prior history, affidavits and witnesses such as the parent and child.

2. If appropriate in light of seriousness of factual disputes or other reasons, the maker of relevant reports, including the probation officer, should be examined.

3. Prosecution and probation witnesses, if any, should be cross-examined concerning their recommendations and the basis for such recommendations; if appropriate, they should be questioned concerning the possibility of a less restrictive disposition.

4. The law guardian should present and argue a complete dispositional alternative consistent with the needs and desires of the child, including specific programs or dispositional orders and, if appropriate, alternative possibilities.

H. Post-Disposition

1. The law guardian should explain to the child and his parents, in terms the child can understand, the disposition and its consequences, including the rights and possibilities of post-trial motions or requests for new hearings, the consequences of possible violations of the dispositional order and the continuing jurisdiction of the court.

2. The child and his parent should be advised of the right to appeal, including the right to appeal as a poor person. The possibilities of appeal should be explored fully, including possible grounds. The law guardian should file a notice of appeal and assure that the appeal hearing be perfected unless the child indicates explicitly and intelligently his decision to waive an appeal.

3. The law guardian should examine the dispositional order to ensure that the order conforms to the agreed disposition or finding.

Law Guardian Guidelines: PINS Proceedings

A. Prior to the Initial Appearance

1. The law guardian should interview the child to ascertain the detailed facts concerning the petition and the facts surrounding the child's possible involvement. (If the law guardian is not assigned until the initial appearance, the law guardian should request a brief adjournment to carry out these functions.)

2. The child and his parent (unless the parent is the petitioner) should be advised, in terms the child can understand, of the nature of the proceeding, the child's rights, the role and responsibilities of the law guardian, the attorney-client privilege, the fact-finding process and the possible consequences of a finding.

3. The family situation and relevant social history should be explored with the child and his parents, including family relationships, prior court proceedings, school records, mental health history and any handicapping conditions.

4. If the petitioner is a school authority, the school officials should be consulted and every effort made to adjust or ameliorate the situation or provide appropriate family services without continuing the court action.

5. If the petitioner is a parent or other private individual, the law guardian should consult with the probation officer to ascertain why the case could not be adjusted; every effort should be made to adjust or otherwise provide services to ameliorate the situation without continuing the court action.

B. The Initial Appearance

1. The petition and supporting papers should be examined carefully; if any defects are found, as appropriate, motions should be filed, such as a motion to dismiss.

2. The possible substitution of a neglect petition or a referral to a child protective agency should be considered and, if appropriate, the necessary motion should be filed.

3. If the child admits that he did the complained of acts to the law guardian, the case should be conferenced with appropriate officials, such as county attorney, judge, probation officer and petition, to consider alternatives to a finding, such as an adjournment in contemplation of dismissal. If the child denies to the law guardian that he committed the complained of acts, alternatives, other than dismissal or a provision for appropriate family services, should not be considered unless there are special circumstances which render a finding probable and the child agrees fully to the possible alternative.

4. The law guardian should determine with the child whether the child should remain at home, pending fact-finding, particularly when the parent is the petitioner. If removal from home is a possibility, the law guardian should determine and advocate the best alternative, including possible temporary placement with a relative, friend or foster parent.

C. Pre-Fact Finding Hearing

1. If a full fact-finding hearing is a possibility, the law guardian should conduct extensive interviews with the respondent and witnesses, both defense and petitioner. Oral and written statements should be prepared.

2. If efforts to ameliorate the situation without continuing the court action fail, every practical defense should be developed.

3. The law guardian should determine whether habitual conduct can be proven.

4. If necessary, experts, such as mental health specialists, should be retained.

5. The scope of any possible testimony and possible cross-examination should be carefully prepared with the child and major defense witnesses.

6. The full range of appropriate pre-trial discovery, such as school records, should be carefully considered and, where appropriate, filed on a timely basis.

7. If appropriate, additional discussions with the relevant officers should be requested so that an agreed disposition, such as an adjournment in contemplation of dismissal or an admission, can be explored.

8. Dispositional alternatives should be carefully explored at this point, including possible community based non-residential programs, placement with relatives or friends, or other dispositions which involve the minimum feasible loss of liberty. A dispositional strategy should be formulated prior to reaching a negotiated agreement or the fact-finding hearing.

9. The strength and weaknesses of the petitioner's case should be fully evaluated from the point of view of both fact-finding and disposition. The defense strategy should be developed with full consultation, in terms the child can understand, with the child and his parent (unless the parent is the petitioner). The law guardian's position, goals and strategies should be agreed to by the child.

10. The law guardian should not agree to an admission unless a) pre-trial discovery and evaluation has revealed no legal impediment to a finding, b) the disposition is agreed to or there is an agreed upon option, and c) the child has been fully advised, in terms he can understand, of the facts, the alternatives, the consequences and the rights he is waiving; an admission should not be entered without the intelligent consent of the child.

D. The Fact-Finding Hearing

1. The law guardian should present an opening statement.

2. Prosecution witnesses should be cross-examined (unless cross-examination is waived in accordance with valid defense strategy), and an attempt made to impeach such witnesses by appropriate questioning, inconsistent prior statements, and other evidentiary methods.

3. Appropriate expert witnesses should be called.

4. Defense witnesses, including the child, should be questioned in accordance with pre-trial preparation; if necessary, character or rebuttal witnesses should be called.

5. The law guardian should almost always present a summation.

6. If appropriate, post-trial motions and briefs should be submitted.

E. Pre-Dispositional Hearing

1. The law guardian should request the court to order reports which may be helpful, including mental health studies or other evaluations.

2. The law guardian should determine whether the petitioner can prove that the child needs supervision or treatment; if the need for supervision or treatment may not be proven, a defense concerning this element should be prepared.

3. Every realistic dispositional alternative should be explored, including, where relevant, specific placements with residential or non-residential programs; the law guardian should develop a specific dispositional plan to present to the court.

4. If the law guardian's disposition is likely to be contested, potential witnesses, including parents, school officials or neighbors should be interviewed; evidence should be gathered to support the specific dispositional plan.

5. If appropriate, the law guardian should visit the child's home or meet with school officials or other relevant persons.

6. The probation report should be read prior to the dispositional hearing. The report should be discussed with the child and his parent (unless the parent is the petitioner).

7. County attorney or probation officials should be consulted regarding possible dispositional alternatives.

8. The desires of the child should be ascertained and the child and his parent should be advised of the potential alternatives. The child should fully consent to the specific disposition which the law guardian intends to present and argue.

F. The Dispositional Hearing

1. The law guardian should support the least possible restrictive dispositional alternative, including, when appropriate, preventive services, by presenting relevant evidence, including school records, mental health reports, prior history, affidavits and witnesses such as the parent and child. When appropriate, evidence concerning the possible absence of need for treatment or supervision should be presented.

2. If appropriate in light of the seriousness of factual disputes or other reasons, the maker of relevant reports, including the probation officer, should be examined.

3. Petitioner and probation witnesses, if any, should be cross-examined concerning their recommendations and the basis for such recommendations; if appropriate, they should be questioned concerning the possibility of a less restrictive disposition.

4. The law guardian should present and argue a complete dispositional alternative consistent with the needs and desires of the child, including specific programs or dispositional orders and, if appropriate, alternative possibilities.

G. Post-Disposition

1. The law guardian should explain to the child and his parents (unless the parents are the petitioners), in terms the child can understand, the disposition and its consequences, including the rights and possibilities of post-trial motions or requests for new hearings, the consequences of possible violations of the dispositional order, and the continuing jurisdiction of the court.

2. The child and his parent (unless the parent is the petitioner) should be advised of the right to appeal, including the right to appeal as a poor person. The possibilities of appeal should be explored fully, including possible grounds. The law guardian should file a notice of appeal and assure that the appeal hearing be perfected unless the child indicates explicitly and intelligently his decision to waive an appeal.

3. The law guardian should scrutinize the dispositional order to ensure that the order conforms to the agreed disposition or finding.

Law Guardian Guidelines: Abuse and Neglect (Article Ten Proceedings)[1]

A. Prior to the Fact-Finding Hearing

1. The law guardian should obtain and examine the petition and supporting documents.

2. The law guardian should interview the child[2] to ascertain the detailed facts concerning the alleged abuse or neglect, the child's wishes and the need for temporary services or placement.

3. The child should be advised, in terms the child can understand, of the nature of the proceeding, the child's rights, the role and responsibilities of the law guardian, the attorney-client privilege, the fact-finding process, and the possible consequences of a finding.

4. The parent's attorney should be solicited for approval to interview the parents; if possible, the respondents should be interviewed.

5. The child protective worker should be interviewed (with the cooperation of the agency's counsel), and the case record examined.

6. The law guardian should consider interviewing every relevant person including, when appropriate, school officials, medical or mental health practitioners, social work or day care center personnel, and factual witnesses.

7. Necessary records, such as school reports and case records, should be obtained or subpoenaed.

8. If appropriate because of the insufficiency of existing reports or other valid reason, services such as an independent mental health evaluation, should be requested under section 722-c of the County Law.

9. The law guardian should request any temporary orders which may be in the child's best interests, including supportive and rehabilitative services under the Child Welfare Reform Act, temporary foster care or temporary placement with a relative; if the child is in foster care, the possibility of placement with a relative or friend as well as possible alternative foster

[1]There appears to be some ambiguity regarding the lawyer's role in Article Ten proceedings, primarily resulting from a lack of clarity about whether the child is the object of the proceeding, and or a subject. Some lawyers argue that at the fact-finding stage the lawyer's role is to remain relatively neutral, and only take an active stance at the dispositional stage. The criteria below require the lawyer to be active not only at the dispositional stage, but also at the initial stage regarding any temporary plans, including removal, made for the child. However, in the absence of clear statutory directives or case law, we do not take a position on the appropriateness of the lawyer's neutrality at the fact-finding stage.

[2]Several of the criteria, including this one, are not applicable if the child is an infant.

placement should be considered and appropriate parental visitation should be determined and advocated. The law guardian should request that if possible, sibling groups should be kept together.

10. If the child has been taken into custody prior to a court order, the law guardian should participate actively at the section 1027 hearing and present his evidence and position concerning the need for removal.

B. The Fact-Finding Hearing

1. The law guardian should be familiar with the relevant records, reports and evidence and insure that necessary witnesses testify and relevant material is introduced into evidence.

2. If appropriate, the law guardian should present independent evidence and witnesses.

3. The law guardian should urge that the child not be asked to testify unless his testimony is necessary; if testimony is necessary, the law guardian should request that it be taken in chambers in his presence after the law guardian has advised the child of the purpose of such testimony.

C. Pre-Dispositional Hearing

1. The law guardian should request the court to order reports, if any, which may be helpful, including mental health studies or other evaluations.

2. The child should be interviewed again to determine his wishes, the weight to be accorded to his wishes, the possible dispositional evidence and, if relevant, the status and appropriateness of the foster home.

3. The law guardian should consider visiting the natural home and, if relevant, the foster home; the parents should again be interviewed with the consent of their attorney. Parental visitation should be evaluated and, if possible, observed.

4. Every relevant report and record should be obtained or subpoenaed, including school records, court ordered evaluations and the records of any supportive or rehabilitative program.

5. The law guardian should develop independently a complete dispositional plan to present to the court. If a full dispositional hearing may be needed, potential witnesses and other evidence should be assembled to support the specific dispositional plan.

6. The child should be consulted and apprised, in terms the child can understand, of the specific dispositional plan and possible alternatives proposed by the law guardian or child protective service.

7. Child protective officials and other appropriate persons should be consulted regarding the dispositional plan; if possible, the law guardian and service should reach agreement or consent concerning the disposition.

D. The Dispositional Hearing

1. The law guardian should present and advocate a specific dispositional plan to the court and apprise the court of the child's wishes.

2. The law guardian should insure that every relevant report and witness is presented to the court.

3. When relevant, witnesses should be cross-examined; if appropriate, such as when the law guardian disagrees with the agency's plan, the law guardian should present evidence to support his plan.

4. If the court wishes to speak to the child in chambers, the law guardian should be present; all questions should be posed only by the court and attorneys should submit written questions to the court in writing prior to the interview.

E. Post Disposition

1. The law guardian should explain to the child, in terms the child can understand, the disposition and its consequences, the rights and possibilities and post hearing motions or hearings and the responsibilities of each of the parties, including the agency and the parents.

2. The law guardian should examine the dispositional order to insure that the order conforms with the findings and dispositions; the law guardian should insure that statutorily required findings and notices, such as the possibility of future termination of parental rights if there was an abuse finding, are included in the order.

3. If the law guardian believes that the court's determination is contrary to the child's interests, after considering the wishes of the child, a notice of appeal should be filed and measures undertaken to assure that the appeal is perfected.

Law Guardian Guidelines: Foster Care Approval Proceedings (358-a)*

A. Prior to the Hearing

1. The law guardian should obtain and examine the pleadings and supporting documents submitted to the court in support of the petition; the transfer of custody instrument executed by the parent or transfer of care instrument signed by a non-parent should also be examined.

2. If the records and documents indicate a prior foster care placement, the relevant court records should be reviewed -- any law guardian who had previously represented the child should be consulted.

3. The uniform case record (U.C.R.) should be obtained (by subpoena if necessary) and reviewed in detail to determine issues such as the agency's assessment of the natural family and the specific problems which require foster placement, the services which were offered to prevent placement, the parental response, the estimated time necessary to ameliorate the conditions which resulted in foster placement, the identification and availability of services required by the child and the family, and the visitation plan.

4. The law guardian should determine whether all necessary parties have been served with notice of the proceeding, such as an unwed father who has the right to receive notice and to be heard at the proceeding.

5. The law guardian should determine, if possible, whether the parent or parents executed the transfer instrument voluntarily or whether there was possible coercion (patent or latent); it should also be ascertained whether the parents waived a 358-a hearing and consented to a court review on the papers only, and whether the parents were aware of alternatives to placement, including preventive services.

6. After a review of the relevant documents, the caseworker should be interviewed; if the child is already in foster care, the foster parents or institutional representative should also be interviewed.

7. The law guardian should interview the child to ascertain his desires concerning placement and the weight which should be accorded his wishes, as well as the adequacy of services and care. If the child is very young the interview should be conducted at the foster home or agency; if older, the interview should be conducted in a neutral environment where the child is free to speak. The child should also be questioned concerning possible neglect or abuse.

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*While representation in this proceeding is now discretionary, when law guardians are assigned, the legislative and administrative mandates pursuant to the Child Welfare Reform Act suggest that the lawyer's essential obligation in a Social Services Law section 358-a proceeding is to hold suspect any plan that fails to comply with the priorities identified in the legislation and to propose alternatives. The guidelines are based on this interpretation.

8. The nature of the proceeding should be explained to the child as well as his rights; the role and responsibility of the agency, the court, the parents and the law guardian; the attorney-client privilege; and the possible dispositional alternatives available to the court.

9. The parents' attorney, if any, should be solicited for approval to interview the natural parents; if necessary, the parents should be interviewed -- if they oppose continued placement, their plan concerning the child should be explored by the law guardian.

10. If needed, services, such as a mental health evaluation should be requested under section 722-c of the County Law.

11. If the foster child has siblings already in care, the sibling's caseworker should be interviewed regarding the family situation, and the case plan for the siblings and parents.

12. The law guardian should formulate an opinion as to whether placement at this time is an appropriate plan for the child, giving due consideration to the child's wishes. If placement is deemed appropriate, the law guardian should formulate an opinion as to whether the specific proposed placement is appropriate, the appropriateness of the proposed duration, and the appropriateness of the visitation plan.

B. The Hearing

1. If needed, the law guardian should submit motions, such as a motion to produce records or a motion for a mental health evaluation of the child or any other party.

2. If there was a parental waiver of the hearing, the law guardian should question the agency worker under oath concerning the facts surrounding waiver and efforts to encourage the parents to attend the hearing.

3. If parental presence is deemed necessary, the law guardian should request an adjournment and the issuance of appropriate process.

4. The law guardian should consider whether an Article Ten proceeding (neglect or abuse) would be more appropriate; if so, the court should be urged to direct that such a proceeding be commenced.

5. The law guardian should advocate a complete appropriate plan. If any aspect of the agency plan appears to be inappropriate, including the decision to place, the proposed duration and level of placement, visitation, services to the child and the family, or the specific placement (the suitability of the foster home, distance from the natural home, school, etc.), the law guardian should present evidence and advocate appropriate alternatives.

6. The law guardian should present independent evidence to support the child's position and, when necessary, call relevant witnesses such as school officials or the foster parents.

7. The law guardian should advise the court of the child's wishes and desires.

C. Post Hearing

1. The law guardian should explain to the child, in terms he can understand, the disposition and its consequences, including the rights and possibilities of post hearing motions or requests for new hearings and the responsibilities of each of the parties including the agency and foster parents.

2. If the law guardian believes that the court's determination is contrary to the child's interests and grounds exist upon which to base an appeal, after considering the wishes of the child, a notice of appeal should be filed and measures undertaken to assure that appeal is perfected.

3. The law guardian should examine the dispositional order to insure that the order conforms with the agreed upon disposition and findings.

Law Guardian Guidelines: Foster Care Review Proceedings (392)*

A. Prior to the Hearing

1. The law guardian should obtain and examine the pleadings and supportive documents to the court in support of the petition seeking a continuation of foster care; the law guardian should also determine whether service of process was made on all necessary parties, such as the natural parents and the foster parents.

2. Prior court records concerning the child's placement should be reviewed, including child protective actions, section 358-a and any prior section 392 hearings -- any law guardian who had previously represented the child should be consulted.

3. The uniform case record (U.C.R.) should be obtained (by subpoena if necessary) and reviewed in detail focusing on permanency plans, family services, goals and amendments to the initial U.C.R.; progress notes, the comprehensive service plan and the goal and objective review sections of the U.C.R. should be examined carefully. The extent of compliance with plans and the time frames for meeting the plans should be carefully scrutinized and any discrepancies noted. The law guardian should also examine the initial placement instrument.

4. After a review of the relevant documents, the caseworker should be interviewed, particularly concerning placement and permanency decisions involving the child; the foster parents or institutional representative should also be interviewed.

5. The law guardian should interview the child to ascertain his desires concerning placement and the weight which should be accorded his wishes, as well as the adequacy of provided services and care. If the child is very young the interview should be conducted at the foster home; if older, the interview should be conducted in neutral environment where the child is free to speak. If warranted, the child should also be questioned concerning possible neglect or abuse.

6. The child should be advised, in terms he can understand, of the nature of the proceeding, the child's rights, the role and responsibility of the agency, the court, the foster parents and the law guardian, the attorney-client privilege and the possible dispositional alternatives available to the court.

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*While representation in this proceeding is now discretionary, when law guardians are assigned, the legislative and administrative mandates pursuant to the Child Welfare Reform Act suggest that the law guardian's essential obligation is to look with a critical eye at any petition filed by the agency seeking to continue the child's foster care placement beyond eighteen months on the grounds that the parents' service needs still persist or that sufficient progress has not been made by the parents toward rehabilitation so that the family can be reunited. The guidelines are based on this interpretation.

7. The parents' attorney should be solicited for approval to interview the natural parents; if possible, the parents should be interviewed -- if they oppose continued placement, their plan concerning the child should be explored by the law guardian.

8. If needed, independent services such as a mental health evaluation should be requested under section 722-c of the County Law.

9. The law guardian should formulate an opinion as to the appropriateness of the dispositional plan proposed by the agency, including any recommendation for continued foster care. If the law guardian disagrees with the agency's plan, a comprehensive alternative plan should be prepared for submission to the court.

B. The Hearing

1. If needed, the law guardian should submit appropriate motions, such as a motion to produce records or a motion for a mental health evaluation of the child or any other party.

2. The law guardian should consider the cross-examination of witnesses called by the parties -- detailed examination is particularly important when the law guardian disagrees with the agency's plan.

3. If necessary, the law guardian should present independent evidence to support the child's position and call appropriate witnesses such as school officials or the foster parents.

4. The law guardian should advise the court of the child's wishes and desires.

5. A complete dispositional plan and recommendations should be submitted to the court, including provisions for any services which may be needed; the dispositional plan should be supported through the introduction of relevant evidence.

6. If appropriate, the law guardian should request periodic reports from the agency or the scheduling of a subsequent review proceeding earlier than the 24 month statutory period.

C. Post Hearing

1. The law guardian should explain to the child, in terms he can understand, the disposition and its consequences, including the rights and possibilities of post hearing motions or requests for new hearings and the responsibilities of each of the parties including the agency and foster parents.

2. If a proceeding to terminate parental rights has been ordered, the law guardian should closely monitor the agency to insure that a timely termination petition is filed.

3. The law guardian should scrutinize the dispositional order to insure that the order conforms with the agreed upon disposition and findings.

4. If the law guardian believes that the court's determination is contrary to the child's interests, after considering the child's wishes, a notice of appeal should be filed and measures undertaken to assure that the appeal is perfected.

Law Guardian Guidelines: Termination of Parental Rights Proceedings

A. Prior to the Hearing

1. The law guardian should obtain and examine the pleadings and supporting documents; in addition, s/he should determine whether all necessary parties were properly served, (including a statutorialy entitled unwed father).

2. Prior court records concerning the child's placement history should be reviewed (child protective proceedings, extension of placement, Section 358-a and Section 392 hearings) and law guardians who had previously represented the child consulted.

3. The uniform case record (U.C.R.) should be obtained (by subpoena, if necessary) and reviewed in detail to determine the natural family - agency involvement during the period of the child's placement in care, the agency's assessment of the natural family's needs, the services that were made available to the family, the utilization, if any, of these services and parental visitation evaluations (as established by the visitation plan and reviewed by progress notes).

4. The law guardian should interview the child to ascertain the detailed facts concerning the placement, the foster parents, the birth parents and the child's wishes (concerning placement and adoption), as well as the weight which should be accorded his wishes. If the child is very young, the interview should be conducted at the foster home; if older, the interview should be conducted in a neutral environment where the child is free to speak.

5. The child should be advised, in terms the child can understand, of the nature of the proceeding, the child's rights, the parents' rights, the role and responsibility of the agency, the court, the foster parents and the law guardian, the attorney-client privilege and the possible dispositional alternatives available to the court.

6. The parents' attorney should be solicited for approval to interview the natural parents; if possible, the respondents should be interviewed and, if they oppose termination, their plan concerning the child's future should be evaluated.

7. If appropriate, the law guardian should visit the natural parents' home.

8. If appropriate, services such as a mental health evaluation, should be requested under section 722-c of the County Law (which permits reimbursement for expert services).

9. After a review of the relevant documents and interviews, the caseworker should be interviewed, particularly concerning permanency decisions involving the child (for example, a possible adoption by foster parents); the foster parents or the institutional representatives should also be interviewed.

10. The law guardian should formulate an opinion as to the dispositional plan to be presented by the petitioning agency, including the appropriateness

of adoption at this time, the possibility of continued foster care, or the return of the child home immediately or in the near future. If the law guardian disagrees with the agency's plan, a comprehensive alternative plan should be prepared for presentation at the conclusion of the fact-finding hearing; potential witnesses and other evidence should be assembled to support a specific law guardian dispositional plan.

B. The Fact Finding Hearing

1. The law guardian should be familiar with the relevant records, reports and evidence and insure that necessary witnesses testify and relevant material is introduced into evidence.

2. If appropriate, the law guardian should present independent evidence and witnesses.

3. The law guardian should urge that the child not be asked to testify unless his testimony is absolutely necessary; if testimony is necessary, it should be taken in chambers in the presence of the law guardian and after the law guardian has prepared the child and has advised the child of the purpose of such testimony.

C. Post Fact Finding Hearing

1. At the conclusion of a termination proceeding based on abandonment or mental disability, the law guardian should request that the court convene a dispositional hearing unless s/he concurs with the agency's plan to have parental rights terminated and the child adopted (since a dispositional hearing is required in a permanent neglect or severe or repeated abuse proceeding, such a request is not necessary).

2. If appropriate for a dispositional hearing, services, such as a mental health evaluation, should be requested under Section 722-c of the County Law.

3. The law guardian should request the court to order reports which may be helpful and submit appropriate motions to produce relevant reports, such as relevant records pertaining to the parents or the child.

D. The Dispositional Hearing

1. The law guardian should present and advocate a specific dispositional plan to the court and apprise the court of the child's wishes; recommendations for specific services necessary for the child or the family should be submitted.

2. The law guardian should insure that every relevant report and witness is presented to the court.

3. Witnesses should be cross-examined to elicit relevant information to support the law guardian's plan; the law guardian should also present evidence to support the plan, particularly when it conflicts with a party's recommendations (the agency or the parents').

4. If the court wishes to speak to the child in chambers, the law guardian should be present; all questions should be posed only by the court and attorneys should submit written questions to the court prior to the interview.

E. Post Hearing

1. The law guardian should explain to the child, in terms the child can understand, the disposition and its consequences, the rights and possibilities and post disposition motions or hearings and the responsibilities of each of the parties, including the agency, the parents and the foster parents.

2. The law guardian should examine the dispositional order to insure that the order conforms with the findings and dispositions.

3. If the law guardian believes that the court's determination is contrary to the child's best interests, a notice of appeal should be filed.

APPENDIX C

THE LAW GUARDIAN STUDY METHODOLOGY

THE LAW GUARDIAN STUDY METHODOLOGY

The Law Guardian Study involved several discrete data gathering efforts; a mail survey of panel law guardians; an on-site county study, which involved interviews, courtroom observations and reviews of court files; and an analysis of transcripts from selected court proceedings. The approach used to gather and analyze information from these different components is described below.

THE SURVEY OF PANEL LAW GUARDIANS*

The survey form (see Appendix D) was developed and refined over a period of several months, based on comments from the Technical Advisory Committee, as well as a number of others, in order to ensure that the questions were precise and substantively appropriate. The questionnaire required the law guardians to make forced choices, provide statistical information and, if they wished, provide a narrative commentary.

Once the questionnaire was completed, a list of all known panel law guardians was compiled, using county-by-county lists from each Appellate Division. (There is no central listing.) Where these lists included addresses, we simply used the lists. In some instances, it was also necessary to individually identify addresses with the help of Appellate Division Staff. Once the mailing lists were complete, the initial mailing was sent out in September, 1981. Two follow-up letters and a second questionnaire were sent to those who did not respond.

785 questionnaires were coded, keypunched and entered onto the IBM 3032 computer macro computer at the University of Rochester, The descriptive and inferential statistical analyses were all conducted with the Statistical Analysis System (SAS) software, which is a highly refined and commonly used statistical package for the social sciences. Descriptive statistics are procedures for organizaing, summarizing, and describing quantitative information. The descriptive statistics obtained in this research included frequency distributions, means and standard deviations. Frequency distributions show the distribution of a variable's values. Means are the average weighted response; that is, the response value most typical of the particular group under study. Standard deviations represent the average amount of variability around the mean score. The descriptive information was obtained for each question for the whole sample, and by subgroups which included population area, experience of the law guardian, region (upstate--downstate), and judicial department.

Inferential statistics are procedures by which inferences are made to a larger group based on data from a smaller group or a sample. This study has a sample of 785 which is assumed representative of the larger population of law guardians in New York State. Associated with all inferential statistics are significance levels. The significance level represents the likelihood that the obtained result could have been produced by some peculiarity in the

*The statistical analyses of the survey information were prepared by Paul Tero of the University of Rochester.

particular sample or by chance. That is, probability level is the likelihood that the obtained results would not be found in the general population from which the sample was drawn. .05 is the generally accepted level of significance; it would be reported as p <.05, "p" standing for probability.

When testing the differences between groups for significance, t-tests were completed. t-tests indicate the degree of difference between two groups on some criterion variable or question. When testing for the differences of more than two groups, an analysis of variance tests for the differences among groups on a criterion variable, rather than between groups as does the t-test. Both t-tests and analysis of variance produce significance values.

While t-tests and analysis of variance test for mean differences, Pearson Product-moment correlations and regression analysis test for relationships and prediction, respectively, between or among variables. These relationships and predictions are also tested for significance.

For the t-test and analyses of variance, a test for equal variances of subgroups were computed. Where they were considered unbalanced for a t-test, an adjusted t was used; where they were considered unbalanced for an analysis of variance, a General Linear Model (GLM) procedure was used which adjusts the sums of squares for unbalanced data. These adjustments allow for valid inference.

In addition to this statistical analysis all the narrative comments for each question were typed as a set, and then reviewed for patterns related either to the comments as a whole or specific to individual counties.

THE ON-SITE COUNTY STUDY

Sample Selection

The original goal was to study 15 counties; however, it was only possible to complete the field work in 14 counties.[1]

In choosing the sample counties, five criteria were established. The counties had to:

A) Reflect a range in terms of actual youth population;[2]

[1]At the point it became clear we could not use the fifteenth county (because of the refusal of the Family Court Judges to cooperate) the decision was made not to substitute a different county since the field data had already yielded sufficiently systematic and clear patterns.

[2]For the purposes of this study, we consider youth to be between 0-17. 17 was selected as the cut off point because with the exception of juvenile delinquency proceedings and PINS proceedings for males, jurisdiction for all other family court proceedings under study is through 17. More specifically,

B) Include counties from each judicial department
C) Include counties with substantial numbers of minority youth;
D) Reflect different levels of potential youth involvement with the family court; and
E) Include both counties with legal aid societies and law guardian panel programs.

The rationale for focusing on each of these criteria is straightforward. The actual youth population is important because there may be some relationship between it and the most appropriate mechanism for delivering representation. The judicial department in which the county was located is important because each judicial department functions with its own set of rules, and advisory committees for juvenile and family court matters. The racial and ethnic composition of the youth population in each county is important because minority youth may constitute a disproportionately large share of youth who come before the courts.

Some measure of the potential youth involvement with family court in a county is important for two reasons. First, the volume of potential involvement has implications for the supply of needed law guardians. Second, courts with relatively high numbers and rates of children involved in situations that may lead to family court proceedings pose special challenges for law guardians, as for example, in counties with very high child abuse rates.

The rationale for including both legal aid societies and appointed counsel was of course built into the very purpose of the study and needs no explanation.

In order to select a sample meeting the key criteria, a four-stage process was used. First, all New York State counties were clustered by youth population into four groups (100,000 and over; 50-80,000; 20-50,000 and under 20,000).[3] Second, for each county an index was developed to provide some measure of the extent to which youth in that county are involved in circumstances that have (or could potentially) involve them in family court proceedings. There is, of course, no one piece of data that captures the potential of youth to be involved with family court. However, as a gross measure, it seemed reasonable to use such indices as rates and numbers of indicated child abuse cases, rates and numbers of juvenile delinquency and

2 Cont. juvenile delinquents are defined as over 7 and less than sixteen. PINS, for males, are defined as less than 16, for females less than 18. F.C.A. §712. Abused or neglected children are defined as less than 18. F.C.A. §1012. In determining population figures for each county, 1980 census data were used.

[3]Source: N.Y. State Department of Commerce, 1980 Census of Population, Characteristics of People and Housing, prepared by the N.Y. State Data Center.

PINS petitions, numbers and rates of foster care placement, and rate of admission to DFY facilities. Therefore, using available DFY and DSS data[4] these statistics were recorded for each county and from them, a score of "potential youth family court involvement" derived ("PYFCI").

Third, within each population cluster, counties were ranked by "PYFCI" score, and both high and low scoring counties noted. (See Table 1.) Fourth, the sample was actually chosen. All counties in each population cluster with legal aid societies were automatically included. Then, from the remaining list, counties with relatively high and low scores distributed across judicial departments and with minority populations were selected.

Field Methodology

The research effort to assess the adequacy of representation to juveniles and the efficacy of current systems for providing representation involved gathering systematic county information in three ways, through interviews with those who play key roles in the provision of representation to juveniles in the study counties; and through courtroom observations of procedures under study. In addition, we analyzed a set of transcripts from three study counties. The data-gathering and analysis procedures for each of these is described below.

Interviews

Separate interview schedules were prepared for family court judges, clerks, presidents of local bar associations (and/or chairpersons of family court or juvenile law bar association committees), law guardians, other attorneys (e.g. DSS lawyers or district attorneys), DSS and probation workers and organized client or client advocate groups in a position to observe law guardians interacting with juveniles, such as foster parent associations and child protection committees.

The most detailed interview schedules were developed for judges, for directors of the four legal aid offices, for law guardians and for the bar association personnel involved in the maintenance of the law guardian panels. Each is described briefly below. (For a sample form, see Appendix D.)

The interview schedule for judges addressed the following issues: the adequacy of the supply of law guardians (including contingency plans if the

[4]The basic data for deriving this index were taken from the following sources:

State of New York: Third Annual Report of the Chief Administrator of the Courts for Calendar Year Jan. 1, 1980 - Dec. 31, 1980. (N.Y. Office of Court Administration, 1981.)

N.Y. State Department of Social Services, "Statewide and Individual County Analysis of Indication of Service Needs in New York State" (New York Department of Social Services, Office of Program Planning, Analysis and Development, April 1981, Mimeo)

N.Y. State Division for Youth: Annual Statistical Report Services, (N.Y. DFY, Bureau of Program Analysis and Information Services, Dec. 1981.)

Table 1

New York State Counties (excluding New York City) by Judicial Department, Population, "PYIFC" Score and Type of Representation

County[1]	Judicial Department	Youth Population	"PYIFC" Score	Percentage Minority
Suffolk*	2	405,000	3.10	10
Nassau	2	339,000	3.09	13
Erie*	4	270,000	5.25	16
Westchester	2	217,000	3.82	21
Monroe*	4	191,000	5.18	19
Onondaga	4	128,000	6.18	12
Rockland	2	80,000	2.46	12
Orange*	2	79,000	4.01	11
Oneida	4	70,000	3.00	6
Albany	3	69,000	6.45	12
Dutchess	2	68,000	6.26	11
Niagara	4	63,000	3.33	9
Broome	3	55,000	5.50	4
Saratoga	3	47,000	3.10	2
Ulster	3	42,000	3.46	7
Rensselaer	3	41,000	2.78	5
Chautauqua	4	40,000	5.31	4
Schenectady	3	38,000	4.69	7
Oswego	4	35,000	3.24	2
St. Lawrence	3	33,000	3.33	1
Steuben	4	29,000	5.17	2
Chemung	3	27,000	8.35	6
Jefferson	4	27,000	5.13	1
Wayne	4	26,000	4.64	6
Ontario	4	25,000	4.60	3
Cattaraugus	4	25,000	4.49	4
Putnam	2	24,000	1.43	2
Cayuga	4	23,000	3.48	3
Clinton	3	22,000	6.47	3
Herkimer	4	19,000	2.67	2
Madison	3	19,000	3.23	2
Tompkins	3	18,000	4.10	7
Genesee	4	17,000	6.46	4
Livingston	4	16,000	4.43	2
Tioga	3	16,000	5.55	2
Columbia	3	16,000	3.37	6
Sullivan	3	16,000	6.98	12
Warren	3	16,000	5.27	2
Washington	3	16,000	3.79	1
Chenango	3	15,000	3.70	1
Fulton	3	15,000	5.79	2
Allegheny	4	14,000	1.98	1
Otsego	3	14,000	5.25	1
Franklin	3	13,000	7.75	6
Cortland	3	13,000	3.45	2
Montgomery	3	13,000	3.90	3
Wyoming	4	12,000	3.61	1
Delaware	3	12,000	3.18	2
Orleans	4	11,000	4.64	8
Essex	3	10,000	4.13	1
Greene	3	10,000	3.23	4
Seneca	4	9,000	5.60	2
Lewis	4	8,000	3.33	1
Schoharie	3	8,000	5.42	2
Yates	4	6,000	1.96	2
Schuyler	3	5,000	3.32	2
Hamilton	3	1,000	2.18	0

*County has a Legal Aid office; in all others, youth are represented by assigned counsel.

supply is/were to become inadequate; past and current consideration of other approaches, such as contracting, retainer fees, or establishing legal aid societies); recruitment procedures, training for law guardians; assignment, removal, and recertification policies and practices (including use of means tests, time of assignment, position regarding continuity of representation); judicial perceptions of the effectiveness of the law guardians; the availability of support services to law guardians within the county; problems or concerns regarding appeals and reimbursement policies; and general recommendations regarding ways to strengthen the law guardian system and the quality of representation to juveniles. A parallel form was also developed for judges in counties with legal aid societies. In study counties with more than one judge, the administrative judge was interviewed and every effort was made to interview all other family court judges.

The interview schedule for directors of legal aid offices sought information on the history of each legal aid office; the volume of work; the specific procedures for which law guardians are used; the nature of staff in the legal aid office; the availability of support services for the law guardians; training available to law guardians; perceptions of the role of law guardians in various proceedings; local policies regarding use of assigned panel attorneys to represent children; and recommendations for improvement. The questions were, to the extent possible, similar to those asked of the judges.

The general interview schedule for law guardians basically paralleled the information sought in the mail survey, but provided the opportunity to explore in greater depth the lawyer's satisfactions and disatisfactions; his or her views on representing juveniles in different procedures; perceived need for more support services and knowledge of the statutes and community resources. In addition, case specific questions were developed for each proceeding. (See Appendix D.) These questions focused on non-legal courtroom activity relevant to a particular recently closed case selected by the Project Staff.

The interview schedule for bar association personnel covered such issues as: the level of involvement of the bar association with the law guardian system in particular and juvenile law issues in general; the strengths and problems with the current system (administratively, fiscally, and in terms of the adequacy of the supply of lawyers); the anticipated consequences of expanding mandated representation of juveniles; and suggestions for improvements. For the other categories of people interviewed, interviewers asked a few basic questions then followed up on information that was county specific.

Court Case File Analysis

In order to obtain quantifiable data to supplement information obtained from interviews with law guardians and court personnel, case files were reviewed in each county. Project staff attempted to review at least nine JD files, six PINS, six Article 10, three 392, three 358-a, and three TPR files that had been closed within the previous year. The proportion of each type of case was determined by a review of statewide percentages for each proceeding.

In higher volume counties, more files were reviewed, and in lower population counties, sometimes fewer were reviewed. Information was collected on: pre-assignment policies; law guardian substitution; number of appearances and adjournments; length of time spent on cases; frequency of admissions; use of plea bargaining; and the frequency of formal written motions.

The Courtroom Observations

In order to code the courtroom observations, a special observations scale was constructed that combined a numerical coding scheme with the opportunity for the observers to make narrative comments. (See Appendix D.) Observations were made by three staff members who were trained together.

After the observatons were completed, a coding scheme was developed that focused on four aspects of representation. In addition directions were developed for the overall code given to each observation. See Figure 2. After a period of training and refining the coding scheme, raters independently coded the observations. The reliability coefficient was .82.

Transcript Analysis

In each of the three counties in which transcripts were requested, the project staff selected, by pulling from recent cases in which a final order had been entered, every third file until there were nine JD proceedings, six PINS proceedings, six Article 10 proceedings and three each of foster care reviews and approval proceedings. The total number of cases to be transcribed was limited by resources; the proportion of each type of case was determined by a review of statewide percentages for each proceeding.

A decision was made, however, to exclude cases involving full fact-finding hearings. Transcripts for these cases are very lengthy, and therefore, very expensive. Moreover, only a very small percentage of cases actually go to trial, so they do not reflect the typical encounter between a child and a law guardian. The cases were transcribed by the official court stenographers in each of three counties at project expense. When all the material was available the cases were first summarized then coded, using a modification of the courtroom observation scale. All the transcript analysis was conducted by Merril Sobie, Esq.

Overall Analysis

After the field visits were completed, all available material was reviewed and synthesized in a county profile report. (For two sample profiles, with specific demographic data deleted, see Appendix E.) All county profiles prepared for the study are on file with the New York State Bar Association.

Figure 2

COURTROOM OBSERVATION CODING FORM
FOR SPECIFIC DIMENSIONS

Relationship Between Law Guardian and Client Pre-Court:

1 Child not interviewed before court.
2 Child probably interviewed in a perfunctory manner before court proceeding - or child interviewed but not recently in relation to current proceeding.
3 Child interviewed.
4 Child carefully interviewed, law guardian makes home or office visit.
5 No information.
6 Law guardian appointed at proceeding/substitute law guardian.
7 Infant.

Relationship Between Law Guardian and Client as Reflected in Court:

1 No evidence of familiarity; child sits with probation officer or social worker, makes no contact with law guardian.
2 Some familiarity.
3 Familiarity. (Child seems comfortable with law guardian.)
4 Especially responsive; law guardian explains proceeding to child, gives verbal and other support.
5 Not enough information.
6 Child(ren) not present.
7 Substitute law guardian.

Preparation

1 Evidence of minimal or no preparation, lack of knowledge about facts of case, circumstances of child, services and/or law.
2 Uneven preparation, knowledgeable about some but not central aspects of the case.
3 Adequate preparation, general knowledge of circumstances; read reports, talked with caseworker, met with others to work out plans.
4 Detailed knowledge of the facts; services.
5 Not enough information to determine.
6 Requests adjournment to prepare; denial entered.
7 Substitute law guardian; no chance (appointed at proceeding).
8 Substitute or regular law guardian requests adjournment to prepare.

Role at Hearing: Activity Level - Use of Legal Strategy

1 Law guardian silent, has no role, no position or simply defers to other attorneys and case workers; appears active but without any purpose or plan.
2 Reacts to what others say, generally not very vigorous; expresses views of parties other than client, e.g., mother.
3 Seems prepared, makes some comments, takes a position;
4 Active and in an informed way argues for child's best interests or rights.
5 Not enough information.
6 All discussion and decisions made in chambers or at bench.

Not Codable:

1 Not enough information.
2 Hearing adjourned; brief proceeding; arraignment/enter denial, etc.
3 Poor Coding.

APPENDIX D

SAMPLES OF DATA COLLECTION FORMS

1. Panel Law Guardian Survey
2. Sample Courtroom Observation Cover Sheet and Rating Form
3. Sample Sheet for Coding Information from Case Files
4. Interview Schedule for Law Guardians
5. Interview Schedule for Judges in Legal Aid and Panel Counties

LAW GUARDIAN SURVEY

Section I. Experience as a Law Guardian

1. Are you currently a law guardian: Yes ____ No ____
   a. If yes, how long have you served as a law guardian:
      Under 1 year ____ 1-3 years ____ 3-5 years ____ over 5 years ____
   b. What counties do you practice in _____ _____

2. How many years have you been practicing law:
   2 years or less ____ 2-5 years ____ 5-10 years ____ 10-20 years ____
   20 years or more ____

3. What juvenile law experience did you have prior to becoming a law guardian:
   None ____ Family/or Juvenile Law Courses ____
   Representation of juveniles through clinical law school program ____
   Other experience prior to becoming a law guardian (Please specify):

4. a. Please indicate the number of cases in each category for which you represented a child as an assigned law guardian for the six month period from Jan. 1982-June 1982:
   PINS ____ Child Abuse/Neglect ____ Foster Care Review ____
   JD ____ Extension of Placement (1055) ____ Foster Care Approval ____
   JO ____ Termination of Parental Rights ____ Appeals ____
   Custody ____
   b. For each of the last two years, indicate the total number of cases in which you represented children as an assigned law guardian:
   1980 ____ 1981 ____ Not Applicable ____
   c. In the future would you like to be assigned as law guardian:
   In more cases ____ In fewer cases ____ In about the same number of cases ____
   d. How long do you expect to continue to serve as a law guardian?

5. a. What was your total court caseload during the last year?
   (Include any kind of court case for which you provided legal representation.) ____
   b. Approximately how many cases of your total court caseload during the last year involved representation as:
   A law guardian _____ An 18-B lawyer representing criminal defendents _____
   An assigned lawyer representing adults in Family Court _____
   Private practice representing juveniles in Family Court _____
   Private practice representing adults in Family Court _____
   Other proceedings _____

6. a. What is the nature of your current law practice:
   Solo practice ____ Small firm (2-5 attorneys) ____
   Large firm (over 6 attorneys) ____ Legal Aid ____
   Other (please specify):
   b. What type of law do you specialize in (check whatever applies):
   General ____ Real Estate ____ Commercial ____ Tort ____ Matrimonial ____
   Juvenile ____ Criminal ____ Other (please specify): _____

7. a. Why did you decide to become a law guardian:
   Interest in substantive area ____ Professional obligation ____
   Pressure from bar association/judge ____ Developing law practice ____
   Policy of firm to do pro-bono work ____ Other (please specify): _____
   b. Prior to the assignment of your first case as a law guardian which, if any of the following occurred:
   Nothing further than being placed on list ____ Attended orientation ____
   Served as co-counsel ____ Interviewed by experienced law guardian or bar association committee ____ Other (please specify): _____

8. a. Within the past two years, what, if any, continuing education have you participated in relevant to your law guardian practice:
   None ____ Seminar sponsored by local bar association ____
   Other (please specify):
   b. Which topics were covered (please check):
   Juvenile Offender Law ____ Child Welfare Reform Act ____ Child Abuse & Neglect ____ Tactics & Skills ____ Termination of Parental Rights ____
   Other (please specify):
   c. How useful was it:
   Not at all ____ Minimally ____ Moderately ____ Very ____
   d. What additional training/continuing education would you find useful? (please comment.)

e. Would you participate in training, continuing education, if it were offered:

Evenings (with reimbursement) Yes ____ No ____
Evenings (without reimbursement) Yes ____ No ____
Days (with reimbursement) Yes ____ No ____
Days (without reimbursement) Yes ____ No ____

9. a. As a law guardian, what, if any problems have you experienced with the voucher system:

Not applicable (Legal Aid Law Guardian) ____
Lack of clarity about what is reimbursable ____ Slowness of processing ____
Levels of reimbursement ____ Other ____ Please elaborate on areas checked:

b. Do you ever not submit a voucher for work done pursuant to your law guardian activities:

Yes ____ No ____

c. How frequently do you not submit a voucher: Routinely ____ Occasionally ____

d. What is your reason for not submitting vouchers:

10. a. In your role as law guardian have you ever used the provision of County Law §722-C in order to obtain investigative, expert or other services:

Yes ____ No ____

b. If yes, in approximately how many cases during the last year: _____

c. If no, why not?

11. a. Have you ever filed a notice of appeal for a child: Yes _____ No _____

b. Have you ever represented a child in an appeals case: Yes _____ No _____

c. If yes, did you have any particular problems (e.g. conducting research, getting reimbursed)? Please describe.

12. What in your view could be done to improve the law guardian system in your county? (Please be as specific as possible. Feel free to attach additional paper.)

13. What, if any changes in the law guardian system on a state-wide basis do you see as needed? (Feel free to attach additional paper.)

14. To what extent would it be helpful to you in your practice as a law guardian to have access to:

	very	moderately	minimally	not at all
A brief bank	____	____	____	____
Legal Research Services (Lexis/West)	____	____	____	____
Paralegal investigative help	____	____	____	____
Social workers or other mental health professionals	____	____	____	____
Advice from experienced law guardians	____	____	____	____

Section II. Below are some questions to help us understand how, in general, law guardians view their roles in different proceedings. (Check whichever best reflects your general reaction.)

15. a. The law guardian's role in a juvenile delinquency proceeding is similar to that of criminal defense at:

	Disagree		Agree Moderately		Agree Strongly
Fact-finding:	1	2	3	4	5
Disposition:	1	2	3	4	5

b. The law guardian's role in a PINS proceeding is similar to that of defense counsel at:

	Disagree		Agree Moderately		Agree Strongly
Fact-finding:	1	2	3	4	5
Disposition:	1	2	3	4	5

c. The law guardian at a fact-finding hearing of an Article X proceeding, should under most circumstances, remain neutral.

Disagree		Agree Moderately		Agree Strongly
1	2	3	4	5

d. The law guardian at a dispositional hearing of an Article X should, under most circumstances, represent the child's best interest.

Disagree		Agree Moderately		Agree Strongly
1	2	3	4	5

16. a. What are you likely to do if your assessment of the most appropriate disposition f a child differs from what the child wishes in a juvenile delinquency proceeding?

Represent the child's wishes _____ Argue for the best plan ____

Inform the court/judge of both the child's wishes and his or her best interest _____ Request that a new law guardian be assigned ____

Other (please specify):

b. What are you likely to do if your assessment of the most appropriate disposition for a child differs from what the child wishes in a PINS proceeding?

Represent the child's wishes _____ Argue for the best plan _____

Inform the court/judge of both the child's wishes and his or her best interest _____ Request that a new law guardian be assigned ____

Other (please specify):

c. What are you likely to do if your assessment of the most appropriate disposition for a child differs from what the older child/adolescent wishes in an Article X proceeding?

Represent the child's wishes _____ Argue for the best plan _____

Inform the court/judge of both the child's wishes and his or her best interest _____ Request that a new law guardian be assigned _____

Other (please specify):

d. What are likely to do if your assessment of the most appropriate disposition for a child differs from what the older child/adolescent wishes in a 392 proceeding?

Represent the child's wishes _____ Argue for the best plan _____

Inform the court/judge of both the child's wishes and his or her best interest _____ Request that a new law guardian be assigned _____

Other (please specify):

17. We would welcome any comments on the ways in which, in your view, the role and responsibilities of the law guardian should be clarified in any of the following proceedings, either at fact-finding or disposition. (Please feel free to use additional paper.)

JD/PINS/Article X/Foster Care Approval/Foster Care Review/Extension of Placement/ Termination of Parental Rights

18. a. What is the most satisfying aspect of being a law guardian?

b. What is the most frustrating aspect of being a law guardian?

Please feel free to raise any other issues or concerns you think are important about law guardians.

THANK YOU. PLEASE READ THE NEXT PAGE BEFORE RETURNING.

17. We would welcome any comments on the ways in which, in your view, the role and responsibilities of the law guardian should be clarified in any of the following proceedings, either at fact-finding or disposition. (Please feel free to use additional paper.)

JD/PINS/Article X/Foster Care Approval/Foster Care Review/Extension of Placement/ Termination of Parental Rights

18. a. What is the most satisfying aspect of being a law guardian?

b. What is the most frustrating aspect of being a law guardian?

Please feel free to raise any other issues or concerns you think are important about law guardians.

THANK YOU. PLEASE READ THE NEXT PAGE BEFORE RETURNING.

SAMPLE FORM

2. Courtroom Observation: Juvenile Delinquency Court Sheet

Cover Sheet

I. General Information: Docket # _____

County _____

Judge _____

Child's Age _____

Law Guardian Present _____ yes; _____ no

Type of Hearing (circle):

--Fact Finding/Disposition

--Other (specify) _____ Date of Observation _____

Outcome (circle):

--Dismissed

--ACD

--Adjourned

--JD Finding (specify) _____

Disposition (circle)

--Probation

--Secure Placement

--Non-secure Placement

--Other (specify) _____

Time Proceeding Began _____ Name of Observer _____

Time Completed _____

Total Time (in minutes) _____

II. Other Comments

Courtroom Observation Scale

1. Is it the appointed law guardian or a substitute?

_____ appointed law guardian; _____ substitute
Comments:*

2. Was the lawyer punctual? _____Yes; _____No
Comments:

3. To what extent does the lawyer seem familiar with the specific facts of the case?

1	2	3	4	5
Minimally or Not at All		Moderately Prepared		Very Well Prepared

Comments:

4. How well prepared does the law guardian appear to be (e.g. any evidence that the law guardian has read reports, prepared motions, conducted independent investigations)?

1	2	3	4	5
Minimally or Not at All		Moderately Prepared		Very Well Prepared

Comments:

5. How well does the law guardian appear to know the relevant law?

1	2	3	4	5
Minimally or Not at All		Moderately Prepared		Very Well Prepared

Comments:

6. How familiar does the law guardian appear to be with services available for the child? (Answer only if relevant, e.g. dispositional hearing, 358-A, 392, etc.)

1	2	3	4	5
Minimally or Not at All		Moderately Prepared		Very Well Prepared

Comments:

*Original forms included more space for commentary.

7. How vigorously does the law guardian appear to represent the child?

1	2	3	4	5
Minimally or Not at All		Moderately Prepared		Very Well Prepared

Comments:

8. To what extent does the lawyer appear to represent the child's interests?

1	2	3	4	5
Minimally or Not at All		Moderately Prepared		Very Well Prepared

Comments:

9. How well does the law guardian seem to know the child (e.g. never met, met in hall, have talked)?

1	2	3	4	5
Not Well At All		Some Familiarity		Very Well

Comments:

Courtroom Style

How formal is the courtroom (formal means judge robed, all stand when judge enters, parties at separate tables, no talking in courtroom)?

1	2	3	4	5
Informal		Moderately Formal		Very Formal

Comments:

What is the judge's general reaction to legal motions, objections?

1	2	3	4	5
Reacts Unfavorably		Mixed Reaction		Seems to Encourage

Comments:

What is the judge's general attitude toward the law guardian?

1	2	3	4	5
Seems Impatient, Ignores		Treats Same as Other Attorneys		Relies on Fully

Comments:

SAMPLE FORM

3. INFORMATION RECORDED FROM COURT CASE FILE

ARTICLE TEN ABUSE AND NEGLECT

County: _____ Age: _____
Name: _____
Docket No.: _____

Date petition filed _____
Name of Law Guardian _____ LG change _____
Name _____

Date Law Guardian assigned _____
Date first hearing _____
Date finding entered/
case dismissed _____ Date of dispositional
hearing _____

Number of appearances _____ Child alone _____
Law Guardian alone _____
Child with Law Guardian _____

Adjournments _____

Motions filed	By whom/Date	Result

Reports ordered	By whom	In File

Copies to _____

Other evidence _____

Other papers in file _____

Type of Disposition

_____ Dismissal
_____ A.C.D.
_____ Finding
_____ Other (specify)
_____ Protective Order

Specific Disposition

_____ Child returned to home (no supervision)
_____ Child returned to home with supervision
_____ Child removed; foster care ordered
_____ Child removed; institutional placement
_____ Other (specify)

Article Ten

DSS Report Recommendation
Followed (F)
Not Followed (NF)

Algernative suggested	By whom	
1. _____	_____	F/NF
2. _____	_____	F/NF
3. _____	_____	F/NF

Prior Abuse/Legal History	Disposition	Result
_____	_____	_____
_____	_____	_____
_____	_____	_____

Prior Placement History	Disposition	Result
_____	_____	_____
_____	_____	_____
_____	_____	_____

Law Guardian Voucher Information
_____ hours spent in court
_____ hours spent out of court
_____ total

4. GENERAL INTERVIEW SCHEDULE FOR LAW GUARDIANS

Introduction. 1. Describe study. 2. We would like to talk in general about the problems and satisfactions with being a law guardian and then ask you about specific cases you have been involved in. 3. I want to assure that while we are interviewing individual law guardians, what you say is confidential. We are interested only in learning about overall patterns and issues.

1. a. Why did you decide to become a law guardian?
   b. Is this the same reason you remain one?

2. What kinds of problems with the system have you had?
   a. Assignment policies (not called frequently enough);
   b. Reimbursement policies (do you ever not submit a voucher);
   c. Scheduling (waste of time in court);
   d. Problems keeping up with case law, statutes, etc.

3. a. How do you know when you are appointed?
   b. Do children get notified, too (or parents)?
   c. How do you get papers? (Are they mailed, do you have to go to the court to see them? Is this a problem?)

4. Do you feel any pressures on you that affect how you represent juveniles? (Probe for examples.)
   --Do you feel that with some judges you really can't push for a trial?
   --Do you do anything differently in different courtrooms?
   --Does the level of reimbursement limit the representation you can provide for a child? (Probe: preparation time; things you'd like to do but can't.)

5. a. Where do you turn if you want informal advice on how best to represent a child, or what kind of disposition is most appropriate?
   b. Do you ever feel a need for such advice?

6. a. How do you learn about what services are available to a child in this community?
   b. What facilities/services have you visited?

7. a. Do you ever do any follow up for your clients?
      --review final orders
      --let them know how to contact you
      --check on dispositions
      --see if 392 order is carried out
   b. Ideally, is this part of the law guardian's role?
   c. Should such activities be reimbursable?
   d. get response to continuing responsibility hypothetical (see Chapter 4); ask, "In this situation is it the law guardian's responsibility to try to prevent his client's transfer? How could this situation be handled?

8. What conflicts do you see about the law guardian's role in different proceedings? Give hypotheticals (see Chapter 4), ask:

a. Under these circumstances, would you make a motion to suppress the confession, or would you allow the confession in the interest of helping your client receive treatment?
b. What is the law guardian's role in Article 10 proceedings?
c. Does the law guardian's role in any proceeding differ between fact finding and disposition?
d. Have you ever been a law guardian in a foster care review (392)?
How does your role in a 392 differ from other proceedings?
Do you ask to receive copies of the six-month progress report?
On the last 392 you were assigned to, could you describe what happened?
e. Do you handle cases differently when your client is in detention? (i.e. do you visit him in detention; do you request an expedited fact finding, etc.)
f. What do you do if your client is placed out of the county? (Do you request he be transported to your office; do you visit him and bill for your time; do you meet in court?)
When did this situation last occur?

9. a. How active are you in Bar Association/other child-related committees?
b. Do you ever have occasion to see the JRD newsletter? (Juvenile Rights Division)
c. What other materials relating to juveniles do you read?
d. Has the Child Welfare Reform Act affected the way you represent juveniles?

10. a. Is there anything you do to ease the stress of a court appearance for a child?
b. Is there any training that would make you more comfortable in dealing with children?

11. How much does it cost to run this office? (Ask only if law guardian seems willing to discuss this.)

12. In general, how well does the law guardian system work in this county for lawyers?
For the children?

13. What changes in the system would you recommend?

14. Are there any other issues or concerns?

Have you completed our survey questionnaire?

We would now like to discuss a specific case with you.

INTERVIEW SCHEDULE FOR SPECIFIC CASES
HANDLED BY LAW GUARDIANS

PERSON IN NEED OF SUPERVISION

County:
Name:
Docket No.:

Assignment

1. How were you assigned?
_____ appointed by judge
_____ available in court
_____ appointed by court clerk
_____ other (please specify)

2. When were you assigned?
_____ prior to the respondent's first appearance
_____ on the day of the first appearance
_____ subsequent to the first appearance

3. To your knowledge, was the respondent involved in prior Family Court proceedings? _____ Yes; _____No

If so, did you represent him or her? _____ Yes; _____No

The First Appearance:

4. Did you have the opportunity to interview the child prior to the date of the first court appearance? _____ Yes; _____ No

5. Did you have an opportunity to speak to any other persons prior to the first appearance (witnesses, parents, probation, police, etc.)
_____ Yes; _____ No

If so, please list such persons (i.e. parent, probation officer, etc.)

6. Did the first court appearance include oral argument? ____ Yes; _____ No

Please check the issues, if any, which were contested or argued

_____ Temporary Placement or Shelter Care
_____ A.C.D.
_____ Withdrawal of the petition
_____ Sufficiency of the petition
_____ Other (please specify)

Fact-Finding

7. Did the petitioner (county attorney, school district or police) give you or serve any material, such as copies of school records, statements by the respondent or witnesses, etc.? _____ Yes; _____ No

If so, please list the material:

8. Were any motions filed by you prior to the entry of a finding or dismissal of the case? _____ Yes; _____ No If yes, please list the type of motion and outcome

9. Did you interview any witnesses? _____ Yes; _____ No

   If so, how many? _____

   Were they defense witnesses, petition witnesses, or both _____

10. Did you confer with the county attorney, probation or any other official prior to the entry of a finding or dismissal? _____Yes; _____ No

    If so, were conferences by telephone or in person _____

11. Did the respondent admit to a finding? _____ Yes; _____ No

    If so, was the admission: _____ to the charge in the petition; _____ to a lesser charge

12. Was the possible substitution of a neglect petition discussed? If so, was a neglect petition substituted? _____

13. If the respondent admitted, was he or she advised of the rights to a full hearing, to call and cross-examine witnesses and the possible dispositional alternatives? _____ Yes; _____ No

    If so, was the child advised by: _____ the court; _____ you; _____ both

14. Did you request the appointment of any independent expert evaluations, such as a mental health evaluation or investigation services, under section 722-c of the County Law or other provisions? _____ Yes; _____No

    If so, please list the type of expert: _____

15. Was there a full fact-finding hearing? _____ Yes; _____ No

    If so, did you call witnesses other than the respondent? _____

    How many?_____

Disposition

16. Was there a separate dispositional hearing (assuming the case was not dismissed)? _____ Yes; _____ No; _____ Not applicable

    If so, did you call witnesses?_____
    How many? _____

17. Did you discuss possible dispositional alternatives with the county attorney or probation officer? _____ Yes; _____ No

18. If there was an admission, was the disposition agreed to before entry of the admission? _____Yes; _____ No; _____ Not applicable

    If so, who agreed to the disposition? _____ You; _____ county attorney; _____ probation; _____ the court; _____ other (please specify)

19. Did you request any reports or expert evaluations for the dispositional hearing?

    If so, please list any reports:

20. Did you propose or advocate a dispositional plan independent of probation or other agency? _____ Yes; _____ No

    If so, was your plan accepted by the court? _____ Yes; _____ No; _____ Partially acceptable

21. If there was a finding, did you advise the respondent of his right to appeal? _____ Yes; _____ No; _____ Not applicable

General:

22. Please list the approximate amount of time you spent:

    _____ interviewing the respondent
    _____ interviewing other persons
    _____ conferring with county attorney, probation, etc.
    _____ conducting legal research
    _____ other time spent out of court (please specify)
    _____ time spent in court

    _____ total time devoted to the case

23. Any other comments or suggestions?

INTERVIEW SCHEDULE FOR JUDGES IN SAMPLE COUNTIES
(WITH LEGAL AID AND PANEL)

General Overview

1. Do you have enough law guardians in this county?
   (Probe caseload - increase, decrease; number of law guardians - increase, decrease.)
   (Note to interviewer - first check county profiles.)

2. Do you anticipate problems in the future?
   (Caseload increases, mandatory representation in 392, child custody.)
   What would you do?

3. Under what circumstances do you use legal aid attorneys?
   Panel attorneys?

4. What, in general is the attitude of the lawyers to serving on the panel?
   (Probe: why do they serve - favor, obligation, money.)
   What do law guardians complain about to you?

5. How did the panel get started?

6. Ever considered alternatives to legal aid/panel?
   Why or why not?

7. Do you have any role in the recruitment/training/orientation of law guardians?
   (Probe: sign recruitment letters, administer co-counsel program, plan orientation, etc.)

8. What orientation/training is available to law guardians?

9. Should there be increased training, continuing education for law guardians?
   Do/would law guardians attend?
   What should training cover?
   Who should be responsibile?
   (If Bar, probe willingness.)

Assignment Procedures

10. a. Who assigns the law guardian to a case (judge, Family Court clerk, other)?
    On what basis?
    (Strict rotation/type of proceeding/other? Please explain.)
    b. How is the caseload distributed among the law guardians?
    c. How do attorneys get access to papers (mailed, must come to court)?

11. a. Do you try to assign the same law guardian to a child at all proceedings? ____ Yes; ____ No.
    If yes, is this a formal written policy, or informal? ___
    Formal; ____Informal.

    If no, why not? If yes, how do you keep track of which attorney has represented which child?
    (Probe: Index cards, memory, master docket, other.)
    Does the name of counsel appear on the face sheet of court records?
    b. What is your general approach to assigning counsel?
    (Routinely at first appearance; pre-assignment by telephone of PINS/JD's; pre-assignment for all cases; other?)
    c. At what point is counsel assigned in each of the following proceedings: JD detention, JD no detention; PINS; Child abuse and child neglect; Termination of parental rights; 392 reviews; Other.
    d. Do you apply a means test prior to the assignment of counsel?
    If yes, what is legal justification; what are criteria; who developed them; how strictly are they applied?
    e. Under what circumstances are law guardians appointed in non-mandated proceedings?
    (Probe: 358-a/392-custody.)
    f. Do you have any policies regarding the assignment of counsel to siblings?
    If yes, is this a formal written policy or informal?
    g. Is there any policy regarding the assignment of counsel to co-defendants in JD/PINS proceedings?

Recertification/Removal/Evaluation

12. a. Is there a formal recertification process? If yes, explain. If no, should there be?
    b. How long do law guardians usually stay on the panel?
    (What is the turnover?)
    c. Have you ever removed or recommended removal of a law guardian from the panel, from legal aid?
    Is there a formal procedure for so doing?
    d. Have you ever referred a complaint involving a law guardian to the appropriate grievance committee?

Effectiveness of Representation

13. a. In your view, as a whole, how effective is the representation provided by law guardians in this county?
    Probe: strengths/weaknesses.
    What kind of changes would you like to see?
    b. Is anyone responsible for formally evaluating the performance of individual Legal Aid law guardians/panel law guardians?
    If yes, what are the criteria and who does it (e.g., observation by judges, solicitation of comments, review of cases, etc.)?
    If no, should there be?
    c. In your view, what is the role of the law guardian in PINS and JD proceedings?
    (Probe fact-finding and disposition separately.)
    How important is a law guardian in 392 proceedings?
    358-a?
    Custody?

d. In doing ths study, we have observed that law guardians sometimes take a position that they believe represents the child's best interest, although the child disagrees. How frequently have you seen this in this county in PINS? In JD's? In child abuse and neglect? (Probe specific examples.)

e. How frequently do law guardians present an alternative disposition to the one developed by either probation or the Department of Social Services?
In your view, should they do so more frequently?

f. Do you have any indication that law guardians review final orders with their clients?
Do juveniles get copies of final orders?
Under what circumstances?
Have law guardians ever brought errors in final orders to your attention?

g. Are you aware of any instances in which law guardians assume additional post-dispositional responsibility, for example, informing the child about how to contact the law guardian?
Should they?

h. Under what conditions would you appoint a guardian ad litem?
Have you ever appointed a guardian ad litem?
If so, under what circumstances?
Why?
Who pays?
Do you see a need for guardians ad litem in your court to represent the child's best interest?

Availability of Supportive Services

14. a. If a law guardian wanted help in investigating a case, what could she/he do?
(Probe: Resources in the community, funding, section 722-c.)

b. If a law guardian wanted help in evaluating a service plan, or a disposition proposed by the Department of Social Services, what community resources are available?

c. How frequently do you receive requests from law guardians under 722-c of the county law, for expert witnesses; independent evaluation and help in conducting investigations?
How many such requests have you approved?

15. a. How frequently do law guardians appeal decisions on behalf of their clients?

b. What accounts for this?
(Probe: Confusion about who assigns; who pays; time to bring appeals.)

c. Who represents the children; who assigns?

d. Do you see a need for a mechanism to encourage appeals?
(Probe: Regional panel, other.)

Reimbursement

16. a. What complaints have you had from law guardians about reimbursement policies?

From legal aid about funding?
(Probe: Slowness of processing vouchers, voucher forms, rates, other.)

b. Is it your understanding that the state, or the county is responsible for:
--lawyers for the child in appeals? Has this ever been an issue?
--expert witnesses requested by child's law guardian?
How frequently does this happen?
--transcripts of proceedings?

c. Has there been confusion around any other reimbursement issues?

d. Do you routinely/ever reduce vouchers?
Under what circumstances?

OCA/Appellate Division Role

17. What has your involvement with the Appellate Division been with regard to law guardians; the role of the Office of Court Administration?
(Probe: Extent of contact, problems, departmental advisory committee, need for new structure.)

Recommendations

18. a. What would make the law guardian system more effective in this county?
(Probe: Contract, legal aid, other.)

b. What changes to you think are needed in the law guardian system statewide?
(Probe: Access to investigation; access to social workers; smoother administration; changes in appointment procedures; reimbursement changes; training; other.)

Other

19. a. How long have you been a family court judge?

b. What kinds of changes have you seen in family court over this time period?

c. In what way, if any, has the effort to increase the court's efficiency affected the way law guardians function in this county?

d. Have you had experience sitting in any other counties?
How would you say the law guardians differed from those in your own county?

e. Are there any other issues regarding law guardians that we have not explored that you feel ae important to examine in the course of this study?

APPENDIX E

SAMPLE COUNTY PROFILES*

Low Population County
Medium Population County

*All county profiles prepared for this study are on file at the New York State Bar Association.

SAMPLE PROFILE

Low Population County

Data Sources:

7 Law Guardians Interviewed
1 Case Specific Interview
10 Courtroom Observations
25 Case Files Reviewed
12 Total Non-Law Guardian Interviews

Law Guardian Policies & Practices

The Law Guardian Panel is composed of 34 law guardians or 27% of all attorneys in the county. According to the judge, this is an adequate supply. In reality, however, only a small core of law guardians on the panel are actually used; approximately 10 to 12 law guardians. These law guardians receive frequent assignments, the others receive few or none.

Recruitment is basically done by the judge. There is no formal procedure for removal, for registering grievances, or for recertification. The Bar Association has no active role except to routinely approve the list of law guardians that is sent over by the judges.

The actual assignments are made by the judge who does not use a rotation system, but repeatedly calls on the same law guardians. There is some informal specialization even within the core of most used law guardians, which results in some doing frequent representation in Article 10 cases, some in JD and PINS.** At least one does across the board representation.

With respect to policies regarding the assignment of counsel in non-mandatory proceedings, a lawyer is used in 392 proceedings, in custody cases, in cases of conflict, or in particularly unusual situations; law guardians are not appointed in 358-As.

With respect to continuity, there seems to be some effort to assign the same law guardian (which in part is inevitable because so few law guardians

*An analysis by the New York State DSS in 1980 noted the high and increasing rate of children involved in abuse and maltreatment, the high and increasing rate of JD and PINS petitions to Family Court, high rate of foster care placements in group homes, group residences and group institutions, and the high and increasing rate of persons under 21 admitted to State in-patient mental hygiene facilities. (Analysis of Indicators of Service Needs)

**One attorney noted that although her law firm permits her to represent children only for JD and PINS cases, as other cases are too controversial.

are assigned), but there is no formal policy. In fact, although the case records are organized in most instances so that all prior petitions on the same child are in one case folder, it was not possible from those court case records to determine the name of the law guardian in prior cases.

Law Guardian Views

Neither the interviews with the law guardians, nor a review of the comments from those returning the survey from this county indicated any systematic issues of concern on the part of the law guardians. Rather, the comments were typical of those heard elsewhere. Some thought a full time law guardian would be able to develop the needed expertise. Some noted that as soon as the law guardians become experienced they leave the panel; and some felt that the panel system was essentially a good one, although assignments should be more equitable. Some of the more active law guardians objected to being treated with disdain by other law guardians. They expressed a wish for better resources, newsletter updates, etc. Most of the law guardians had received no specialized training for their law guardian role. One indicated that he was a law guardian because he was interested in children and because his office was close to Family Court. The law guardians we interviewed were mixed on whether or not a law guardian's responsibility included follow-up. At least one law guardian gave evidence he did fairly vigorous follow-up. Most, however, did not see it as appropriate to a law guardian role.

We did have independent confirmation of the fact that a few law guardians are responsible for handling most of the cases. One law guardian reported to us that in the past two years, his caseload had involved over 200 cases. This particular law guardian believes that training should be mandatory, and indeed law guardians should be required to pay to attend. It is also noteworthy that two of the law guardians, repeatedly described to us as the very best, told us during our interviews that they were planning on resigning. One, because he had taken another position; one, because he was serving at the pleasure of the judge and the judge was leaving.

Law Guardian As Viewed by Others

The law guardian panel is perceived by others, with the exception of the judge, as basically ineffective. The judge is content, and feels the system needs no changes. The Bar Association president indicated virtually no contact with the law guardian system, except to approve the list sent over by the judge. The Bar there has never been involved in any law guardian training, and has no juvenile or family law committee.

The DSS caseworkers with whom we spoke however were less sanguine. They indicated that rarely do law guardians seek to contact them, although in some instances, they try to contact the law guardians. They also indicated that law

guardians rarely, if ever, recommend alternative dispositions.* One caseworker cited an instance in which a law guardian asked her her recommendation, said he would go along with it, then left the courtroom and was not present for the rest of the hearing. Additionally DSS complained that law guardians with two exceptions simply asked what the DSS workers had observed in making home visits, and rarely did any independent investigations or home visits.**

The caseworkers also commented that very frequently, the children don't know what a law guardian is or what he or she is supposed to do for them. Of special concern was the law guardians' discomfort with, and lack of skill in dealing with sexual abuse cases. They were perceived as trying to get these cases over with as quickly as possible. (This is a theme that surfaced at law guardian training in other parts of the state as well.) Caseworkers felt law guardians were also reluctant to go to trial because of the potential time involvement, hence they frequently sought ACD's. Law guardians rarely ask for the UCR which DSS says they would gladly make available, although only in the DSS office.

Probation shares a similar view of the law guardians' passivity and cursory contact with the youth. One probation officer indicated that he had never had a law guardian come to his office. Another noted that law guardians rarely contacted probation. The probation officers also noted that it was most unusual for a law guardian to develop an independent recommendation. In general, they indicated that law guardians rarely speak to the children except five minutes before court time, forcing the probation officers to explain to both parents and children what is happening in court, which they see as a law guardian's responsibility. They also view the law guardian as unfamiliar with the services available, and are particularly critical of the law guardians' acceptance of traditional, secure detention, rather than any other alternatives. Some skepticism was expressed about the amount of time billed for based on their knowledge of the law guardians' activities.

We did not speak with foster parents in the county. We did speak with a representative from the Child Abuse Committee, who indicated great concern about the law guardians, both in terms of their inexperience and their inaccessability. He noted that he had tried to contact law guardians on several occasions and had not been contacted back in return. He also complained that the law guardians did not know about or seek referrals to specialized child abuse services in the community.

---

*We had interesting corroboration of this from at least one law guardian who, in representing juveniles involved in delinquencies and PINS petitions, said that he took a very strong adversarial stance. In contrast, he noted that in representing children in foster care review proceedings, unless the child indicated otherwise, he simply concurred with DSS disposition.

**In talking with a law guardian about a specific abuse and neglect case, he indicated that he had not made a home visit, that probably the case worker had done so and he concurred with their recommendation.

Quality of Representation

Example of Effective and Ineffective Representation as Reported by Others

The examples shared with us about the effective and ineffective law guardians by others seem to center primarily on the extent to which the law guardian knew the child, or was willing to learn what circumstances the child was in. A particularly ineffective case described to us involved the law guardian's failure to establish either in his own investigation or in court, whether the abuser was the father or a relative, both of whom had the same name. An order of protection was directed against one, but the other one remained in the home.

In another case in which the law guardian was perceived as ineffective, and indeed harmful to a child, the law guardian recommended in court an end to supervised father/child visits, without ever checking on how the supervised visits had been. In fact, there was evidence they had not gone well.

In contrast, an effective case was described in which the law guardian did respond to the DSS caseworker's concern about returning an infant home. He agreed to make a visit with the DSS worker, and at that point became convinced that the DSS worker was correct. The DSS caseworker found that his willingness to make this effort was really very important in a long-term determination made about this very young child.

Another instance in which a law guardian was reported to be extremely effective, was one in which a child was charged with theft, as grand larceny. The law guardian discovered that the price of what was stolen was far below the amount required for grand larceny, and the charge was reduced.

Courtroom Observations

There seems to be some consensus both from the law guardians, and from others who work with the law guardians, such as case workers and probation officers, that the law guardians play for the most part (there are some exceptions) a fairly passive role, not only at the dispositional stage but at the fact-finding as well. This was confirmed by our own court room observations of ten proceedings. In 7 out of 8 cases the law guardian had no recommendation regarding disposition, and in at least two cases the law guardian said nothing during the proceedings. In only three cases did we directly observe the law guardians explaining either the proceeding or the disposition to the child. Examples follow:

> In one JD case, a law guardian was substituted. He saw the child for the first time in court. It was a dispositional hearing for a 13 year old that lasted 30 minutes. He made no recommendations.
>
> In another JD case, the probation plan was to try to prevent the child from being sent to secure placement. Probation proposed such a plan; the law guardian apparently had no role.

> In a third case, the attorney did not seem familiar with the proposed placement, but did ask extensive questions about it, and did indicate some knowledge of the family and a willingness to speak to a resistant parent.
>
> In another case, a 10-year old child who stole a small amount of money was initially petitioned as a JD. The law guardian had the petition reduced to a PINS petition. He made no objection to a disposition of placement for 18 months. Essentially this disposition was made on the grounds that the child lived in a bad environment. The law guardian did try to comfort the child at the conclusion of the case, who upon hearing the disposition was visibly distressed. The law guardian, however, did not raise any questions about the appropriateness of the PINS petition itself, or alternatives to placement, including preventive services which in fact are permitted under the Child Welfare Reform Act, to both PINS and neglected children.

Legal Concerns

In reviewing our data from this county, two specific legal concerns surfaced on several occasions. First, there is a concern among some of the law guardians who represent juveniles in delinquency about the role of the state and local police in interrogating youth, and in eliciting admissions without any regard to due process.* However, in this county, a non-law guardian who also raised concern about this, said that the law guardians rarely challenge the interrogation in the subsequent court hearing and most JD's simply admit to charges.

Secondly, it is of note that two of the six attorneys that we interviewed had no knowledge of what the Child Welfare Reform Act was, or of its existence, although both were most interested in hearing about it and indicated that they would do some follow-up research.**

Additionally, in at least one case we observed, there seemed to be confusion among all the participants about psychiatric referrals for juveniles, a fact particularly noteworthy in view of DSS's concern about increasing referrals in this county for the psychiatric hospitalization of minors. (This too has surfaced elsewhere, and in part seems to be related to the difficulty of getting inpatient evaluations, in part to statutory problems.)

---

*This is a concern that we heard from several other upstate counties as well, and has implications for follow-up training.

**It was also troubling to hear from the DSS attorney that there have been no changes in the ways law guardians represent kids because of the CWRA and in fact the CWRA is a "useless piece of legislation."

Summary

This appears to be a county in which, for the most part, the law guardians play a very passive role. With some exceptions, the law guardians neither challenge potential legal violations for clients charged with serious offenses, nor conduct detailed investigations on child abuse cases, a particularly troubling finding in view of the high rates of child abuse in this county. The law guardians' role in the dispositional stage of the proceedings is at best minimal. Problematic too is the selectivity in the use of the panel members.

SAMPLE PROFILE

Medium Population County

Data Sources:

14 Law Guardians Interviewed
11 Case Specific Interviews
23 Courtroom Observations
25 Case Files Reviewed
7 Non-Law Guardian Interviews

Law Guardian Policies and Practices

This is a county with a panel of 124 attorneys, representing 28% of the Bar. Both family court judges in this county are satisfied with the supply of law guardians. Law guardians are routinely assigned in 392's and custodys, and as needed on Committee on the Handicapped hearings.

In past years, the administrative judge recruited law guardians from the Bar Association, but since 1981 no effort at recruitment has been necessary. Until recently, attorneys wishing to join the panel had only to submit their names to the judge to be added to the list. However, new departmental rules governing law guardian panels now require that law guardians be formally interviewed and attend an orientation before being placed on the list. Both judges feel this is a good policy and that it may help weed out ineffective law guardians. There is no formal recertification procedure, but the court clerk does call each panel member yearly to ask if she/he wishes to remain on the list. The court clerk indicated that law guardians who refuse assignments three times in a row will not receive any more assignments, although their names remain on the list.

The court clerk makes the actual assignment of the law guardians. One judge will suggest two or three law guardians for each case, while the other judge leaves it entirely up to the clerk. The assignments are made on the basis of geography, and the clerk's judgment as to the amount of expertise and experience required for the case. On Article X cases, the law guardians receive notice of assignment and the petition in advance of the first appearance. On JD and PINS cases, however, no pre-assignment is possible as two or three "law guardians for the day" are appointed to handle all incoming cases. One law guardian said only he receives notice, but no notice is sent to either the parent or the child, another indicated that children and parents get notice. The court clerk indicated that neither parent nor child receive notice.

Separate counsel is provided to co-defendants, but not to siblings. Continuity is maintained by an informal records' check of every incoming case. Means tests are not applied.

Bar Association Involvement

The Bar Association in this county has a Family Law Committee, however, the focus is on matrimonial issues. There has been no involvement with the law guardians. The chairman of the Family Law Committee acknowledged that there should be a Juvenile Justice Committee, however, there has never been a move to form one.

Training

Both judges feel that training for law guardians (both orientation and continuing legal education) is essential if quality legal representation is to be provided to juveniles. One felt that training should be mandatory and reimbursed and that it should be conducted by the Appellate Division. With respect to actual training, the county bar is co-sponsoring the training program initiated by its departmental advisory committee, and is responsible for conducting a specific seminar on its family court practices and procedures.

Law Guardian Views

14 law guardians, or 11 percent of the panel, were interviewed. For the most part, the complaints in this county were shared by all the panel members interviewed. The most frequently mentioned problem is the congestion of the court calendar. Often the next available court date is 4-6 weeks away. Further compounding the problem of calendar congestion is the court's scheduling practices. All cases are scheduled for the same time, creating long waits.

The processing of vouchers is a common complaint. All agree that it routinely takes six months to receive reimbursement. Another problem, apparently universal to all law guardians in this county, is the difficulty in obtaining probation reports. The reports are not routinely made available to the law guardians before the court appearance, and usually only one copy is available for the judge. The law guardian must wait until the judge is finished to read the probation report. One law guardian stated that the probation officers are unwilling to share reports, even when requested, and that there should be penalties against these probation officers for not providing the law guardians with reports. (A probation officer indicated the reports are shared.)

Several law guardians expressed concern with the lack of an organized system of assigning law guardians to cases. The frequency of assignments and the method of assignment varies greatly. Law guardians are sometimes pre-assigned to cases by mail, sometimes are called on the phone with no notice, sometimes are appointed while in court and sometimes are "law guardian of the day." They noted that often there is no opportunity to see the petition until the first appearance. In response to a question about how they get the papers, one law guardian said, "You get them at court if you yell."* One law guardian estimated that in 99 percent of his cases he is assigned with so short notice he cannot prepare a case.

Many of the law guardians interviewed felt it is very difficult to learn about services. One stated that law guardians must be as knowledgeable as DSS and probation in this area, and that a seminar on the topic is badly needed. Another stated that he relies heavily on probation because he lacks the knowledge about services and facilities.

Of the 14 interviewed, only one law guardian felt that the reimbursement rate really affected his representation. He felt it prevented him from pursuing technical or procedural options. Several law guardians, however, complained that the out-of-court rate discourages out-of-court preparation; one noting that if he did spend more time out of court he couldn't afford to continue taking cases.

The law guardians in this county sometimes use the words of a rights orientation, but fundamentally operate on the assumption that the law guardian's role is to represent the child's best interest. In response to our JD hypothetical, only four law guardians stated that they would suppress the confession; seven stated they would try for an ACD with treatment. Of the four who stated that they would make a motion to suppress, three said they would do it with great reluctance, as it is important for the child to get help. Other law guardians expressed a good deal of role conflict. One, for example, stated that with the younger JD's he takes a best interest stance, while with the older JD's he is more rights oriented. Another said he really does not know "how legal to be."

On the issue of detention, one law guardian stated that his clients who are detained are brought to court once a week until disposition. Another said he would seek a hearing. Two others took a more relaxed view, one stated that sometimes it's better to let time pass and find out what really happened; another that if it appeared from discussion with probation the child could benefit from detention, he would not seek expedited fact-finding.

While most law guardians give the child their card or let them know how to contact them, almost all felt that follow-up is not part of their role. There are, however, two notable exceptions to this attitude. One law guardian reports reviewing her files monthly to be sure nothing is pending. She maintains contact with her clients through visits, calls and letters. Another law guardian, a former probation officer, reportedly accompanies his clients on pre-placement visits; writes a follow-up letter to them to be sure they understand everything that occurred, and requests reports from probation every three months. If necessary, he will also move to modify a disposition. Yet another law guardian who does only very informal follow-up (he asks probation how his client is doing) expressed his desire to have a legal assistant with social service experience who could perform follow-up functions and report to him. He and the judge actually discussed a plan for finding such a person and then submitting a voucher to OCA to test their reaction, although this has not yet been done.

Most law guardians, however, responding to our continuing jurisdiction hypothetical were not enthusiastic about modifying the order. One stated that he would not consider putting the case back on the calendar, since he wouldn't have allowed the disposition if it wasn't exactly what the child needed in the first place. Another felt that he would ask the court to reconsider but only if probation were extensively involved, since they would be better able to

evaluate the situation than the law guardian. Two others indicated they would do so if the child had "really" adjusted well to foster care.

With respect to services, most law guardians interviewed had not actually visited facilities. There also seemed to be a tendency for them to rely on "professional assessments" rather than their own investigation. This, as indicated earlier, was clear in one law guardian's comment that he would decide what to do for a detained youth based on probation's views; another indicated in Article X proceedings, he felt he had to rely on professionals who observed the child in his own environment. He did not seem to consider the possibility of a law guardian making a home visit. A third, as noted above, responding to our hypothetical, indicated he would rely on probation's assessment. At the same time this should be taken in context of comments by non-law guardians that when placement is an issue, especially out-of-county placement, the law guardians do tend to be more active.

Among the law guardians the view of the effectiveness of the system varies. Some law guardians view the system as equivocal at best. One said, the system works all right; it's better than nothing; another commented if the county prefers this to legal aid, they just have to put up with it. Others, however, think it works well.

Law Guardians as Viewed by Others

Both judges feel that the law guardians in this county are providing adequate representation, although both agree that law guardians rarely (perhaps 5-10 percent of the time) present an alternative disposition and that they should do so more often. One judge noted that it requires a great deal of motivation to learn enough to be able to propose dispositional alternatives and that perhaps the solution to this problem would be to have full-time law guardians.

On the law guardian's role after disposition, one judge commented that in several instances on Article X and custody cases the law guardian has followed up. He feels this role should be encouraged by reimbursing the law guardian for this time.* He has also had law guardians bring errors in the final order to his attention on one or two occasions in the last year and one half.

Both judges noted that law guardians do not take appeals on behalf of their clients in this county. Neither felt that appeals are necessary since the law guardian's role is to protect the child's best interest.

Suggestions for improving the law guardian system in addition to a full-time law guardian staff include requiring minimum levels of experience, and developing a resource network for law guardians.

The caseworkers interviewed all agree that while there are both good and bad law guardians on the panel, overall the representation provided is poor. One caseworker described the law guardians as generally a "weak group" and

*This judge would also like to see law guardians specifically responsible for monitoring 392 orders.

another felt that they are confused about their role and consequently don't contribute to court hearings at all. A third mentioned that law guardians lack the ability and willingness to conduct a hard and in-depth cross-examinations.

It was also noted that law guardians seldom meet with the caseworker in advance of the first petition, even if they have been pre-assigned to the case. More importantly, nor do they meet with the child. Law guardians are perceived as simply unwilling to make the effort to get to know the child and family and show some interest in their client. This, in the view of at least one caseworker, renders them incompetent.

Although all the caseworkers interviewed felt that representation in this county is very ineffective, they placed the blame on different areas. One, for instance, felt that law guardians are uninterested in family court work and have taken it only to build their practice. Therefore, they are unwilling to take the initiative on a case, to meet with the child or caseworker and find out what's happening. Another caseworker placed the blame on the court. If in the middle of a proceeding the law guardian can't make an appearance the judges would rather appoint another law guardian than allow an adjournment.

Further, the caseworkers complain that the law guardians are not independently investigating cases, do not request DSS reports in advance of the court appearance and generally are too willing to support any recommendation made by DSS. Even though the law guardians are knowledgeable about some of the more frequently used services, they do not propose alternative dispositions. One caseworker noted that often it is better for a child not to be returned home but since DSS is obligated to work toward this goal, only the law guardian is in a position to really protect the child's best interests, hence she is particularly dismayed by the law guardians' passivity.

Recommendations from the caseworkers include evaluating law guardians and removing the less competent from the panels, providing law guardians with a definition of their role and duties, providing more training and improving their cross-examination techniques.

The view from one member of the county attorney's office was quite different. He described the law guardians as very effective and commented that the influx of new law guardians in recent years has improved the quality of representation. He feels that law guardians fight vigorously on questions of law and attend meetings at DSS and local facilities and have become in recent years, quite active at disposition. He stated that the law guardians are particularly effective on Foster Care Reviews where they advocate for ending foster care. The only time he feels law guardians are inefficient is when they serve as "law guardian of the day." In those situations, the law guardian has no knowledge of the facts or the child's situation and, at best, he can ask for an adjournment but even that is undesirable. He feels that the law guardians are especially effective at disposition in opposing placements and particularly in opposing out-of-the-area placements.

The probation officers interviewed shared many of the same complaints as the caseworkers. One feels that the law guardians are unprepared for both

arraignment and fact-finding. They do not adequately interview their clients and they rely on probation's investigation, and are generally unprepared. One probation officer noted, however, the law guardians do actively pursue plea bargaining and do oppose probation's recommendations when placement is involved. The other felt even this level of activity was rare. It was suggested that a handbook outlining the duties of law guardians (to, among other things, interview their client and adequately prepare the case) would be useful.

A number of other observers noted that there are also pressures from the court that make it difficult for the lawyers who want to be more thorough. The substitution of law guardians problem has already been mentioned. One caseworker also cited an instance in which a petition, charging medical neglect by the parents, was dismissed over the law guardian's objections before he was able to investigate. Another attorney reported being put under pressure by the court to represent three co-defendants, one of whom had no prior court involvement. (She refused.)*

Quality of Representation

Effective Representation

Only probation was able to cite examples of effective representation. In one case, a severely disturbed child was admitted to a psychiatric center for treatment and, while there, stabbed a therapy aid in the neck. The police brought a JD petition, but it was clear the child would be found incompetent and the child needed long-term treatment. After lengthy out-of-court negotiations, it was finally agreed that the law guardian would not "hassle" the assistant county attorney regarding the probable cause hearing required to prove incompetence and would permit it based on a felony (not a misdemeanor) in order for the child to get sufficient treatment. (According to the probation officer if it had been a misdemeanor, psychiatric confinement could only take place for up to 90 days, if probable cause on a felony, then confinement may be up to one year.)

In a second case described to us, a boy who just turned 15 had already been in two placements. The law guardian had represented the boy on several other instances. There was some further delinquent behavior, and the boy failed to show up for court and a warrant was issued. Probation asked for and got secure detention. Probation talked to the law guardian and explained all the placement alternatives. The law guardian then talked to his client about admitting to a reduced charge in order to get admitted to the best placement. (The boy had to have a delinquency adjudication in order to get that particular placement.)

In addition, one probation officer noted that one law guardian, in particular, was very effective because of his knowledge of Committe On Handicapped proceedings and on family court matters. (If he doesn't know, he finds out.)

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*It is not clear from our data how frequently dispositional hearings are held but one probation office worker reported not being asked to testify in two years.

One caseworker could not describe a specific case where the law guardian was effective but stated that generally a law guardian who will discuss the case with the caseworker and do an independent investigation will be effective. Another caseworker noted she had recently had a law guardian call her about an educational neglect case, get the client's telephone number and seek information. The law guardian then went to the client's home, an extremely rare occurrence.

Ineffective Representation

Caseworkers descibed two instances of ineffective representation. On one case, involving sexual abuse, midway through the case, a new law guardian was assigned. He approached the caseworker for information on the proceeding and was told simply to agree with whatever DSS recommended. He followed these instructions, did not say anything in court and agreed with DSS.

Probation cited a complex case which highlights the impact of a law guardian's failure to follow-up. In this case, involving a youth whom the law guardian had represented previously on a JD petition, an ACD was granted with the stipulation that the school district effect a placement. That occurred on 3/11/82. After six months, the school district had done nothing. The law guardian came back into court and did not press the school at all. A second law guardian was appointed to represent the child before the Committee on the Handicapped. The first law guardian kept appearing at subsequent hearings, and did absolutely nothing. The judge allowed the first law guardian to keep appearing. The second law guardian had been appointed in February '82. There were eight subsequent appearances in court on the case, but the second law guardian did not appear at all of these. The first and second law guardians took turns appearing in the court on the case or appeared together and after one year, up to the time of the interview, a placement still had not been effected for this child.

In another case of a seriously disturbed hospitalized youth, the probation officer reported he gave all the reports to the law guardian, but the law guardian did not read them.

Case File Analysis

We reviewed 25 case files in this county. In none of the 25 proceedings was a law guardian appointed in advance of the first appearance.

Substitution of law guardians occurred in nine out of the 22 cases in which more than one appearance was made on the case. On one neglect case, nine appearances were made by three different law guardians. On one JD case with five appearances, there were five law guardians on the case.

Despite the apparent lack of pre-assignment and continuity, the law guardians in this county seem active. In several cases we reviewed, the law guardians made motions for ACDs, motions for discovery, and on one neglect case, a writ of habeas corpus was filed. Plea bargaining is frequent, and detention was infrequently used (in only two out of ten JD cases). In one of

the 392 case files reviewed, the law guardian successfully opposed DSS's recommendations and the child was returned home.

With regard to PINS cases, there is some question as to whether or not the law guardians are addressing the issues of neglect that may be involved. In one case, the child was adjudicated a PINS, but the disposition involved the parents attending a parenting class and an order of protection was issued. On another case reviewed, it was noted that the county attorney had recommended that a neglect petition be filed, however, the law guardian opposed this recommendation.

Case Specific Interviews

The law guardian case specific interviews confirmed some of the assignment problems identified by others; for two cases, the law guardians were available in court; for two they were substitutes (including one on an Article X, in which the law guardian became involved after the adjudication and seemed to know nothing about the content of the fact-finding and one involving a detention hearing in which the law guardian had not represented the youth before, nor did he at subsequent stages of the delinquency proceeding). Three cases were assigned to the law guardian of the day, and one was appointed by the court clerk; only one said he was a prior law guardian.

In two instances where the youth was known to have prior court involvement, there was no continuity of representation; in a third the law guardian had represented the youth before.

Courtroom Observations

23 observations were done in this county; four of which involved the substitution of law guardians.

In ten of the cases observed, representation was basically perfunctory with no evidence the law guardian had any knowledge of either the child or the facts prior to the court appearance. In one, for example, involving a review of a PINS disposition, (and a substitute law guardian) the child in a residential facility wished to return home; the law guardian spoke to the child for five minutes before the case, the judge extended placement for one month. In two 358-a proceedings, one involving, according to our observer a 17-year old, the law guardian said nothing, except that he agreed with DSS. The 17 year old was not present. Equally perfunctory were proceedings for 16 and 17-1/2 year olds to end foster care placement. (Of the 23 cases observed, a surprising number involved older adolescents.) Similarly, in several PINS and JD proceedings, the law guardians said nothing. (In one, the judge ordered the law guardian to participate in a Committee on the Handicapped meeting.)

At least two proceedings in this county involved COH issues, one related to an Article X, one to a JD with questions about the timeliness of the schools responses. This was not noted in other counties. In these cases too, the law guardian had a minimal role.

In five proceedings, the law guardian seemed to have known the child or read reports, but was otherwise passive. These included one instance of a two month extension of placement for a JD; a termination of parental rights proceeding and a PINS disposition involving truancy, a JD petition for a 17 year-old and a preliminary hearing for a child in a psychiatric hospital in which the law guardian talked briefly with the parents for 15 minutes before the proceeding.

In six instances, the law guardians seemed fully prepared, and or familiar with the child, and or aware of legal tactics. In one, a JD arraignment (in which in court the law guardian never spoke to the child, although he did to the parents), the law guardian requested that any statements made by the child either to probation officer or the psychiatrists be deemed confidential as to the fact-finding. (The law guardian said this after agreeing to a psychiatric evaluation and probation report before the fact-finding hearing.) In another instance, the law guardian knew his client had already made restitution efforts.

In a third example, a PINS hearing, the law guardian seemed to have done careful investigation, was very familiar with the child's health and school records. (The youth was given a suspended judgment and the judge urged the law guardian to have the case reviewed if he was not satisfied with the youth's educational placement.)

In a fourth instance, involving a JD fact-finding, the law guardian asked questions on direct and cross-examination (although he did not know the answers); objected to improper questions and moved to dismiss. (Our observer, in fact, thought the law guardian was too vigorous, the county attorney had not investigated and in putting the youth on the stand, the law guardian actually filled in some missing pieces of information for the county attorney.)

In a case (that was identified as an Article X proceeding) involving a child in a psychiatric hospital, the law guardian indicated he had more current information on the child's condition than the respondent's attorney and then argued for continued hospitalization as opposed to return home. (A full dispositional hearing was scheduled.) In the final example of more vigorous representation in this county, a law guardian (just appointed) for a child referred back to family court by criminal court, tried to get the boy out of detention and released to residential school he had been in. (A full fact-finding was scheduled.)

Summary

This is a downstate county in which, contrary to stereotypes, the law guardians do not espouse a strong juvenile rights philosophy, but rather a best interest orientation. On the other hand, the review of the project sheets indicated some use of legal tools, e.g. plea bargaining, motions for discovery, etc. At the same time, the attorneys, with some exceptions, do not see their role as doing follow-up, rarely provide alternative dispositions, and in at least some cases observed, seemed to view their clients as parents, rather than the juveniles. Particularly problematic in this county is the frequent substitution of law guardians and the multiple approaches to assignments.

APPENDIX F

SAMPLE OF TRANSCRIPT SUMMARIES*

*The complete set of summaries are on file with the New York State Bar Association.

County A Case 19

This case involved serious allegations of sexual abuse filed against the father, who had been charged criminally, and the mother, who was apparently charged with permitting abuse by the father. Five children were involved. The case was continually adjourned during a five-month period. The law guardian was completely inactive and there was no way of ascertaining whether the children were receiving appropriate services; instead he simply acquiesced in repeated adjournments. Further, a paternal aunt had requested temporary custody -- yet the court continued temporary foster care (perhaps the aunt could have provided a more stable and beneficial environment for the children). It is apparent that the law guardian was of the opinion that her resonsibility did not include the assurance of adequate services for her clients (victims of serious sexual abuse) or a determination as to whether a collateral relative, who was eager to help, should be granted temporary care and custody.

After five months (on November 9, 1982) the mother entered an admission and the children were placed with the Department of Social Services for a twelve-month period in accordance with a very detailed stipulation. After twelve months the children were to return to the mother with appropriate supervision. The law guardian, however, was inactive (but perhaps had participated in the discussion which resulted in the stipulation).

I believe the law guardian evidenced an extreme lack of responsibility in this case. Although the disposition appeared to be adequate, the troubling fact was the five-month hiatus during which the law guardian was completely inactive. Assigned to represent five children who had been the victims of serious sexual abuse, there is no indication that the law guardian was even aware of their needs and possible services (not to mention the possibility of temporary custody by the paternal aunt).

County A Case 15

In this PINS case a law guardian entered an admission at the first appearance; the court conducted a complete allocution and statement of rights. At the disposition, the child was placed on probation -- the period of probation and conditions are very unclear. The child subsequently ran from home and a warrant was issued.

Throughout the proceedings the law guardians were extremely inactive. The family appeared to have great needs and there was an indication that the child was handicapped. Unfortunately there was no follow through (should this case, for example, have been submitted to the appropriate committee on the handicapped?). The law guardians offered nothing and it appears that no services were provided. This case also represents the difficulty in having a case sequentially assigned to several different law guardians, each of whom is unfamiliar with the child or the proceeding's history.

County B Case 15

The law guardian appeared to be effective and responsible in this delinquency case. He first requested non-secure detention (instead of secure);

the court ordered non-secure. The law guardian subsequently entered an admission to PINS -- however, there was no allocution or any statement of rights. The disposition was foster care; the law guardian was active, appeared to have devoted a good deal of time and effort to the case and obtained a detailed order which included provisons for counselling services.

County B Case 17

This was a lengthy neglect case which was handled effectively by all the participants, including the court and the law guardian. The law guardian had visited the foster home, evidenced a thorough familiarity with the case and contributed substantially to the disposition (an ACD with several conditions). The child was retarded and the family clearly needed a lot of assistance. The dispositional plan was carefully worked out with these facts in mind and included provisions for the parent to attend parenting classes and counseling. The judge was extremely thorough and understanding. Only one caveat: the law guardian was not present during one of the several dispositional proceedings, yet the court continued in his absence (i.e. without the law guardian or a substitute present).

County C Case 15

This case involved neglect, PINS and delinquency charges spread over five petitions. The delinquency charge was extremely minor (the child allegedly broke a window). The PINS petition was disposed of by substituting a neglect petition upon motion by the county attorney. Yet, despite the minor nature of the delinquency and the substitution of neglect for PINS, the law guardian admitted the delinquency charge. There was no discussion and no allocution of the respondent, his parent or the law guardian. The court thereupon ACDed the delinquency.

This case represents an extreme example of ineffective law guardian representation. The major factor was obviously an inadequate home and an apparently neglectful or abusive parent. The delinquency case should have been dismissed outright without a finding or admission or, at the very least, incorporated in the substituted neglect petition. The child clearly had great needs -- the law guardian did nothing except admit to an inappropriate minor delinquency charge.

County C Case 16

The most important aspect of this neglect case was the effectiveness and strong presentation by counsel assigned to represent the parent (the same attorney had, on other occasions, provided effective law guardian representation). Counsel for the parent argued cogently, offered a very carefully tailored partial admission and fully allocuted the parent (counsel provided the necessary allocution, not the court). Throughout the proceedings, the law guardian was inactive.

APPENDIX G

SUPPLEMENTAL STATISTICAL INFORMATION

1. Caseload Data Reported by Panel Law Guardians Responding to the Survey
2. OCA Data on Caseload Changes by Type of Proceeding 1979 to 1981 in Sample Counties and Statewide
3. Substitution of Law Guardians Within Proceedings in Sample Counties
4. Law Guardians as Percentage of All Attorneys in Sample Counties
5. Overall Law Guardian Program Costs 1980 to 1984
6. Analysis of Courtroom Observations
7. Analysis of Delinquency Petitions In One Urban Study County

1. CASELOAD DATA REPORTED BY PANEL LAW GUARDIANS RESPONDING TO SURVEY

TABLE I

Mean Caseload Sizes Reported by Panel Law Guardians for All Juvenile Proceedings
1980 - 1981

	Statewide	Population Levels			Experience Levels[a]				
		High	Medium	Low	0-2	2-5	5-10	10-20	20+
1980	16.3	19.2	16.1	12.9	3.9	16.9	16.9	17.3	16.0
1981	18.6	22.4	17.6	15.2	9.6	22.9	17.8	17.5	17.7

TABLE II

Mean Caseload Sizes Reported by Panel Law Guardians for
Specific Types of Juvenile Proceeding

Law Guardian Caseload	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
JD	4.86	5.79	4.31	4.15	4.60	4.67	5.81
PINS	3.69	3.55	4.17	3.20	3.98	3.19	4.42
JO	.30	.67	.13	.05	.14	.23	.74
Custody	2.14	1.97	2.03	2.44	2.18	1.99	2.43
Child Abuse	3.06	3.26	1.48	1.66	1.90	2.00	7.77
Ext.	1.55	1.84	1.53	1.25	1.42	1.42	2.13
392	.97	1.05	1.16	.70	.96	.92	1.13
358	.34	.33	.54	.16	.30	.30	.52
TPR	.59	.90	.05	.06	.46	.49	1.08
Appeals	.95	.11	.54	.28	.09	.06	4.68
Corrected Total[b]	18.45	19.47	15.94	13.95	16.03	15.27	30.71

[a]Mean caseload is reported on this table with five experience levels to highlight the dramatic increase in caseload after lawyers have two years of experience.

[b]The law guardians were not asked to report a total for this question. Note too, the question asked for 6-month caseload, but the consistency of the responses with the totals in other questions, indicated they uniformly provided caseload information for 12 months.

(continued on next page)

TABLE III

Mean Caseload Sizes Reported by Panel Law Guardians
For All Types of Cases

Total Caseload	Statewide	Population Levels			Experience Levels		
		High	Medium	Low	Inexp.	Exp.	Very Exp.
Law Guardian	16.36	18.00	16.56	14.15	17.77	15.70	15.64
18-B	13.29	16.27	7.42	15.20	16.26	12.52	10.13
Assigned-Adult	6.22	9.04	4.67	4.44	6.37	5.37	8.14
Private-Juvenile	2.37	3.08	2.31	1.62	2.54	2.05	2.90
Private-Adult	10.23	6.00	14.29	11.35	9.36	11.10	9.45
Other	49.65	43.63	55.08	51.73	53.40	53.75	33.36
Corrected Total[c]	98.2	96.02	100.33	98.49	105.70	100.49	79.62
Reported Total	110	101	108	120	124	111	85

[c]The reported total was provided by the law guardians for this questions. Because of inconsistencies between that total and the total reported for specific cases, a corrected total was calculated based on the specific data. The corrected total was used to calculate percentages reported in Table 16 of the text.

(continued on next page)

2. CASELOAD CHANGES BY TYPE OF PROCEEDING 1979 - 1981 IN SAMPLE COUNTIES AND STATEWIDE[1]

	% Change Total Juvenile Caseload[2]	% Change Cases Where Rep. Is Mandatory[3]	% Change 392 Review	% Change 358-a	% Change Custody	% Change All Cases Where Rep. Is Not Mandatory
High Population Counties	%	%	%	%	%	%
C*	- 2	- 5	+ 55	- 35	+ 40	+ 6
J	N/A[4]	N/A	N/A	N/A	N/A	N/A
K*	- 23	- 31	+ 33	- 12	+ 58	+ 15
N	N/A	N/A	N/A	N/A	N/A	N/A
O*	- 8	- 12	- 20	0	+102	+ 13
Average	- 10	- 15	+ 22	- 19	+ 67	+ 11
Medium Population Counties						
B	+ 6	+ 6	+ 87	- 32	+ 35	+ 6
E	+ 31	- 11	+240	+ 32	+135	+115
H	N/A	N/A	N/A	N/A	N/A	N/A
L*	+ 2	- 21	+ 11	- 30	+173	+ 61
M	- 19	- 35	- 44	+ 26	+ 63	+ 23
Average	No change	- 18	+ 7	- 12	+106	+ 45
Low Population Counties						
A	+ 26	+ 34	- 89	- 75	+114	+ 12
D	+ 18	+ 8	- 50	- 10	+ 34	+ 28
F	N/A	N/A	N/A	N/A	N/A	N/A
G	+188	+371	0	+167	+118	+125
Average	+ 29	+ 33	- 82	+ 61	+ 76	+ 25
Average for All Sample Counties	- 7	- 14	+ 18	- 20	+ 84	+ 20
Statewide	+ 4	- 9	+ 28	- 29	+ 51	+ 30

*Legal Aid Counties

[1]New York State Office of Court Administration, "Original & Supplementary Petitions, Petitions Added, Deducted and Actively Pending by Type of Proceeding" - Table 2, 1979, 1981 (mimeo) Calculations by Project Staff.

[2]Includes J.D., PINS, Article X, TPR, custody, 392, 358-a

[3]Includes J.D., PINS, Article X, TPR.

[4]Information not available.

CONTINUED

3 OF 4

3. LAW GUARDIAN SUBSTITUTION IN SAMPLE COUNTIES BY TYPE OF PROCEEDING[1]

	Population Code[1]	# Case Files	% of Substitutions	JD Cases with Substitutions/ Total Cases	PINS Cases with Substitutions/ Total Cases	Article Ten Cases with Substitutions/ Total Cases	Other Proceedings Cases with Substitutions/ Total Cases
Legal Aid Offices			%				
C	H	25	76	6/8	7/8	6/8	0/1
K	H	17	41	4/9	3/5	0/3	0
L	M	10	70	1/3	3/3	2/3	1/1
O	H	9	44	0/3	3/3	1/2	0/1
Average % of Substitutions			61	48%	84%	56%	33%
Panels							
J	H	14	0	0/5	0/2	0/5	0/2
N	H	14	36	0/5	5/6	0/2	0/1
K	H	10	0	0/3	0/0	0/7	0/0
O	H	3	33	1/3	0	0	0
Average % of Substitutions			15	6%	63%	0	0
B	M	15	0	0/8	0/5	0/2	0
E	M	15	13	0/7	1/5	1/3	0
H	M	14	43	2/6	2/5	2/3	0/0
M	M	21	43	4/11	2/5	2/4	1/1
L	M	3	67	2/2	0	0/1	0
Average % of Substitutions			28	24%	20%	38%	100%
A	L	14	7	0/4	0/2	0/5	1/3
D	L	8	13	0/4	0/2	1/2	0
F	L	22	0	0/9	0/5	0/5	0/3
G	L	0	-	-	-	-	-
Average % of Substitutions			5	0	0	0	17%
Average % of Substitutions for all panels in all sized counties			18	13%	27%	15%	20%

[1]This analysis is based on a review of 214 of the 335 case files reviewed in the study counties by Project staff. Only those cases with more than one appearance are included.

4. LAW GUARDIANS AS PERCENTAGE OF ALL ATTORNEYS IN THE STUDY COUNTIES

	Actual Number of Panel Law Guardians #	Number as Percentage of All Attorneys %
High Population Counties		
C	None*	
J	91	8
K	110*	15
O	30*	11
N	130	5
Medium-Population Counties		
B	35	3
E	16	22
H	25	33
L	53*	2
M	124	28
Low Population Counties		
A	34	27
D	28	58
F	13	24
G	5	25

*These counties also have Legal Aid.

Source: Attorneys are required to register with the Office of Court Administration every two years. This data is published in the Annual Report of the Chief Administrator of the Courts, 1982, table 4-16.

5. OVERALL LAW GUARDIAN PROGRAM COSTS 1980 TO 1984

Comparison of Legal Aid and Panel Caseload and Share of Funding in 1980-81

	Cost[1]	%	Caseload	Caseload Share[2] %
Statewide (Panel & Legal Aid)	7,280,487	100%	86,832	100%
Panel	1,766,515	24%	58,611	67%
Legal Aid	5,513,972	76%	28,221	33%

Increases in Total Appropriations for All Law Guardian Services 1980-84[1]

Year	Amount Appropriated	Percentage Increase Over Previous Year
83-84	10,834,787 (requested	+ 9 (requested)
82-83*	9,965,379	+13
81-82	8,782,491	+21
80-81	7,280,487	-

[1]All fiscal data were obtained from the Office of Court Administration budget requests 1981-82, 1982-83, and 1983-84.

[2]Fourth Annual Report of the Chief Administrator of the Courts 1982 Table 49. Data missing for seven counties: Genesee, Nassau, New York, New York Foster Care Review Term (city-wide), Onondaga, Rennselaer, St. Lawrence, Westchester. Total number of petitions before family court involving juveniles in which representation is either mandatory or discretionary.

6. ANALYSIS OF COURTROOM OBSERVATIONS

Table 1

Overall Law Guardian Effectiveness as Reflected in Courtroom Observations

Overall Rating	Total #	Total %	Legal Aid #	Legal Aid %	Panel #	Panel %
Inadequate, no contact with child, no preparation, takes no position	29	15	7	8	22	19
Perfunctory, uneven representation, reactive	60	30	31	37	29	26
Acceptable/adequate	55	27	31	37	24	21
Effective	8	4	1	1	7	6
Uncodable	47	24	15	17	32	28
	199	100	85	100	114	100

Table 2

Evidence Child Interviewed Prior to Court As Judged from Courtroom Observations

Pre-Court Relationship	Total #	Total %	Legal Aid #	Legal Aid %	Panel #	Panel %
Child not interviewed.	7	5	1	1	6	7
Child probably interviewed, in a perfunctory manner, or in relation to another proceeding.	48	31	25	36	23	28
Child interviewed.	24	16	10	15	14	17
Child carefully interviewed, e.g. home or office visit.	7	5	1	1	6	7
No information.	56	37	32	46	24	29
Law guardian appointed at proceeding, substitute law guardian.	8	5	1	1	7	9
Infant.	2	1	-	-	2	3
	152	100	70	100	82	100

Table 3

Law Guardian-Client Relationship as Judged from Courtroom Observations

In-Court Relationship	Total #	Total %	Legal Aid #	Legal Aid %	Panel #	Panel %
No evidence of familiarity; child sits w/ probation or social worker; no contact with law guardian.	14	9	8	12	6	7
Some familiarity.	40	26	23	33	17	21
Familiarity; child comfortable with law guardian.	20	13	9	13	11	13
Especially responsive; law guardian explains proceeding to child, gives verbal/other support.	8	5	4	6	4	5
No information.	51	34	24	34	27	33
Child(ren) not present.	13	9	1	1	12	15
Substitute law guardian.	6	4	1	1	5	6
	152	100	70	100	82	100

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Table 4

Levels of Preparation by Law Guardians as Judged from Courtroom Observations

Preparation	Total #	Total %	Legal Aid #	Legal Aid %	Panel #	Panel %
Evidence of minimal or no preparation, lack of knowledge about facts of case, circumstances of child, services and law.	34	22	13	19	21	26
Uneven preparation, knowledgeable about some, butt not central aspects of case. Vague knowledge of questions.	38	25	19	27	19	23
Adequate preparation, general knowledge of circumstances, read reports, talk w/caseworkers, met w/ others to work out plans.	55	36	30	43	25	30
Detailed knowledge of facts, services.	9	6	1	1	8	10
Not enough information	7	5	4	6	3	4
Requests adjournment to prepare, denial entered.	3	2	2	3	1	1
Substitute law guardian appointed at proceeding (no chance to prepare).	5	3	-	-	5	6
Substitute or assigned law guardian requests adjournment to prepare	1	1	1	1	-	-
	152	100	70	100	82	100

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Table 5

Activity Levels of Law Guardians as Judged from Courtroom Observations

Role at Hearing	Total #	Total %	Legal Aid #	Legal Aid %	Panel #	Panel %
Law guardian silent, has no role, no position or simply defers to other attorneys and caseworkers, appears active but without any purpose or plan.	26	17	7	10	19	23
Reacts to what others say, generally not very vigorous, expresses views of parties other than client (law guardian, mother)	31	20	15	21	16	20
Seems prepared, makes some comments, takes a position.	65	43	35	50	30	37
Active in an informed way, argues for child's best interests or rights.	26	17	11	16	15	18
Not enough information.	4	3	2	3	2	2
All discussion or decisions made in chambers or at bench.	-	-	-	-	-	-
	152	100	70	100	82	100

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7. ANALYSIS OF DELINQUENCY PETITIONS IN ONE URBAN STUDY COUNTY*

100 delinquency case files from one study county, including the petition, order of disposition and law guardian voucher, were made available to us for analysis. (The cases included only those which had final dispositional orders.)

Of the 100 cases, 35 resulted in placement (20 with Division for Youth and 15 with Department of Social Service or a private residential agency). Four placements were for 18 month periods even though the crime found was a misdemeanor, a clearly illegal placement. Thirty-five cases were dismissed or ACDed (at least four ACD's were for periods in excess of the six months permitted by the statute), 26 resulted in probation or suspended judgment and the disposition in four cases is unclear.

In 68 of the 100 cases the respondent admitted and waived the fact-finding hearing. Twenty-eight cases were dismissed or ACDed before the fact-finding stage, two cases are unclear and there were two trials (both children were acquitted). In other words, there were 68 admissions versus two fact-finding hearings. 38 admissions were to the crime (highest count) charged in the petition, 27 were to a lesser crime and one was to a PINS charge (in one case, the respondent was charged with A-1 felony, admitted to an A-1 felony and was placed on probation); in two cases the records do not indicate the crime which was admitted to. Ten cases in which the petition charged only a misdemeanor resulted in placement (7 with Division For Youth).

In every relevant case except one, 69 in all, the child and the law guardian waived the dispositional hearing (none were consequently held). In only one case out of 70 was the dispositional hearing not waived; in that case the disposition was an ACD. The dispositional hearing was waived in every case in which the child was placed (35) and virtually every case which resulted to a lesser disposition (33).

An analysis of the law guardian vouchers indicates that the law guardians billed for an average of 10.6 hours; of this, 4.6 hours were devoted to out-of-court work. In cases which resulted in placement, the law guardian billed an average total of 11.7 hours per case, with 4.9 of those hours devoted to out-of-court work. Law guardians devoted an average of .93 hours to interviewing the child; in cases which resulted in placement the average was .82. Last, the law guardians reported an average of 1.4 hours per case devoted to interviewing persons other than the child (witnesses, county attorney, DFY, etc.) -- in cases which resulted in placement, the average was 1.8 hours (in 6 cases the law guardians did not differentiate this time -- those cases are excluded from the averages).

*Note: At the request of a judge in an urban study county, we analysed 100 cases. These cases represent only those with orders of disposition; a startling 83% of the cases forwarded to us had no order of disposition. It should be noted that these case files were not part of the court files reviewed specifically for this project.

APPENDIX H

COMPARISON OF DEPARTMENTAL

APPELLATE DIVISION RULES

A Comparison of Appellate Court Rules for Law Guardian Panels in Four Judicial Departments*

	First Department	Second Department	Third Department	Fourth Department
Attorneys Appointed To:	Family Court Panel.	Law guardian panels.	Law guardian panels, established each Oct. for each county.	Panels, or contract, or combination by April 1st.
Term	1 year with successive designation.	1 year with re-designation.	Not specified, but if attorney on panel for two years and not appointed, no reappointment.	Not specified, but if attorney on panel for two years and not appointed, no reappointment.
Appointment Process	Designation must be approved by administrator for Appellate Division of assigned counsel plan after certification by Bar Association.	Approved by Appellate Division, based on lists prepared by advisory committees.	Recommended by Family Court Judge to Appellate Division after consultation with County Bar Association president, denial may be reviewed by Department Advisory Committee. Attorney may also request appointment.	Attorneys recommended by senior administrator or Family Court Judges after consultation with representatives of Bar. Attorney may request on own if office in county. Director's denial may be reviewed by Department Advisory committee.
Standards for Appointment	Member in good standing of N.Y. Bar; certified by Bar Ass'n; counsel to a party in at least 2 Article 7 proceedings, 2 Article 10 proceedings, and 1 proceeding under Article 5 or 6, unless waived if attorney exceptionally well-qualified by training or trial experience. If no trial experience, attorney must serve co-counselship.	Member in good standing of N.Y. Bar; counsel or co-counsel in at least three Article 7 proceedings and and three Article 10 proceedings. Requirements may be waived if applicant otherwise qualified.	Attorney of record or associate counsel for a party in three Family Court proceedings.	Member in good standing of N.Y. Bar, counsel or co-counsel for a party in three proceedings under Article 6, Article 7 or Article 10 of F.C.A. or have completed a law guardian training program. Requirements may be waived if applicant is well-qualified.
Exclusions	None.	None.	D.A., county attorney and corporate counsel and assistants, city, town or village court judge or justice, or where conflict of interest exists.	Attorneys serving as D.A., county attorney, corporation counsel assistants; judge or justice of a city, town or village court, or as law clerk to judge or justice must disclose such employment. When adequate numbers of attorneys, only county residents may be appointed.

*Prepared for Law Guardian Study, Institute for Child & Youth Policy Studies.

Source: 22 N.Y.C.R.R. Sections 611.2-611.11; 679.1-679.10; 835.1-835.2; 1032.1-1032.3.

A Comparison of Appellate Court Rules for Law Guardian Panels

Training and Education	Bar Association shall provide continuing program of training and consultation, that at a minimum includes a continuing co-counsel program and a professional course in Family Court advocacy.	Advisory Committee shall establish and supervise a training and education program subject to Appellate Division approval.	Law guardian shall be thoroughly familiar with relevant provisions of Family Court Act, Domestic Relations Law; Social Services Law, Penal and Criminal Procedure Law; basic principles of child development and behavior; existence and availability of community-based and residential resources; recent case law and legislation.	The family court in each county with the local Bar Association or law school shall provide a continuing program of law guardian training.
Provision for Additions/ Removals	Appellate Division may add or delete attorneys. (No criteria mentioned.)	Advisory committee may recommend removals with written reasons at any time; no reasons needed if reappointment recommended at expiration of term.	No specific provisions, except by request of attorney or presiding justice.	By request of attorney, or request of family court judge, Appellate Division may also remove for misconduct or lack of diligence in accepting assignments.
Provision for Attorney to Request Removal from Panel	Not specified.	Not specified.	Yes, and may not be renamed without consent.	Yes, and may not be renamed without consent.
Mechanism for Appointment to Dept. Advisory Committee	Appellate Division, 1st Department.	Appellate Division, 2nd Department. Provides for six advisory committees in 2nd Dept., appointed by Appellate Division.	Presiding Justice.	Presiding Justice.
Membership of Dept. Advisory Committees	Three Family Ct. Judges, at least one rep. from each Bar Ass'n authorized to certify panel members, at least one law school faculty member required; three non-attorneys and additional members as needed, optional.	Provides for establishment of six committees. Each committee composed of Adm. Family Ct. Judges, rep. from each county Bar Ass'n, faculty member, three additional members, one non-attorney.	Family Ct. Judge, rep. of family and child care agency, of a department of social services, of probation, of a Bar Association, one law school faculty member, one county attorney, and ex officio the clerk of the Appellate Division.	Family Ct. Judge, rep. of family and child care agency, law school faculty member, county attorney, one non-attorney, not employed by government, director of administration (ex officio).

A Comparison of Appellate Court Rules for Law Guardian Panels

Term of Dept. Advisory Committee Members	Judicial members-4 years; non-non-judicial members-3 years.	3 years with reappointment permitted.	2 years.	Not specified.
Responsibilities of Dept. Advisory Committee				
Written Reports	Submit a written evaluation report of the panel plans and of panel attorneys to Appellate Division, Dec.31st, including information re: the efficiency of the plan, operational problems, and procedures to improve quality of representation.	Submit a written evaluation to Appellate Division on Dec. 31st each year by each committee, including an evaluation of the panel plan and training program and recommendations.	No mention (annual recommendations to presiding justice).	No mention (annual recommendations to presiding justice).
Complaints	Adopt procedures for processing complaints.	No mention (but can recommend removal).	No mention.	Family Court Judges obligated to report attorneys not meeting standards.
Dept. Advisory Committee Role Re Individual Law Guardians and Panels	Oversee the operations of panel plan and matters pertaining to the performance and professional conduct of individual law guardians.	Oversee, subject to Appellate Division supervision, operations of panel and performance of individual attorneys, make recommendations to Appellate Division re plan; submit lists of attorneys to Appellate Division, recommend removal.	Oversee operation of law guardian program and make recommendations annually to presiding justices re standards and administrative procedures to improve quality of representation.	Evaluate plan and lawyer's performance re: adequate numbers of law guardians available in each county; lawyer's willingness to accept assignments; and, familiarity with procedural and substantive law; adequate training; existence of adequate removal procedure; provision of effective representation.
Other		Submit lists of attorneys. With Appellate Division approval, add requirements for panel members.		
Appellate Division Reports**	Appellate Division must file report on operation of Family Court panels with Chief Administrator of the Courts on Jan. 31 of each year.	Appellate Division must file file report on operation of law guardian panels with Chief Administrator of Courts on Jan. 31st of each year.	No mention.	No mention.

**Now required in all Judicial Departments by OCA rules.

APPENDIX I

GLOSSARY

GLOSSARY*

ADJ Adjournment in contemplation of dismissal. An adjournment of the case, for a period of up to six months, with a view toward ultimate dismissal. Dismissal may be contingent upon the child meeting certain conditions and may include probation supervision; if the conditions are complied with the case is dismissed at the conclusion of the adjourned period.

Allocution An allocution refers to direct questioning by the court of the respondent. Such questioning is required in certain circumstances, including prior to the acceptance of an admission.

Appellate Division The Appellate Division is an intermediate Appellate Court that hears appeals from within the Judicial Department. Each Division also has some administrative responsibilities for the law guardian program. (See Chapter 6.)

Article 10 (Family Court Act) Legislation which governs child protective proceedings, including neglect and abuse.

Child Welfare Reform Act (CWRA) 1980 Legislation which defines state and local obligations to children in, or at risk of voluntary out-of-home placement, and emphasizes the state's commitment to limiting unnecessary foster care and ensuring children permanence.

Committee on the Handicapped (COH) A committee established by Section 4402 of the New York Education Law to provide for the evaluation of students suspected of having educationally handicapping conditions and determine an appropriate educational plan for a handicapped child..

Departmental Advisory Committees Volunteer committees on law guardian matters appointed by each Appellate Division.

Detention Temporary care of youths pending adjudication, disposition or placement; detention may be in either a secure or a non-secure facility (such as a group home).

Dispositional Hearing A hearing to determine the proper disposition of a case after a finding has been made.

Division for Youth (DFY) The state agency that operates residential and community-based treatment programs for adjudicated juveniles, and funds local programs aimed at prevention of juvenile delinquency.

Department of Social Services (DSS) The state agency responsible for the provision of social services, including services to prevent placement, and foster care, to children and families. Local district social services offices exist in every county.

*Note: This glossary is intended for those not familiar with legal proceedings or state agencies. The definitions are deliberately not technical.

Expungement The obliteration or destruction of records.

Extension of placement An extension of an order placing a child when the original order expires; extension of placements can be ordered only after a hearing to determine whether extension is necessary.

Fact-finding Hearing The adjudicatory stage of a family court proceeding, analogous to the trial stage of an adult civil or criminal proceeding.

Foster Care Approval (S.S.L. Section 358-a A statute which requires a court hearing to determine the appropriateness of a voluntary placement of a child for foster care.

Foster Care Review S.S.L. Section 392 A statute which requires periodic court reviews when a child has been in foster care for a continuous period of 18 months or longer.

Guardian ad litem An individual (attorney or non-attorney) appointed to safeguard the best interests of an incapacitated adult or of an infant.

Judicial Department The state is divided into four Judicial Departments, each of which has its own Appellate Divisions.

Juvenile Delinquent (F.C.A. Section 30.12) A person who has committed a crime (other than a juvenile offense) prior to attaining the age of 16 and, further, requires supervision, treatment or confinement.

Juvenile Offender A person who has committed a specified serious crime (limited to children ages 14 or 15 and in the case of murder, 13). A person who is charged with a juvenile offender crime is brought before the adult criminal court, though the case may be subsequently returned to the Family Court.

Law guardian An attorney who represents a youth who is the subject of, or a party to, a Family Court proceeding. A law guardian may be certified by the appropriate Appellate Division or may be employed by a legal aid society under a contract to represent children.

Office of Court Administration An office of statewide authority overseeing the courts.

PINS - Persons in need of supervision (F.C.A. Section 712) A child less than 16 years of age who is truant, a runaway or who is incorrigible, ungovernable or historically disobedient and beyond the control of his or her parent or guardian.

Probable Cause Hearing A hearing to determine whether sufficient evidence exists to proceed with the case; in a juvenile delinquency case it is also determined at the probable cause hearing whether sufficient evidence exists to justify continued detention.

Recertification The annual re-appointment by an Appellate Division of a law guardian to the law guardian panel.

Section 722-c A section of the county law that permits assigned counsel, including a law guardian, to request that the court approve the retention of expert services (e.g. mental health or investigative services), to be reimbursed by the child's county.

Special litigation Litigation undertaken to redress an allegedly system-wide problem or one which affects an entire "class" of plaintiffs. Examples that are relevant to juveniles include detention practices, department of social services policies or practices, or Division for Youth practices.

Suppression Hearing A hearing to determine whether specific evidence, such as property seized by the police, or a confession, should be excluded because it was obtained illegally.

Termination of Parental Rights The permanent termination of the child-parent relationship based upon abandonment, permanent neglect or permanent mental illness.

Uniform Case Record A comprehensive case record compiled by social service districts on each child and his family. Its format and contents are dictated by Social Services Law 409-F, augmented by departmental regulations. The uniform case record must include detailed information on the child service plan and all services provided to the family.

END