

April 2, 2020

Dear CAFL Appellate Panel Attorneys:

We are sending this letter to provide guidance and answer your questions about contact with appellate clients during the Covid-19 pandemic. Before doing so, however, we want to stress that your health and safety are of paramount concern, so we urge you to follow current public health guidelines (such as those issued by the WHO, the CDC, or DPH) for any in-person contact you have with your clients and others.

We also want to thank all of you again for your dedication and commitment to your parent, young adult, and child clients. No words can adequately convey our appreciation for all that you are doing to protect their legal rights and interests during this time. In addition, we want to remind you that appellate mentors, the Appellate Panel Support Unit, and (in some circumstances) the staff Appellate Unit members are available to provide support and respond to questions you may have.

CAFL private appellate attorneys are involved in legal matters that are intensely personal and that regularly call for intimate, in-person communication and interaction with parent and child clients. The current pandemic, however, requires all of us to minimize in-person interactions to protect our own health and the health of our clients, our family members and friends, and the public generally.

In view of all of this, we want to provide guidance to CAFL private appellate attorneys regarding in-person and other forms of client contact.

Representation of Parents at the Outset of a Case

The Appellate Performance Standards require attorneys to “make all reasonable efforts to meet” with their clients within a week of the assignment in order to enable the attorney to establish an attorney-client relationship. App. Perf. St. 5. What efforts are “reasonable,” as well as the meaning of “meet,” are different under the current circumstances than in ordinary times. **If, upon being assigned to an appellate client, an attorney for a parent is able to communicate effectively and confidentially with the client about the case through a phone call or some type of video communication,¹ the attorney may do so and postpone the initial in-person meeting.²**

Keep in mind, of course, that in-person communication is almost always best for sensitive discussions and relationship-building. Please tell your parent clients that you *will* speak together in person soon, when such meetings are safer. In some cases, the client may insist on immediate in-person communication, even when alternative ways to communicate may seem more

¹ Video conferencing is available through Facetime, Skype, WhatsApp, Google Hangouts, and Zoom, among others. Information about these platforms is available on the CPCS/CAFL website.

² The attorney should document the reasons for that decision in the client’s case file.

appropriate under the circumstances. In other cases, you may determine that effective and confidential communication is impossible without it taking place in person. In either event, if you are unable to meet with the client because of valid concerns you have about your health or the health of others (or for any other reason), we ask that you either (a) not accept the assignment, return the assignment, or move to withdraw³; (b) hire an associate or a social worker who is willing to meet in person with the client; or (c) ask the Appellate Panel Support Unit to assign co-counsel for the client for this purpose.⁴

Representation of Children at the Outset of a Case

Appellate attorneys for children must also “make all reasonable efforts to meet” with the client after assignment. App. Perf. St. 5.⁵ **When representing children who are able to express their preferences verbally**, you may be able to arrange to meet them in person in a safe fashion, consistent with current public health guidance.⁶ For example, you can suggest to the child and the child’s caretaker that you can sit or walk (six feet away from each other) outside with the child and communicate in that way. Although this may be awkward, it will often be the best option, given the importance of in-person contact.

But for some child clients, in-person contact at the outset of a case may not be possible without significant health-related risks for the child or the child’s caretaker – for example, when a child is medically compromised or placed with an elderly relative. In such a case, telephone or video communication may be the best option. In that case, ask if the child is familiar with video communication apps such as those set forth in footnote 1. (Most teenagers and many pre-teens are very familiar with them.) As a reminder, when using those apps, you will need to instruct the child to communicate with you in private and explain that confidentiality is very important. You may also need to explain to the child’s caretaker that you will be having such communication with the child periodically and that you hope to meet with the child and caretaker at the placement (i.e., in person) in the near future. Although telephone or video contact with child clients is not ideal, it is still extremely important. Without such communication, it is very difficult for the child and you to share information about the case and for you to elicit the child’s preferences.

When representing younger children (including preverbal children), counsel should also explore options for a safe, in-person visit with the client. If a safe, in-person viewing of a younger child client is not possible, counsel should arrange (cooperatively with trial counsel) for

³ If you are returning the assignment or withdrawing from the case, please make sure that the Appellate Panel Support Unit and successor counsel are aware of the need for in-person contact with that client.

⁴ Please note that the two-attorney prohibition in G.L. c. 211D, sec. 6B does not apply to appeals.

⁵ See also CAFL Appellate Practice Advisory (August 28, 2019), “Meeting & Communicating with Child Clients on Appeal,” available at: <https://www.publiccounsel.net/cafl/wp-content/uploads/sites/7/Child-client-practice-tip-8-28-2019.pdf>

⁶ The latest prevention guidance from the Department of Public Health (as of April 1, 2020) is available at <https://www.mass.gov/info-details/covid-19-prevention-and-treatment#prevention->.

an alternate way of ensuring that the child's placement is safe and appropriate and that their medical, mental health, and other needs will be met. This may include communicating with the caretaker and viewing the child and the placement through electronic means.⁷

We trust that decisions that you make about whether to see a client in person at the outset of a case will be based primarily on the client's wishes and needs. We understand, however, that in some cases you may be unable to abide by the client's wishes or meet their needs regarding contact because of valid health concerns you have about yourself or others. In such event, we ask that you take one of the steps set forth at the top of page two, above.

Ongoing Contact with Parent and Child Clients

The Appellate Performance Standards require that, on an ongoing basis, appellate counsel "confer with the client" and "keep the client informed" about the case; they also require that appellate counsel for a child "communicate with the child to the extent necessary to maintain a normal attorney-client relationship with the child." App. Perf. St. 6. The Appellate Panel Support Unit explained in an August 2019 practice advisory (see footnote 5) that appellate counsel for a child should, after the initial meeting, meet with the client (a) after any placement change; (b) before counsel drafts the brief; (c) within a few weeks of oral argument; and (d) at the close of the appeal. Most of these meetings are to ensure that the child's position hasn't changed.

As noted above, in-person meetings are preferable for such ongoing contact. However, if counsel is unable to meet with the client in person,⁸ and the client has access to a phone or computer, counsel should communicate with the client through electronic means as a temporary substitute for in-person meetings. This may include phone, text, email, or some type of video conferencing. As noted above, please be mindful of confidentiality when communicating with clients in this fashion (for example, by asking your client to be in a private place when talking to you on the phone). In addition, for all child clients, the attorney should find means for regularly ensuring (cooperatively with trial counsel) that the child's placement is safe and appropriate and that their medical, mental health, and other needs are being met. This may include communicating with the caretaker and (for younger children) viewing the child and placement through electronic means.

We recognize the challenges that the Covid-19 pandemic presents, not only with respect to representation of appellate clients in CAFL cases, but also in your personal life. We hope that

⁷ As with the representation of parents, if an attorney representing a child decides not to meet in person with the client within a week after being assigned, the attorney should document the reasons for that decision in the client's case file.

⁸ As noted above, if counsel is unable to meet with the client in person but the client insists on in-person communication, or effective or confidential communication is impossible without it being in person, counsel should take one of the steps set forth at the top of page two. Attorneys are encouraged to consult with their mentor (if they have one) or the Appellate Panel Support Unit in the course of making this decision. The reasons for the decisions should be included in the client's case file.

you and those around you are able to stay safe and healthy. We will do our best to support you in your work as this situation continues to unfold.

Once again, please feel free to contact your mentor or the CAFL Appellate Panel Support Unit if you have any questions. Thank you again for doing this work during these incredibly trying times.

Sincerely,

Mike Dsida, Deputy Chief Counsel, CAFL
and
The CAFL Appellate Panel Support Unit