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LAW AND CHILDREN

BY ANDREW SCHEPARD

Training the Lawyer to Represent the Whole Child

ON NOV. 3, 2003, The New York Times described representation for juveniles as “woefully inadequate” and a “wast[e] [of] the precious chance to get young defendants on the right course before it is too late.” Recent American Bar Association studies, according to the Times, found that: children often lack lawyers at key stages of the judicial process; children meet their lawyers for the first time in court; lawyers for children often have excessive case loads and inadequate investigative resources; and many of the lawyers are not trained about alternatives to incarceration for their juvenile clients. As a remedy, the Times called upon state bar associations to “do more training of lawyers representing juveniles.”¹

This month's column focuses on a new program, “Training the Lawyer to Represent the Whole Child,” developed by the National Institute for Trial Advocacy (NITA) to answer the Times' call to action. The program aims to provide state of the art interdisciplinary training and skill development for lawyers who make their careers working with children in the challenging environment of family court. It is a joint project between NITA and numerous national groups including: the Section of Litigation of the American Bar Association, Loyola University of Chicago ChildLaw Center, Northwestern University School of Law, the National Association of Counsel for Children, the Support Center for Child Advocates, the Juvenile Law Center, the Rocky Mountain Children' Law Center, and the American Bar Association Steering Committee on the Unmet Legal Needs of Children. It was offered for the first time at the University of Pennsylvania School of Law last year.

This year, “Training the Lawyer to Represent the Whole Child” will be offered in the New York metropolitan area at Hofstra University School of Law in cooperation with the law school's Center

Andrew Schepard is a professor of law at Hofstra University School of Law and the author of “Children, Courts and Custody: Interdisciplinary Models for Divorcing Families” to be published by Cambridge University Press in 2004.



for Children, Families and the Law from Thursday, June 17 to Tuesday, June 22, 2004.

The program is intended to develop lawyer skills in the following areas:

- The substantive law governing child and family advocacy,
- Courtroom advocacy, client counseling and negotiation skills,
- Interdisciplinary knowledge and its integration into child and family advocacy, especially around rehabilitation issues,
- Sensitivity to professional responsibility problems that arise in representing children.

“Training the Lawyer to Represent the Whole Child” is an intense but highly worthwhile educational experience suitable not only for lawyers with approximately two years experience who represent children, but also for others who participate in child-related legal proceedings — e.g., presenting agency attorneys and lawyers who represent parents. Program faculty includes both experts in child and family advocacy as well as NITA-trained faculty who focus on more general trial practice and advocacy skills. This blend provides participants with multiple perspectives on the development of their representational skills, each of which enrich the other.

Program organizers anticipate that continuing education credit will be available for participants, as they are at all NITA programs. Space in the program is limited to 48 participants who must commit six full days. While the program will draw participants from all over the country, organizers hope that many New York

lawyers will enroll. An organizing committee, which includes representatives from the assigned counsel (18-b) panel and the Juvenile Rights Division of the Legal Aid Society, has been created to guide the program's development and presentation at Hofstra Law School.

A significant number of full and partial scholarships for participants is available from NITA and a fund-raising effort by NITA and Hofstra Law School is beginning to insure that no one who wants to participate in the program is denied the opportunity to do so for financial considerations.

Given the sizable investment of time and energy “Training the Lawyer” requires, this column provides additional background and description to help readers identify suitable participants. More information about the program is available from the sources identified at the end of the column.

National Institute for Trial Advocacy

NITA is one of the premiere not-for-profit advocacy training institutions in the country. Its mission is to provide the best possible training in legal advocacy skills and techniques for resolving legal disputes and to foster professionally responsible behavior emphasizing ethics, candor, civility and judicial economy. NITA was founded in 1971 with funding from the Section of Judicial Administration of the ABA, the American College of Trial Lawyers, and the Association of Trial Lawyers of America.

NITA's programs emphasize learning-by-doing. NITA faculty, generally highly experienced lawyers who have undergone teacher training, demonstrate specific advocacy skills (e.g., direct- and cross-examination, motion argument) throughout each NITA program and also periodically lecture. The heart of any NITA program, however, is participant performance in simulated cases that NITA creates. The average participant to faculty ratio at a NITA Program is 3:1; faculty are thus able to provide intensive individualized critique of participant performance, often using videotape to review.

The Case File

"Training the Lawyer" applies NITA values and teaching methodology to the complex problem of training advocates for children who operate in both a pressured and interdisciplinary environment. Diane Geraghty of Loyola University Chicago School of Law and Thomas Geraghty and Angela Vigil of Northwestern University School of Law, professors of law and nationally recognized child advocates, developed the case file for the program, which illustrates the complexities of representing children.

The case file tells the story of 12-year-old Eva Pena, who is involved in simultaneous legal proceedings in the children's court of the mythical state of NITA that have the potential to dramatically alter her future. The first is a termination of parental rights action brought by NITA's Department of Family Services (DFS) that seeks to terminate Eva's mother's legal relationship to her children because of her use of drugs and child neglect. The second is a juvenile delinquency proceeding against Eva based on charges that she assaulted another child in her foster home. The case file contains relevant statutes, court documents, expert reports, witness statements and legal memoranda for both proceedings.

Both the termination of parental rights and the juvenile delinquency proceedings are hotly contested. The termination of parental rights proceeding was preceded by a child-neglect investigation when Eva and her brother were reported as hungry and abandoned by a neighbor to child protection authorities. DFS placed both children in foster homes. Eva's mother admitted the allegations of the neglect petition. She also pleaded guilty to cocaine possession.

DFS's reunification plans for the family required Eva's mother to enroll in a drug-treatment program, complete parenting classes and see Eva and her brother regularly at a visitation center. For a time, things went well. But then, because of job and life pressures, and perhaps because of actions and attitudes of DFS case workers, Eva's mother had a relapse, started using cocaine again and was arrested for possession of marijuana. The case against her was dropped because she could not be tied to the marijuana. Despite these problems, Eva's mother believes that, with support, she is ready to regain custody of her children. DFS disagrees and seeks to terminate her parental rights.

In the juvenile delinquency case, Eva has been accused of battery against the third child in her foster home along with herself and her brother. Eva and her brother were in numerous other foster placements before this one.

The third child in the home was seriously injured (broken ribs and ruptured spleen) following a period of very rough play with Eva and her brother. The authorities were immediately called to investigate. Eva's brother told investi-

gators that Eva was responsible for the injuries. At first, Eva denied knowledge of the injuries and then blamed her brother for them. But then, she confessed to the assault, providing details consistent with what her brother told the police.

Eva purportedly waived her *Miranda* rights before confessing, but her cognitive capacity to do that is the subject of significant dispute between mental health experts. Moreover, Eva confessed without her mother being present, even though her mother and caseworker were in the police station at approximately the same time. They claim they were not allowed to see her. Pending the hearing on the delinquency charge, Eva is placed in a good foster home, but with foster parents who cannot adopt her. Her brother is in the care of his maternal grandmother.

Eva Pena's case file explains why the program is called "Training the Lawyer to Represent the Whole Child." Lawyers representing children must be trained to represent their clients in simultaneous multiple proceedings (one of the reasons that this column has vigorously advocated the creation of a unified family court). It is common, for example, for an advocate to represent a child who is simultaneously the subject of a child-protection proceeding brought against the child's parents and a juvenile delinquency proceeding against the child.² The author of a recent law review article elaborates on the legal and psychological dilemmas for the child's lawyer that such "crossover children" create:

The attorney representing the parent accused of abuse or neglect [may] argue for dismissal of the abuse charges due to the existence of the child's delinquency petition. The parent's attorney may contend that as a result of the child's delinquent behavior, the child's testimony and assertions are less reliable and less valid. Additionally, the parent's attorney may argue that the child and possibly the parents will receive services as a result of the delinquency petition and therefore any services arising out of the child welfare petition are redundant [D]espite an attorney's ability to overcome legal obstacles created by a parent's attorney, such impediments not only slow down the legal process but sometimes work to invalidate the child's needs as victim. The psychological impact on a child of being told the injury a parent or guardian caused him or her is less significant than the hurt that the child brought on someone else can be very damaging.³

The tasks that the child's lawyer must perform in any case require great skill and judgment. The child's lawyer must interview and counsel his or her client in a developmentally appropriate manner. The child's lawyer must be aware of ever-changing governing legal doctrine (e.g., on when a minor is competent to waive legal rights). The child's lawyer must be able to con-

duct direct- and cross-examination of both fact witnesses and mental health experts on subjects like the efficacy of drug treatment and the competence of minors to understand legal concepts. The child's lawyer must be able to negotiate plea bargains and help develop a plan for the child's rehabilitation should the child be found guilty.

The exercises and lectures in "Training the Lawyer" aim at helping participants develop the skills that a child's lawyer needs to provide effective representation. They include:

- Developing a theory of the case for both the termination of parental rights and juvenile delinquency proceeding involving Eva,
- Planning for and conducting direct- and cross-examination of fact and mental health expert witnesses in both proceedings (drug treatment experts in the termination of parental rights case and psychologist giving opinions about Eva's competence to waive her *Miranda* rights in the juvenile delinquency proceeding),
- A simulated trial in the termination of parental rights case,
- Interviewing and counseling Eva,
- Interviewing other child witnesses,
- Simulations addressing ethical issues in counseling child and adolescent clients (e.g., can the lawyer represent both Eva and her brother?),
- Planning and negotiating a plea bargain for Eva in the juvenile delinquency case,
- A simulated hearing on the motion to suppress Eva's confession in the juvenile delinquency case, and
- Closing arguments in the juvenile delinquency case, emphasizing disposition and post-disposition advocacy.

Program organizers look forward to bringing "Training the Lawyer to Represent the Whole Child" to New York. Readers who are interested in participating, or have comments or suggestions, or simply want further information can contact Mary Anne Hoebeke, NITA's Development Director, at (800) 225-6482, ext. 224, or by e-mail at mhoebeke@nd.edu or Lisa Berman, coordinator of Hofstra University School of Law's Center for Children, Families and the Law, at (516) 463-4758 or by e-mail at lawlhb@hofstra.edu.

(1) "Lawyers for Juveniles," *The New York Times*, Nov. 3, 2003 at A !8, col. 1 (editorial).

(2) See Katharine W. Scrivner, "The Dilemma of the Abused Delinquent," 40 *FAM. CT. REV.* 235 (2002).

(3) *Id.* at 239.