

## Social Workers and Attorneys for the Children – Privileged Communications

Attorneys are not trained to do risk assessments. Just like a social worker is not to do legal work, attorneys are not to do social work. What services should be provided, what reasonable efforts should be made to get a child in or out of a house, etc., are within the case (social) worker's discretion.

In New York City, the Administration for Children's Services provides the case workers. Outside New York City, the County Departments of Social Services do. Case workers are represented by the City's and the County's attorneys. One of the attorneys' responsibilities is to make sure that court orders are followed by their clients.

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A social worker is the child's "representative" for purposes of CPLR §3101(d)(2), which protects materials "prepared in anticipation of litigation or for trial" by the representative. *See Matter of Lenny McN.*, 183 A.D.2d 627, 584 NYS2d 17 (1<sup>st</sup> Dept. 1992).

The testimony of a social worker regarding the child's out-of-court statements would result in a waiver of the privilege, and thus the attorney's or the social worker's notes regarding the child's statements may become discoverable. *See Matter of Lenny McN.*, 183 A.D.2d 627, 584 NYS2d 17 (1<sup>st</sup> Dept. 1992); *People v. Lynch*, 23 N.Y.2d 262, 296 NYS2d 327 (1968); *People v. Marsh*, 59 AD2d 623, 398 NYS2d 166 (2d Dept. 1977).

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Attorneys for children were previously called Law Guardians. Attorneys for children may represent them from newborn to age twenty-one (21). For very young children, the attorney may make decisions for the child. In some circumstances, the attorney may "substitute judgment." The attorney investigates, finds out what happened, and makes a reasonable judgment. The only clear dividing line by age is age 13, when children are presumed to be able to make their own decisions.

The child enjoys the protection of the attorney-client privilege. *Matter of Angelina "AA"*, 211 AD2d 951, 622 NYS2d 336 (3<sup>rd</sup> Dept. 1995). CPLR §4503.

Attorney needs to consider whether disclosure of child-client's communications to other parties or the judge will facilitate representation, whether consent of the child would be knowing and voluntary, and whether the attorney may make the decision on behalf of the client because the client lacks capacity.

Eleven year old child could consent to disclosure. *Carballeira v. Shumway*, 273 A.D.2d 753.