

Oregon State Bar

# Report of the Task Force on Standards of Representation in Juvenile Dependency Cases

**June 27, 2014**

# Foreword

The original version of the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (hereafter, the performance standards) was approved by the Board of Governors on September 25, 1996. Significant changes to the original performance standards were adopted in 2006, and an additional set of standards pertaining to representation in post-conviction standards were adopted in 2009.

As noted in the earlier revision, in order for the performance standards to continue to serve as valuable tools for practitioners and the public, they must be current and accurate in their reference to federal and state laws and they must incorporate evolving best practices.

The Foreword to the original performance standards noted that “[t]he object of these [g]uidelines is to alert the attorney to possible courses of action that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible.” This continues to be the case, as does the following, which was noted in both the Foreword in the 2006 revision and the Foreword to the 2009 post-conviction standards:

“These guidelines, as such, are not rules or requirements of practice and are not intended, nor should they be used, to establish a legal standard of care. Some of the guidelines incorporate existing standards, such as the Oregon Rules of Professional Conduct, however which are mandatory. Questions as to whether a particular decision or course of action meets a legal standard of care must be answered in light of all the circumstances presented.”

We hope that the revised Performance Standards, like the originals, will serve as a valuable tool both to the new lawyer or the lawyer who does not have significant experience in criminal and juvenile cases, and to the experienced lawyer who may look to them in each new case as a reminder of the components of competent, diligent, high quality legal representation.



Tom Kranovich  
Oregon State Bar President

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# Report of the Task Force on Standards of Representation in Juvenile Dependency Cases

## Summary and Background

In September of 1996, the Oregon State Bar Board of Governors approved the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases. In May of 2006, the Board accepted revisions to the 1996 standards. In 2012, at the direction of the OSB Board of Governors, two separate workgroups began meeting to work on significant revisions to the standards in criminal, delinquency and dependency cases. One group focused on juvenile dependency standards and the other on adult criminal and juvenile delinquency standards.

The task force created to address Juvenile Dependency standards included members from academia as well as from both private practice and public defender offices. Task force members were Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shannon Storey, Office of Public Defense Services; Joseph Hagedorn, Metro Public Defender; Leslie Harris, University of Oregon Law School; Tahra Sinks, private practice in Salem; LeAnn Easton, Dorsay & Easton LLP; and Joanne Southey, Department of Justice Civil Enforcement Division.

The following pages include new standards produced by the juvenile dependency task force which are recommended to replace what is currently published on the OSB website as the third specific standard “Specific Standards for Representation in Juvenile Dependency Cases”. These changes, when combined with the revisions recently made to the second specific standard (Criminal and Juvenile Delinquency) may make the “general standards” in Section 1 duplicative, as the material covered broadly in the that document is now included in more details both in the Criminal and Juvenile sections.

The goal of this task force was to create a revised set of standards that was both easy for the practitioner to read and understand and also provide relevant detail and explanations as necessary. As with the criminal standards, this task force sought to include, in addition to the rules and implementation sections, commentary to both explain the rationale behind the individual standards and to provide relevant real world examples when possible. Thus each section of the standards includes the “black letter” standard itself, one or more “Actions” to

guide the practitioner in achieving the standard and then Commentary to more fully explain the Actions and the Standard.<sup>1</sup>

It became very clear to members of the task force throughout this process that customs and practices in juvenile dependency cases vary widely from county to county in Oregon. While some of these differences may be more stylistic than substantive, some may have a significant impact on the rights of children and parents. One of the goals in writing the action and commentary sections of the standards was identify for attorneys best practices that may differ from the custom in their jurisdiction. While this knowledge may not always result in a change in local court practice, reference to the standards may be persuasive to a lawyer who is attempting to convince a court to deviate from its traditional practice.

One criticism of the previous version of the juvenile standards was that some sections were essentially long checklists without much explanation as to why items on the list were important. Additionally, because of the desire to make sure every contingency was covered, checklists often become impractically long, which made them less useful for the reader. The task force felt that it was preferable to replace these sections with a more through explanation of the material.

However, the workgroup did feel that there was some value in checklists in that they can provide inexperienced practitioners with a visual aid to help them to avoid forgetting important tasks or issues. For this reason, much of the information that was previously included in the checklists contained in the standards has been moved to an appendix at the end of the new juvenile standards section.

Another very important change made in this version of the juvenile standards was bifurcating the juvenile standards into a section for lawyers representing children and a section for lawyers representing parents. While there is considerable overlap between these two sections, and while this choice does make the overall standards much longer, it was felt that this created a more useful product for practitioners. When standards for lawyers of parents and children are combined, it becomes critical to frequently interrupt sections with discussions of exceptions or special cases that are applicable to only some of the readers. By separating these into two different parallel sections, each section can be more streamlined and more focused on the needs of the reader. While some sections may have very similar structures, and may in fact repeat the exact same language, other sections are extremely different.

For example in forming and maintaining the lawyer-client relationship, lawyers for children are confronted with the reality that their clients may not yet have a fully developed understanding of their situation or of the nature of the proceeding. Lawyers for children must carefully consider their client's mental development and their decision-making capacity.

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<sup>1</sup> The Juvenile Dependency Task Force preferred the term "Action" to the term "Implementation" that is use in the criminal standards and in the previous version of the juvenile standards. However, this decision is largely stylistic, and the "Implementation" and "Action" items listed in each document serve the same purpose.

Lawyers for parents, on the other hand, have a more straightforward attorney-client relationship with fewer complications and pitfalls based on their client's capacity.

Both sections, as well as the appendices, are included in the report below. However, when publishing this material online, it may be advisable to break the sections up into separate documents for ease of reading or printing.

Throughout the process of creating these revised standards, the task force has sought input from practitioners and judges and has incorporated suggestions when appropriate.

The Obligations of the Lawyer for Children begins on page 4.

The Obligations of the Lawyer for Parents begins on page 44.

The appendixes begin on page 85.

# THE OBLIGATIONS OF THE LAWYER FOR CHILDREN IN CHILD PROTECTION PROCEEDINGS WITH ACTION ITEMS AND COMMENTARY

## STANDARD 1 - ROLE OF LAWYER FOR THE CHILD

- A. The role of the lawyer for the child is to ensure that the client is afforded due process and other rights and that the client's interests are protected. For a child with full decision-making capacity, the lawyer must maintain a normal lawyer-client relationship with the child, including taking direction from the child on matters normally within the client's control.**

Action:

Consistent with Rule 1.14 of the ORCP, the child's lawyer should determine whether the child has sufficient maturity to understand and form a lawyer-client relationship and whether the child is capable of making reasoned judgments and engaging in meaningful communication.

Action:

The lawyer must explain the nature of all legal and administrative proceedings to the extent possible, and, given the client's age and ability, determine the client's position and goals. The child's lawyer also acts as a counselor and advisor. This involves explaining the likelihood of achieving the client's goals and, where appropriate, identifying alternatives for the client's consideration. In addition, the lawyer for the child should explain the risks, if any, inherent in the client's position. Once the child has settled on positions and goals, the lawyer must vigorously advocate for them.

Action:

The child's lawyer should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, the child's lawyer should determine if the child wishes the lawyer to take no position in the proceeding or if the child wishes the lawyer or someone else to make the decision for him or her. In either case, the lawyer is bound to follow the client's direction.

Action:

The lawyer may not request the appointment of a Court Appointed Special Advocate (CASA) or other advocate for the child's best interests where the child is competent to make decisions.

Commentary:

When a child client has the capacity to instruct the lawyer, the lawyer-client relationship is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty and communication and the duty to provide independent advice.

The ability of a child client to express a preference constitutes a threshold requirement for determining ability to instruct the lawyer. When the lawyer can discern the client's preference through investigation rather than eliciting the child's own verbally articulated position the lawyer must advocate for that preference.

When a child client is capable of instructing the lawyer, decisions that are ultimately the client's to make include whether to:

- 1) Contest, waive trial on petition, negotiate changes in or testify about the allegations in the petition;
- 2) Stipulate to evidence that is sufficient to form a basis for jurisdiction and commitment to the custody of DHS;
- 3) Accept a conditional postponement or dismissal; or
- 4) Agree to specific services or placements.

As with any client, the child's lawyer may counsel against the pursuit of a particular position sought by the child. Without unduly influencing the child, the lawyer should advise the child by providing options and information to assist the child in making decisions. The lawyer should explain the practical effects of taking various positions, the likelihood that a court will accept particular arguments and the impact of such decisions on the child, other family members, and future legal proceedings. The child's lawyer should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's lawyer should ensure that the decision the child ultimately makes reflects his or her actual position.

- B. For a child client with diminished capacity, the child's lawyer should maintain a normal lawyer-client relationship with the child as far as reasonably possible and take direction from the child as the child develops capacity. A child may have the capacity to make some decisions but not others.**



### Commentary:

The question of diminished capacity should not arise unless the lawyer has some reason to believe that the client does not have the ability to make an adequately considered decision. A child's age is not determinative of diminished capacity. The commentary to the ABA Model Rule of Professional Responsibility upon which ORCP 1.14 is based recognizes that there exist "intermediate degrees of competence" and that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."

The assessment of a child's capacity must be based upon objective criteria, not the lawyer's personal philosophy or opinion. The assessment should be grounded in insights from child development science and should focus on the child's decision-making process rather than the child's choices themselves. Lawyers should be careful not to conclude that the child suffers diminished capacity from a client's insistence upon a course of action that the lawyer considers unwise or at variance with lawyer's view. For example, the decision of a thirteen-year-old to return home to a marginally fit parent may not be in the child's best interests, but the child may well be competent to make that decision.

In determining whether a child has diminished capacity, counsel may consider the following factors:

- 1) The child's ability to communicate a preference;
- 2) Whether the child can articulate reasons for the preference;
- 3) The decision making process used by the child to arrive at the decision (e.g., is it logical, is it consistent with previous positions taken by the child, does the child appear to be influenced by others, etc.); and
- 4) Whether the child appears to understand the consequences of the decision.<sup>2</sup>

A child may have the ability to make certain decisions, but not others. For example, a child with diminished capacity may be capable of deciding that he or she would like to have visits with a sibling, but not be capable of deciding whether he or she should return home or remain with relatives on a permanent basis. The lawyer should continue to assess the child's capacity as it may change over time.

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<sup>2</sup> See, *Report of the Working Group on Determining the Child's Capacity to Make Decisions*, 64 *Fordham Law Review* 1339 (1996).

- C. When it is not reasonably possible to maintain a normal lawyer-client relationship generally or with regard to a particular issue, the child’s lawyer should conduct a thorough investigation and then determine what course of action is most consistent with protecting the child in the particular situation and represent the child in accordance with that determination. This determination should be based on objective facts and information and not the lawyer’s personal philosophy or opinion.**

Action:

Where the child client is incapable of directing the lawyer, the lawyer must thoroughly investigate the child’s circumstances, including important family relationships, the child’s strengths and needs, and other relevant information and then determine what actions will protect the child’s interests in safety and permanency.

Action:

In determining what course of action to take when the child cannot provide direction, the lawyer must take into consideration the child’s legal interests based on objective criteria as set forth in the laws applicable to the proceeding, the goal of expeditious resolution of the case and the use of the least restrictive or detrimental alternatives available.

Commentary:

If the child is able to verbalize a preference but is not capable of making an adequately considered decision, the child’s verbal expressions are an important factor to consider in determining what course of action to take. The child’s needs and interests, not the adults’ or professionals’ interests, must be the center of all advocacy. The child’s lawyer should seek out opportunities to observe and interact with the very young child client. It is also essential that lawyers for very young children have a firm working knowledge of child development and special entitlements for children under age five.

The child’s lawyer may wish to seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert.

- D. When the lawyer reasonably believes the child has diminished capacity, is at risk of substantial physical, sexual, psychological or financial harm, and cannot adequately act in his or her own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.**

Action:

When a child with diminished capacity is unable to protect him or herself from substantial harm, ORPC 1.14 allows the lawyer to take action to protect the client. Oregon Rule of Professional Responsibility 1.6(a) implicitly authorizes a lawyer to reveal information about the child, but only to the extent reasonably necessary to protect the child's interests.<sup>3</sup> Information relating to the representation of a child with diminished capacity is protected by Rule 1.6 and Rule 1.14 of the Oregon Rules of Professional Conduct.

Action:

The lawyer should choose the protective action that intrudes the least on the lawyer-client relationship and is as consistent as possible with the wishes and values of the child.

Action:

In extreme cases, i.e., where the child is at risk of substantial physical harm and cannot act in his or her own interest and where the child's lawyer has exhausted all other protective action remedies, the child's lawyer may request the court to appoint a best-interest advocate such as a CASA to make an independent recommendation to the court with respect to the best interests of the child.

Action:

When a child has been injured or suffers from a disability or congenital condition that results in the child having a progressive illness that will be fatal and is in an advanced stage, is in a coma or persistent vegetative state, or is suffering brain death, State ex rel. Juvenile Dept. of Multnomah County v. Smith<sup>4</sup>, provides that the lawyer for the child should consult with the parent if appropriate and consider seeking appointment of a guardian ad litem under the juvenile and probate code in a consolidated case with the authority to consent to medical care, including the provision or withdrawal of life sustaining medical treatment pursuant to ORS 127.505 et seq.

Commentary:

This standard implements paragraph (b) of ORPC 1.14, which states the generally applicable rule that when a client has diminished capacity and the lawyer believes the client is at risk of substantial harm, the lawyer may take certain steps to protect the client, such as consulting with family members or protective agencies and, if necessary,

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<sup>3</sup> ORPC 1.14(c).

<sup>4</sup> 205 Or. App. 152, 133 P3d 924 (2006)

requesting the appointment of a guardian ad litem. In addition, the commentary to the Rule notes that if a guardian is not appointed, “the lawyer often must act as de facto guardian.”

Substantial harm includes physical, sexual, financial and psychological harm. Protective action includes consultation with family members or professionals who work with the child. Lawyers may also utilize a period of reconsideration to allow for an improvement or clarification of circumstances or to allow for an improvement in the child’s capacity.

Ordinarily, under ORPC 1.6, unless authorized to do so, a child’s lawyer may not disclose information related to representation of the child. When taking protective action pursuant to this section, the lawyer is impliedly authorized to make necessary disclosures, even when the client directs the lawyer to the contrary. However, the lawyer should make every effort to avoid disclosures if at all possible. Where disclosures are unavoidable, the lawyer must limit the disclosures as much as possible. Prior to any consultation, the lawyer should consider the impact on the client’s position and whether the individual is a party who might use the information to further his or her own interests. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client’s interests before discussing matters related to the client. If any disclosure by the lawyer will have a negative impact on the client’s case or the lawyer-client relationship, the lawyer must consider whether representation can continue and whether the lawyer-client relationship can be re-established.

Requesting the judge to appoint a CASA or other best interest advocate may undermine the relationship the lawyer has established with the child. It also potentially compromises confidential information the child may have revealed to the lawyer. The lawyer cannot ever become the best interest advocate, in part due to confidential information that the lawyer receives in the course of representation. Nothing in this section restricts a court from independently appointing a best interest advocate when it deems the appointment appropriate.

- E. The child’s lawyer should not advise the court of the lawyer’s determination of the child’s capacity, and, if asked, should reply that the lawyer’s relationship with the client is privileged.**

Commentary:

The lawyer’s assessment of a child client’s capacity to direct the case is a confidential matter that goes to the heart of the lawyer-client relationship. Even though sometimes judges want to know whether the lawyer is acting at the client’s direction or is making a substituted judgment, the lawyer should not provide this information, since

doing so fundamentally undermines the lawyer's ability to be an effective advocate for the child.

## **STANDARD 2 - RELATIONSHIP WITH THE CHILD CLIENT**

- A. The child's lawyer should insure that the child is aware that he or she has a lawyer and communicate with the child before all court appearances, case status conferences, pretrial conferences and mediations, and any important decision affecting the child's life, and following (and, when possible, before) significant transitions including, but not limited to, initial removal and changes in placement.**

### Action:

The child's lawyer must meet with the child within 72 hours of counsel's appointment. During the first meeting with the child, the lawyer must explain his or her role to the client.

### Action:

The child's lawyer should meet or communicate with a child client immediately after becoming informed of a change in the child's placement if not beforehand.

### Action:

A child's lawyer must have contact with the client before court hearings and Citizen Review Board (CRB) reviews, in response to contact by the client, when a significant change of circumstances must be discussed with the client or when a lawyer learns of emergencies or significant events affecting the child.

### Action:

A child's lawyer must communicate with the child at least quarterly. Counsel must determine whether developing and maintaining a lawyer-client relationship requires that the meetings occur in person in the child's environment or whether other forms of communication, such as a telephone or email conversation are sufficient.

### Commentary:

Establishing and maintaining a relationship with the child client is the foundation of representation. It is often more difficult to develop a relationship and trust with a child client than with an adult. Meeting with the child personally and regularly allows the lawyer to develop a relationship with the client and to assess the child's circumstances. The child's position, interests, needs and wishes change over time. A lawyer for a child

cannot be fully informed of such changes without developing a relationship through frequent contacts.

In order to provide competent representation, the lawyer for a child should initially meet with the child in the child's environment to understand the child's personal context, unless the client indicates that he or she does not want the lawyer to do this. The benefits of meeting with an older child who can convey information and express his or her wishes are obvious. However, meeting with younger children, including preverbal children, is equally important. ORPC 1.14 recognizes the value of the child client's input and further recognizes that varying degrees of input from children at different developmental stages may occur. In addition, preverbal children can provide valuable information about their needs through their behavior, including their interactions with their caretakers and other children or adults.

The child's lawyer must communicate with a child client at least quarterly. The extraordinary circumstances under which counsel may have contact with a child client less than quarterly include situations where the child is "on the run" and his or her whereabouts are unknown, there is strong evidence that the child will be adversely affected by communicating with counsel or the child refuses to communicate with counsel.

**B. The child's lawyer should provide the child with contact information in writing and establish an effective system for the child to communicate with the lawyer.**

Action:

The child's lawyer should ensure the child understands how to contact the lawyer and that the lawyer wants to hear from the client on an ongoing basis. The lawyer should explain that even when the lawyer is unavailable, the child should leave a message.

Action:

The lawyer must respond to client messages in a reasonable time period.

Commentary:

It is important that the child's lawyer, from the beginning of the case, is clear with the child that the lawyer works for the child, is available for consultation and wants to communicate regularly. This will help the lawyer support the client, gather information for the case and learn of any difficulties the child is experiencing that the lawyer might help address. The lawyer should explain to the client the benefits of bringing issues to the lawyer's attention rather than letting problems persist.

Communicating with child clients and other parties by email may be the most effective means of maintaining regular contact. However, lawyers should also understand the pitfalls associated with communicating sensitive case history and material by email. Not only can email create greater misunderstanding and misinterpretation, it can also become documentary evidence in later proceedings. The lawyer should treat this form of communication as not confidential and advise the client accordingly.

- C. The child’s lawyer should communicate with the child in a developmentally and culturally appropriate manner. An interpreter should be retained when the lawyer and child are not fluent in the same language.**

Action:

The lawyer must explain to the child in a developmentally appropriate way all information that will assist the child in having maximum input in determining his or her position. Interviews should be conducted in private.

Action:

The lawyer must be aware of the child’s cultural background and how that background affects effective communication with the child.

Action:

The lawyer must explain the result of all court hearings and administrative proceedings to the client in a manner appropriate, given the child’s age, abilities, cultural background and wish to be informed.

Action:

The lawyer should ensure a qualified interpreter is involved when the lawyer and client are not fluent in the same language.

Commentary:

A child’s lawyer must be adept at giving explanations, asking developmentally and culturally appropriate questions and interpreting the child’s responses in such a manner as to obtain a clear understanding of the child’s preferences. This process can and will change based on age, cognitive ability and emotional maturity of the child. The lawyer needs to take the time to explain thoroughly and in a way that allows and encourages the child to ask questions and that ensures the child’s understanding.

In addition to communicating with the child client, the lawyer should review records and consult with appropriate professionals and others with knowledge of the child. The lawyer also may find it helpful to observe the child's interactions with foster parents, birth parents and other significant individuals. This information will help counsel to better understand the child's perspective, priorities and individual needs, and will assist the child's lawyer identifying relevant questions to pose to the child.

The lawyer should advocate for the use of an interpreter when other professionals in the case who are not fluent in the same language as the client are interviewing the client. The lawyer should become familiar with interpreter services that are available for out-of-court activities such as client conferences, provider meetings, etc.

**D. The child's lawyer should show respect to the client and act professionally with the child.**

Action:

A child's lawyer should support his or her client and be sensitive to the client's individual needs. Lawyers should remember that they may be their clients' only advocate in the system and should act accordingly.

Commentary:

Often lawyers practicing in abuse and neglect court are a close-knit group who work and sometimes socialize together. Maintaining good working relationships with other players in the child welfare system is an important part of being an effective advocate. The lawyer, however, should be vigilant against allowing the lawyer's own interests in relationships with others in the system to interfere with the lawyer's primary responsibility to the client. The lawyers should not give the impression to the client that relationships with other lawyers are more important than the representation the lawyer is providing the client. The client must feel that the lawyer believes in him or her and is actively advocating on the client's behalf.

**E. The child's lawyer should understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client.**

Action:

The lawyer must fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive or waive a privilege or right to confidentiality. If the lawyer for a child determines that the child is unable to make an adequately considered decision with respect to waiver, the lawyer must act with respect to waiver in a manner consistent with and in furtherance of the client's position in the overall litigation.



Action:

Consistent with the client's interests and goals, the lawyer must seek to protect from disclosure confidential information concerning the client.

Action:

A lawyer should try to avoid publicity connected with the case that is adverse to the client's interests. A lawyer should be cognizant of the emotional nature of these cases, the confidential nature of the proceedings and the privacy needs of the client. A lawyer should protect the client's privacy interests, including asking for closed proceedings when appropriate.

- F. The child's lawyer should be alert to and avoid potential conflicts of interest, or the appearance of a conflict of interest, that would interfere with the competent representation of the client.**

Action:

A lawyer or a lawyer associated in practice, should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases or closely related matters unless it is clear there is no conflict of interest between the parties as defined by the Oregon Rules of Professional Conduct (ORPC). Lawyers should also follow ORPC 1.8–1.13 relating to conflicts of interests and duties to former clients.

Commentary:

A lawyer should be especially cautious when accepting representation of more than one child. A lawyer should avoid representing multiple siblings when their interests may be adverse and should never represent siblings when it is alleged that one sibling has physically or sexually abused another sibling.

In analyzing whether a conflict of interest exists, the lawyer must consider whether pursuing one client's objectives will prevent the lawyer from pursuing another client's objectives, and whether confidentiality may be compromised. Conflicts of interest among siblings are likely if one child is allegedly a victim and the other(s) are not, if an older child is capable of directly the representation but a younger child is not, or if older children object to the permanency plan for younger children.

Child clients may not be capable of consenting to multiple representations even after full disclosure. For a child client not capable of considered judgment or unable to execute any written consent to continued representation in a case of waivable conflict of interest, the lawyer should not represent multiple parties.

**G. The child’s lawyer should advocate for actions necessary to meet the client’s educational, health and mental health needs.**

Action:

Consistent with the child's wishes, the child's lawyer should identify the child’s needs and seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement an individualized service plan. These services should be culturally competent, community-based whenever possible and provided in the least restrictive setting appropriate to the child’s needs. These services may include, but are not limited to:

- 1) Family preservation-related prevention or reunification services;
- 2) Sibling and family visitation;
- 3) Domestic violence services, including treatment;
- 4) Medical and mental health care;
- 5) Drug and alcohol treatment;
- 6) Educational services;
- 7) Recreational or social services;
- 8) Housing;
- 9) Semi-independent and independent living services for youth who are transitioning out of care and services to help them identify and link with permanent family connections; and
- 10) Adoption services.

Action:

Consistent with the child's wishes, the child's lawyer should assure that a child with special needs receives the appropriate and least restrictive services to address any physical, mental or developmental disabilities. These services may include, but should not be limited to:

- 1) Special education and related services;
- 2) Supplemental security income (SSI) to help support needed services;
- 3) In home, community based behavioral health treatment or out-patient psychiatric treatment;
- 4) Therapeutic foster or group home care; and
- 5) Residential/in-patient behavioral health treatment.

**H. The child’s lawyer should report abuse or neglect discovered through lawyer-client communication only if the child consents to the disclosure.**

Commentary:

Under ORS 419B.010, lawyers are mandatory child abuse reporters. However, a lawyer is not required to report if the information that forms the basis for the report is privileged. Further, ORS 419B.010(1), “A lawyer is not required to make a report under this section by reason of information communicated to the lawyer in the course of representing a client if disclosure of the information would be detrimental to the client.” Lawyers should consult with the lawyer advisors at the Oregon State Bar when they face a close question under these rules.

**I. The child’s lawyer should consider expanding the scope of representation.**

Action:

If a lawyer, in the course of representation of a client under the age of 18, becomes aware that the client has a possible claim for damages that the client cannot pursue because of his or her civil disability, the lawyer should consider asking the court that has jurisdiction over the child to either appoint a guardian ad litem for the child to investigate and take action on the possible claim or issue an order permitting access to juvenile court records by a practitioner who can advise the court whether to seek appointment of a guardian ad litem to pursue a possible claim.

Action:

The child’s lawyer may pursue, personally or through a referral to an appropriate specialist, issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. Examples include:

- 1) Delinquency or status offender matters;
- 2) SSI and other public benefits;
- 3) Custody;
- 4) Paternity;
- 5) School and education issues;
- 6) Immigration issues;
- 7) Proceedings related to the securing of needed health and mental health services;  
and
- 8) Child support.

Commentary:

The child’s lawyer may request authority from the appropriate authority to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. Such ancillary matters may include special education, school discipline hearings, mental health treatment, delinquency or criminal

issues, status offender matters, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth transitioning out of care issues, postsecondary education opportunity qualification and tort actions for injury.

The child's lawyer does not have an ethical duty to represent the child in these collateral matters where the terms of the lawyer's employment limit duties to the dependency case. However, the lawyer may have a duty to take limited steps to protect the child's rights, ordinarily by notifying the child's legal custodian about the possible claim unless the alleged tortfeasor is the legal custodian. In the latter case, ordinarily the lawyer adequately protects the child by notifying the court about the potential claim. Whether this solution will work depends on whether a lawyer capable of assessing the potential tort claim is available to be appointed by the court. In Multnomah County, at the request of the juvenile court judges, the Oregon Trial Lawyers Association has created a panel that accepts referrals under these circumstances. In other counties, a juvenile court judge might well expect the child's lawyer to recommend someone to whom the case could be referred. In this situation, the child's lawyer should research the other lawyer's reputation and communicate clearly to the court and to the child that he or she is turning the work over to the receiving lawyer and is not vouching for the receiving lawyer's work or monitoring his progress in pursuing the claim. For more information, see [Oregon Child Advocacy Project, When a Child May Have a Tort Claim: What's a Child's Court-Appointed Attorney to Do? \(2010\)](#).

### **STANDARD 3 - TRAINING REQUIREMENTS FOR COMPETENT REPRESENTATION OF CHILDREN**

- A. A lawyer must provide competent representation to a child client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy for the client.**

**Action:**

A lawyer representing a child in a dependency case should obtain and maintain proficiency in applicable substantive and procedural law and stay current with changes in constitutional, statutory and evidentiary law and local or statewide court rules.

**Action:**

A lawyer representing a child in a dependency case should have adequate time and resources to competently represent the client, including maintaining a reasonable caseload and having access to sufficient support services.

- B. Before accepting an appointment or retainer on a child dependency or termination of parental rights case, the lawyer should gain experience by observing and serving as co-counsel in dependency and termination of parental rights cases. The lawyer accepting appointment or retainers to represent children in dependency and termination of parental rights cases should participate in at least 16 hours of continuing legal education (CLE) related to juvenile law each year.**

Action:

A lawyer representing a child in a dependency case must have served as counsel or co-counsel in at least two dependency cases adjudicated before a judge or have observed at least five dependency cases adjudicated before a judge.

Action:

A lawyer representing a parent in a termination-of-parental-rights cases must have served as counsel or co-counsel in or observed dependency cases as described above and have served as counsel or co-counsel in at least two termination of parental rights trials; or have observed or reviewed the transcripts of at least two termination of parental rights trials.

Commentary:

As in all areas of law, it is essential that lawyers learn the substantive law as well as local practice. Lawyers should be familiar with the Qualification Standards for Court-Appointed Counsel, Office of Public Defense Services, Standard 4(7). Lawyers should consider the contractually-mandated training requirements as a floor rather than a ceiling and actively pursue additional training opportunities. Newer lawyers are encouraged to work with mentors for the first three months and, at a minimum, should observe or co-counsel each type of dependency hearing from shelter care through review of permanent plan before accepting appointments.

- C. A child's lawyer should acquire working knowledge of all relevant state and federal laws, regulations, policies and rules.**

Action:

A child's lawyer must read and understand all state laws, policies and procedures regarding child abuse and neglect, including but not limited to the following:

- 1) Oregon Revised Statutes chapters 419A and 419B, Oregon Juvenile Code;
- 2) Oregon Revised Statutes chapter 418, Child Welfare Services;
- 3) Refugee Child Act, ORS 418.925–418.945;
- 4) Oregon Revised Statutes concerning paternity, guardianships and adoption;
- 5) Interstate Compact on Placement of Children, ORS 417.200-417.260 and OAR;
- 6) Uniform Child Custody Jurisdiction and Enforcement Act, ORS 109.701-109.834 and OAR;
- 7) The basic structure and functioning of DHS and the juvenile court, including court procedures, the functioning of the citizen review board (hereinafter referred to as CRB) and court-appointed special advocates (hereinafter referred to as CASA) programs; and
- 8) Indian Child Welfare Act 25 USC §1901 -1963; BIA Guidelines; and OAR.

Action:

A child’s lawyer must be thoroughly familiar with Oregon evidence law and the Oregon Rules of Professional Conduct.

Action:

A child’s lawyer must be sufficiently familiar with the areas of state and federal law listed in Appendix A so as to be able to recognize when they are relevant to a case and he or she should be prepared to research these and other applicable issues.

**D. A child’s lawyer should have a working knowledge of child development, family dynamics, placement alternatives case and permanency planning, and services for children and families in dependency cases.**

Action:

A lawyer for children should become familiar with normal growth and development in children and adolescents as well as common types of condition and impairments.

Action:

A lawyer for children should be familiar with the range of placement options in dependency cases and should visit at least two of the following:

- 1) A shelter home or facility;
- 2) A foster home;
- 3) A group home;
- 4) A residential treatment facility;
- 5) The Oregon State Hospital Child or Adolescent Psychiatric Ward; or
- 6) An outpatient treatment facility for children.

Action:

The child's lawyer must be familiar with case planning and permanency planning principles, and with child welfare and family preservation services available through Department of Human Services and available in the community and the problems they are designed to address. A child's lawyer is encouraged to seek training in the areas listed in Appendix B.

Commentary:

The parent's lawyer should know the kinds and types of services within their communities which serve parents and children. Based on the conditions and circumstances which brought the parent and their children into the dependency system, the parent's lawyer should identify the services which will help remove the barriers to reunify the parent and their child(ren). The parent's lawyer should consult with the client about such services and whether the services address the client's needs. The parent's lawyer must be aware of cultural issues within the parent's community and be prepared in appropriate circumstances, to advocate services be made available to a parent that are culturally appropriate and meet the client's unique conditions and circumstances.

**STANDARD 4 - GENERAL PRINCIPLES GOVERNING CONDUCT OF THE CASE**

- A. A child's lawyer should actively represent a child in the preparation of a case, as well as at hearings.**

Action:

A child's lawyer should develop a theory and strategy of the case to implement at hearings, including the development of factual and legal issues.

Action:

A child's lawyer should advocate for the child both in and out of court.

Action:

A child's lawyer should inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement and other changes of circumstances affecting the child and the child's family. When necessary, the child's lawyer should also remind parties and their representatives that the child has a lawyer and, therefore, they should not communicate with the child without the lawyer's permission.

Commentary:

Regardless of any alignment of position among the child and other parties, the child's counsel should develop his or her own theory and strategy of the case and ensure that the child has an independent voice in the proceeding. The child's counsel should not be merely a fact finder, but rather should zealously advocate a position on behalf of the child. Although the child's position may overlap with the position of one or both parents, third-party caretakers or DHS, child's counsel should be prepared to present his or her client's position independently and to participate fully in any proceedings.

**B. When consistent with the child's interest, the child's lawyer should take every appropriate step to expedite the proceedings.**

Commentary:

Delaying a case often increases the time a family is separated and can reduce the likelihood of reunification. Appearing in court often motivates parties to comply with orders and cooperate with services. When a judge actively monitors a case, services are often put in place more quickly, visitation may be increased or other requests by the parent may be granted. If a hearing is continued and the case is delayed, the parent may lose momentum in addressing the issues that led to the child's removal or the parent may lose the opportunity to prove compliance with case plan goals. Additionally, the Adoption and Safe Families Act (ASFA) timelines continue to run despite continuances.

**C. The child's lawyer should cooperate and communicate regularly with other professionals in the case.**

Action:

The child's lawyer should communicate with lawyers for the other parties, the court appointed special advocates (CASA), the caseworker, foster parents and service providers to learn about the client's progress and their views of the case, as appropriate.

Action:

The child's lawyer should respond promptly to inquiries from other parties and their representatives.



Commentary:

The child's lawyer must have all relevant information to represent a child client effectively. This requires open and ongoing communication with the other lawyers and service providers working with the child and family. When communicating with other parties, service providers and lawyers, the child's lawyer should be especially mindful of confidentiality requirements.

**D. They child's lawyer or the lawyer's agency must not contact represented parties without the consent of their lawyer.**

Commentary:

Before visiting a child who is in the physical custody of his or her parent(s), a child's lawyer must seek permission from the lawyer(s) for the parent(s). Such a visit may present particular difficulties for the child's lawyer since the parents may want to talk to the lawyer about the case. The child's lawyer should be careful not to disclose confidential information or to elicit any information from the parent. If the parent volunteers information, or if the child's lawyer observes something during the visit that is relevant to the case, the lawyer should take protective action for the child as necessary and as agreed to by the child client. The child's lawyer should also, as a matter of courtesy, tell the parent's lawyer about what was seen or disclosed.

When an agency is represented by counsel, the child's lawyer should not talk with a caseworker without the lawyer's permission. However, in many cases, the agency has not retained the Department of Justice to represent it, and in those cases the child's lawyer may talk to caseworkers without permission. If the child's lawyer is unsure whether the DOJ has been retained in a particular case, the lawyer should ask the caseworker.

In some counties, the District Attorney may appear representing the state. The DA is not counsel for the agency in these cases.

**E. The child's lawyer should engage in case planning and advocate for a permanency plan and social services which will help achieve the child's goals in the case.**

Action:

The lawyer should actively engage in case planning, including attending substantive case meetings, such as planning meetings and case reviews of plans. If the lawyer is unable to attend a meeting the lawyer should send a delegate.

Action:

If the child's goal is reunification with the parent, the child's lawyer should advocate for the parent to receive needed services. If the child's goal is not reunification, but the child's lawyer concludes that the parent will be given an opportunity to attempt reunification, the lawyer should advocate for services in support of that effort.

Action:

The child's lawyer should advocate for the child to receive any needed services in which the child is willing to participate.

Action:

After investigation and consultation with the child, the child's lawyer should advocate for the child's placement with his or her preferred care provider, if any, and in the least restrictive, culturally appropriate and most familiar setting possible.

Action:

Whenever possible, the child's lawyer should use a social worker as part of the child's team to help determine an appropriate case plan, evaluate suggested social services, and act as a liaison and advocate for the client with the service providers where appropriate.

Commentary:

When the child wishes to be reunited with the parent, the child's lawyer should advocate for services for the parent and child that will facilitate reunification. If the child does not want to return to the parent, but the child's lawyer concludes that reunification will be the initial case plan, the child's lawyer should also advocate for appropriate services to the parent, since failure to provide necessary services is likely simply to delay the case.

The lawyer should ensure that the child's plan for permanency addresses not only the permanency goal but also the child's developmental, medical, emotional, educational and independent living. Permanency includes minimizing the child's disruptions during his/her time in care and ensuring trauma-informed treatment, decision-making and transition planning.

Depending on the age and maturity of the child client, the child may have a preference placement or have an existing relationship with a relative or adult friend that can be certified as a placement for the child. The child's lawyer should advocate for the child's preferred placement and ensure the Department fully explores placements suggested by the child client.

**F. If the child's goal is reunification with the parent, the child's lawyer should advocate strongly for frequent visitation in a family-friendly setting.**

Action:

When necessary, the child's lawyer should seek court orders to compel the child welfare agency to provide frequent, unsupervised visitation if safe for the child. The lawyer may also need to take action to enforce previously entered orders.

Action:

The child's lawyer should advocate for an effective visiting plan consistent with the child's wishes. Factors to consider in visitation plans include:

- 1) Developmental age of child;
- 2) Frequency;
- 3) Length;
- 4) Location;
- 5) Child's safety;
- 6) Types of activities; and
- 7) Visit coaching - having someone at the visit who could model effective parenting skills.

Commentary:

Frequent high quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the child's lawyer seek a visitation order that will allow the best possible visitation. The lawyer should advocate that visits be unsupervised if safe for the child or at the lowest safe level of supervision, e.g. families often are more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than caseworkers.

Lawyers should advocate for visits to occur in family-friendly locations, such as in the family's home, parks, libraries, restaurants, place of worship or other community venues and at the child's activities.

## **STANDARD 5 - INVESTIGATION**

- A. A child's lawyer should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial.**

**Action:**

A lawyer should not rely solely on the disclosure information provided by the DHS caseworker, the state or other parties as the investigation of the facts and circumstances underlying the case.

**Action:**

The child's lawyer should review the record of case of the child (formerly the legal file) and the supplemental confidential file and, if available, the record of the case of the child's siblings.

**Action:**

The child's lawyer should contact lawyers for the other parties and court-appointed special advocates (CASAs) for background information.

**Action:**

The child's lawyer should contact and meet with the parents/legal guardians/caretakers of the child with permission of their lawyer.

**Action:**

The lawyer should obtain necessary releases of information in order to thoroughly investigate the case.

**Action:**

The lawyer should interview individuals involved with the child.

**Action:**

The lawyer should review relevant photographs, video or audio tapes and other evidence. When necessary, the lawyer should obtain protective orders to obtain access to such evidence.

Action:

A lawyer should research and review relevant statutes and case law to identify defenses and legal arguments to support the child's case.

Commentary:

In conducting the investigation and utilizing its results to formulate a legal course of action on behalf of a child, lawyers must also utilize that information to understand the child in a larger context as a multidimensional being. The lawyer must become familiar with his or her client's world, maintain an open mind regarding his or her client's differences and ensure objective assessment of the child's circumstances, desires and needs in the context of the child's connection to family, culture and community. To achieve the child's individualized goals for the legal proceeding, within the bounds of confidentiality, the lawyer should encourage, when advantageous to the child, the involvement of family and community resources to resolve the issues the child and family face. The lawyer should be familiar with procedures to obtain funds for evaluation or assessment of the client.

Action:

The child's lawyer should work with a team that includes investigators and social workers to prepare the child's case. If necessary, the lawyer should petition the OPDS for funds.

Commentary:

If possible, the child's lawyer should work with a team that includes social workers and investigators who can meet with the child and assist in investigating the underlying issues that arise as cases proceed. If not possible, the lawyer is still responsible for gaining all pertinent case information, being mindful of not making himself a witness.

**B. The child's lawyer should review the child welfare agency case file.**

Action:

The child's lawyer should ask for and review the agency case file as early during the course of representation as possible and at regular intervals throughout the case.

Action:

After a review of the agency file, the lawyer should determine if any records or case notes of any social worker or supervisor have not been placed in the file and move to obtain those records as well either through informal or formal discovery.

Commentary:

Even if the lawyer is voluntarily given contents of the DHS file in paper or electronic format, the lawyer should also look at the actual file in the DHS office and request disclosure of all documents relating to the case from DHS, since the department may have additional items not given to the lawyer. If requests to obtain copies of the agency file are unsuccessful or slow in coming, the lawyer should pursue formal disclosure in a timely fashion. If the agency case file is inaccurate, the lawyer should seek to correct it. The lawyer must read the case file and request disclosure of documents periodically because information is continually being received by the agency.

- C. The child’s lawyer should obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and respond to requests for documents from other parties.**

Action:

A lawyer should comply with disclosure statutes and use the same to obtain names and addresses of witnesses, witness statements, results of evaluations or other information relevant to the case. A lawyer should obtain and examine all available discoveries and other relevant information.

Commentary:

As part of the discovery phase, the lawyer should review the following kinds of documents:

- 1) Social service records, including information about services provided in the past, visitation arrangements, the plan for reunification and current and planned services;
- 2) Medical records;
- 3) School records;
- 4) Evaluations of all types;
- 5) Housing records; and
- 6) Employment records

- D. A child’s lawyer should have potential witnesses, including adverse witnesses interviewed and, when appropriate, subpoenaed by an investigator or other appropriately trained person.**

Action:

Potential witnesses to be interviewed may include:

- 1) School personnel;
- 2) Neighbors;
- 3) Relatives;
- 4) Caseworkers;
- 5) Foster parents and other caretakers;
- 6) Mental health professionals;
- 7) Physicians;
- 8) Law enforcement personnel; and
- 9) The child(ren).

Commentary:

It is usually good practice to have interviews conducted by an investigator employed by the lawyer but if the lawyer conducts the interview, a third person such as a member of the lawyer's office should be present so that, if necessary, the third person can be used at trial or hearing as a witness.

Action:

When appropriate, a lawyer or another trained and qualified person should observe visitations between the parent and child.

## **STANDARD 6 - COURT PREPARATION**

- A. The child's lawyer should develop a case theory and strategy to follow at hearings and negotiations.**

Action:

Once the child's lawyer has completed the initial investigation and discovery, including interviews with the client, the lawyer should develop a strategy for representation.

Commentary:

The strategy may change throughout the case, as the child or parent makes or does not make progress, but the initial theory is important to assist the lawyer in staying focused on the client's wishes and on what is achievable. The theory of the case should inform the lawyer's preparation for hearings and arguments to the court. It should also

be used to identify what evidence is needed for hearings and the steps to move the case toward the client's ultimate goals.

**B. The child's lawyer should timely file all pleadings, motions, objections and briefs and research applicable legal issues and advance legal arguments when appropriate.**

Action:

The lawyer must file answers and responses, motions, objections and discovery requests that are appropriate for the case. The pleadings must be thorough, accurate and timely. The pleadings must be served on the lawyers or unrepresented parties.

Action:

When a case presents a complicated or new legal issue, the child's lawyer should conduct the appropriate research before appearing in court. The lawyer should be prepared to distinguish case law that appears unfavorable.

Action:

If it would advance the client's case, the child's lawyer should present a memorandum of law to the court.

Commentary:

Filing motions, pleadings and briefs benefits the client. This practice highlights important issues for the court and builds credibility for the lawyer. In addition to filing responsive papers and discovery requests, the lawyer should seek court orders when that would benefit the client, e.g., filing a motion to enforce court orders to ensure the child welfare agency is meeting its reasonable efforts obligations. When out-of-court advocacy is not successful, the lawyer should not wait to bring the issue to the court's attention. Arguments in child welfare cases are often fact-based. Nonetheless, lawyers should ground their argument in statutory, Oregon Administrative Rules (OARs) and case law. Additionally, while non-binding, law from other jurisdictions can be used to persuade a court.

At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Lawyers should preserve legal issues for appellate review by making a record, even if the argument is unlikely to prevail at trial level.



Appropriate pretrial motions include but are not limited to:

- 1) Discovery motions;
- 2) Motions challenging the constitutionality of statutes and practices;
- 3) Motions to strike, dismiss or amend the petitions;
- 4) Motions to transfer a case to another county;
- 5) Evidentiary motions and motions in limine;
- 6) Motions for additional shelter hearings;
- 7) Motions for change of venue;
- 8) Motion to consolidate; and
- 9) Motion to sever.

Note: Under ORS 28.110 when a motion challenges the constitutionality of a statute, it must be served on the Attorney General.

Action:

A lawyer should make motions to meet the client's needs pending trial.

Commentary:

Examples of such motions include:

- 1) Motion for family reunification services;
- 2) Motion for medical or mental health treatment;
- 3) Motion for change of placement;
- 4) Motion to increase parental or sibling visitation;
- 5) Motion seeking contempt for violations of court orders; and
- 6) Motion to establish, disestablish or challenge paternity pursuant to chapter 419B.

**C. The child's lawyer should promote and participate in settlement negotiations and mediation to resolve the case quickly.**

Action:

The child's lawyer should, when appropriate, participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the child's goals.

Commentary:

The child's lawyer should use suitable mediation resources. The child's lawyer should consult the child in a developmentally appropriate way prior to any settlement becoming binding. The ultimate settlement agreement must be consistent with the child's wishes.

The facts to which the parties admit will frame the court's inquiry at all subsequent hearings as well as what actions the parties must take, the services provided and the ultimate outcome.

A written, enforceable agreement should be prepared whenever possible, so that all parties are clear about their rights and obligations. The child's lawyer should ensure agreements accurately reflect the understandings of the parties. The child's lawyer should request a hearing or move for contempt, if appropriate, if orders benefiting the child are not obeyed.

- D. Explain to the child, in a developmentally-appropriate manner, what is expected to happen before, during and after each hearing and facilitate the child's attendance at hearings when appropriate.**

Action:

Prior to a hearing, the child's lawyer should discuss with the child its purpose, what is likely to happen during it and whether the child will attend.

Commentary:

Children over the age of 12 must be served by summons under ORS 419B.839(c). If the child is not properly served with the summons, the child's lawyer should consider whether a motion to dismiss is appropriate. If the child will attend the hearing, the child's lawyer should meet with the child to explain what will happen at the hearing and to prepare for it.

The lawyer for a child younger than 12 years of age, and in some cases for a child older than 12, should determine, through consultation with the client and the child's therapist, caretaker or other knowledgeable person(s), how the child is likely to be affected by attending a hearing. If the child's lawyer concludes that attendance might be detrimental to the child, the lawyer should meet with the child to discuss this concern. The discussion should include how best to minimize the potential detrimental effects on the child. Whether to attend the hearing is a decision for the child provided the child is able to direct the lawyer on this issue.

Action:

When the child wishes to attend the proceedings, the child's lawyer must request that DHS, as the child's legal custodian, transport the child to the hearing.

Action:

When appropriate, the child's lawyer should ask that DHS provide support for the child to minimize adverse impacts of the hearing on the child.

Commentary:

The child's lawyer should ask DHS to provide necessary support for the child during the hearing. One example of such support is requesting that DHS have personnel accompanying the child to and from the hearing who will be able to remain with the child throughout the hearing and during any breaks.

- E. In consultation with the child, the child's lawyer should determine whether to call the child to testify. When the child will offer testimony or will be called by another party, the lawyer should prepare the child to testify.**

Action:

The child's lawyer should decide whether to call the child as a witness, although the lawyer is bound by the wishes of a child capable of considered judgment. The decision should consider the child's need or desire to testify, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, the child's developmental ability to provide direct testimony and withstand possible cross-examination, and any repercussions of testifying, including but not limited to the possible emotional and psychological effect of testifying on the child and on the possible reunification of the family.

Action:

The child's lawyer must be familiar with the current law and empirical knowledge about children's competency, memory and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

Commentary:

There is no minimum age below which a child is automatically incompetent to testify. To testify as a witness, the child must have the capacity to observe, adequate intelligence, adequate memory, ability to communicate, an awareness of the difference between telling truth and falsehood and understand that she or he must tell the truth as

a witness. The court should make the determination of the child client's competency as a witness under the applicable rules of evidence prior to the child's testimony. If necessary, the child's lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. The child's lawyer should take all reasonable steps to reduce the likelihood of the child being traumatized from testifying. The decision about the child's testifying must be made based on the individual child client's abilities, circumstances and need for the child's testimony. If the child has a therapist, he or she should be consulted both with respect to the decision itself and assistance with preparing the child to testify.

If the child does not wish to testify or would be harmed by being forced to testify, the child's lawyer should seek a stipulation of the parties not to call the child as a witness or file a motion pursuant to ORS 419B.310 to take the testimony of the child outside the presence of the parent(s) and other parties.

Action:

The child's lawyer should prepare the child to testify and seek to minimize any harm that testifying will cause to the child.

Commentary:

Unlike a criminal proceeding or delinquency proceeding, the child can be called as a witness by any other party to the proceeding. Thus, regardless of the child's desire to testify, he or she may be called as a witness by another party to the proceeding. The child's lawyer needs to be aware of the potential that the child will be called as a witness and take steps necessary to prepare the child as a witness.

The child's lawyer's preparation of the child to testify should include attention to the child's developmental needs and abilities, as well as to accommodations which should be made by the court and other lawyers including the necessity of filing a motion pursuant to ORS 419B.310 to take the child's testimony outside the parents' presence.

The child's lawyer should familiarize the child client with the court room and process for testifying including the likelihood that the child's lawyers for the parent or state will also ask questions to reduce potential harm to the child. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes which will not be the child's fault.

**F. The child’s lawyer should identify, locate and prepare all witnesses.**

Action:

The child’s lawyer, in consultation with the child to the extent developmentally appropriate, should develop a witness list well before a hearing or trial. The child’s lawyer should not assume the agency will call a witness, even if the witness is named on the agency’s witness list. The child’s lawyer should, when possible, contact the potential witnesses to determine if they can provide helpful testimony.

Action:

When appropriate, witnesses should be informed that a subpoena is on its way. The child’s lawyer should also ensure the subpoena is served. The child’s lawyer should subpoena potential agency witnesses (e.g., a previous caseworker) who have favorable information about the client.

Action:

The child’s lawyer should set aside time to fully prepare all witnesses in person before the hearing. The child’s lawyer should remind the witnesses about the court date.

Commentary:

Preparation is the key to successfully resolving a case, either in negotiation or trial. The child’s lawyer should plan as early as possible for the case and make arrangements accordingly. The child’s lawyer should carefully review the other party’s witness lists and be prepared to independently obtain witnesses and evidence in support of child’s position. Witnesses may be people with direct knowledge of the allegations against the parent, service providers working with the parent or individuals from the community who could testify generally about the family’s situation.

When appropriate, the child’s lawyer should consider working with other parties who share the child’s position when developing the child’s witness list, issuing subpoenas and preparing witnesses. Doctors, nurses, teachers, therapists and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing.

The child’s lawyer should prepare their witnesses thoroughly so the witnesses feel comfortable with the process and understand the scope of their testimony. Preparation will generally include rehearsing the specific questions and answers expected on direct and anticipating the questions and answers that might arise on cross-examination. Lawyers should provide written questions for those witnesses who need them.

**G. The child’s lawyer should identify, secure, prepare and qualify expert witnesses when needed. When possible, interview opposing counsel’s experts.**

Action:

Often a case requires multiple experts with different expertise, such as medicine, mental health treatment, drug and alcohol treatment, or social work. Experts may be needed for ongoing case consultation in addition to providing testimony at trial. The lawyer should consider whether the opposing party is calling expert witnesses and determine whether the child needs to call any experts to respond to the opponent’s experts.

Action:

When opposing counsel plans to call expert witnesses, the child’s lawyer should seek to interview the witnesses in advance. Lawyers should scrupulously comply with standing orders of the juvenile court regarding contact with court-ordered evaluators.

Commentary:

By contacting opposing counsel’s expert witnesses in advance, the child’s lawyer will know what evidence will be presented against the client and whether the expert has any favorable information that might be elicited on cross-examination. The lawyer will be able to discuss the issues with the client, prepare a defense and call experts on behalf of the client, if appropriate. Conversely, if the lawyer does not talk to the expert in advance, the lawyer could be surprised by the evidence and unable to represent the client competently.

**STANDARD 7 - HEARINGS**

**A. Prepare for and attend all hearings, including pretrial conferences.**

Action:

The child’s lawyer must prepare for and attend all hearings and participate in all telephone and other conferences with the court. The child’s position may overlap with the positions of one or both parents, third-party caretakers or DHS. Nevertheless, the child’s lawyer should participate fully in every hearing and not merely defer to the other parties. The child’s lawyer should be prepared to state and explain the child’s position at each hearing.

Action:

If the court proceeds in the absence of the lawyer, the lawyer should file a motion to set aside.

Commentary:

The child's lawyer's participation in pretrial proceedings may improve case resolution for the child and failing to participate in the proceedings may harm the child's position in the case. Therefore, the child's lawyer should be actively involved in this stage. If a lawyer has a conflict with another courtroom appearance, the lawyer should notify the court and the other parties and request a short continuance. The parent's lawyer should not have another lawyer stand in to represent the client in court if the other lawyer is unfamiliar with the client or case.

Becoming a strong courtroom lawyer takes practice and attention to detail. The lawyer must be sure to learn the rules about presenting witnesses, impeaching testimony and entering evidence. The lawyer may wish to seek out training in trial skills and watch other lawyers to learn from them. Presenting and cross-examining witnesses are skills with which the child's lawyer must be comfortable.

**B. The child's lawyer should request the opportunity to make opening and closing arguments.**

Action:

The child's lawyer should make opening and closing arguments in the case to frame the issues around the child's lawyer's theory of the case and ensure the judge understands the issues from the child's perspective.

Commentary:

In many child abuse and neglect proceedings, lawyers waive the opportunity to make opening and closing arguments. However, these arguments can help shape the way the judge views the case and therefore can help the client. Argument may be especially critical, for example, in complicated cases when information from expert witnesses should be highlighted for the judge, in hearings that take place over a number of days or when there are several children and the agency is requesting different services or permanency goals for each of them.

It is important to be able to read the judge. The attorney should move along when the judge is tracking the argument and elaborate on the areas that appear to need more attention.

**C. Prepare and make all appropriate motions and evidentiary objections. Be aware of the need to make a record for appeal.**

Action:

The child's lawyer should make appropriate motions and evidentiary objections to advance the child's position during the hearing. If necessary, the child's lawyer should file memoranda of points and authorities in support of the client's position on motions and evidentiary issues. The child's lawyer should always be aware of preserving legal issues for appeal.

Commentary:

It is essential that the child's lawyers understand the applicable rules of evidence and all court rules and procedures. The lawyer must be willing and able to make appropriate motions, objections and arguments (e.g., objecting to the qualification of expert witnesses, the competence of child or other witness, or raising the issue of the child welfare agency's lack of reasonable efforts).

**D. If the child testifies, the child's lawyer should ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.**

Commentary:

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory and suggestibility. The information a child gives in interviews and during testimony is often misleading because the adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The child's lawyer must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

**E. The child's lawyer should present and cross examine witnesses and prepare and offer exhibits.**

Action:

The parents' lawyer must be able to effectively present witnesses to advance the client's position. Witnesses must be prepared in advance and the lawyer should know what evidence will be presented through the witnesses. The lawyer must also be skilled at cross-examining opposing parties' witnesses. The lawyer must know how to offer documents, photos, physical objects, electronic records, etc. into evidence.



Action:

At each hearing, the lawyer should advocate for the client's goals, keeping in mind the case theory. This should include advocating for appropriate services and requesting that the court state its expectations of all parties on the record.

**F. The child's lawyer should ensure that findings of fact, conclusions of law and orders that benefit the child are included in the court's decision.**

Action:

Be familiar with the standard forms and ensure that they are completed correctly and that findings beneficial for the child are included.

Commentary:

By preparing proposed findings of fact and conclusions of law, the child's lawyer frames the case and ruling for the judge. This may result in orders that are more favorable to the child, preserve appellate issues and help the lawyer clarify desired outcomes before a hearing begins. The lawyer should offer to provide the judge with proposed findings and orders in electronic format. When an opposing party prepared the order, the child's lawyer should review it for accuracy before it is submitted to the judge for signature.

## **STANDARD 8 - POST HEARINGS**

**A. Review court orders to ensure accuracy and clarity and review with client.**

Action:

At the conclusion of the hearing, the child's trial lawyer should request and obtain a copy of the written order or court action sheet to ensure it reflects the court's verbal order. If the order is incorrect, *i.e.*, it does not reflect the court's verbal rulings, the lawyer should take whatever steps are necessary to correct it to the extent that the corrections are beneficial to the client.

Action:

Once the order is final, the child's lawyer should provide the client with a copy of the order, if age appropriate, and should review the order with the client to ensure the client understands it and the client's obligations under the order. If the client is unhappy with the order, the lawyer should counsel the client about any options to appeal or request a rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured.

Commentary:

The child may be angry about being involved in the child welfare system and a court order that is not consistent with the child's wishes could add stress and frustration. It is essential that the child's attorney take time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the client. The attorney should counsel the client about all options, including appeal (see Standard 9).

- B. The child's lawyer should take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.**

Action:

If the client is attempting to comply with the order but other parties, such as DHS, are not meeting their responsibilities, the child's attorney should approach the other party and seek assistance on behalf of the client. If necessary, the lawyer should bring the case back to court to review the order and the other party's noncompliance or take other steps to ensure that appropriate social services are available to the client.

Commentary:

The child's lawyer should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The lawyer should speak with the client regularly about progress and any difficulties the client is encountering. When DHS neglects or refuses to offer appropriate services, especially those ordered by the court, the child's lawyer should file motions to compel or motions for contempt.

## **STANDARD 9 - APPEALS ISSUES FOR CHILD'S LAWYER**

- A. Consider and discuss the possibility of appeal with the client.**

Action:

The child's lawyer should immediately consider and discuss with the client, preferably in person, the possibility of appeal when a court's ruling is contrary to the client's position or interests. Regardless of whether the lawyer believes an appeal is appropriate or that there are any viable issues for appeal, the lawyer should advise the client—at the conclusion of each hearing—that he or she has a right to appeal from any judgment or order resulting from a jurisdictional hearing, review hearing, permanency hearing or termination of parental rights trial. Further, if the hearing was held before a juvenile court referee, the child's lawyer should advise the client that he or she is entitled to a

rehearing before a juvenile court judge. Unless a rehearing is requested within 10 days following the entry of the referee's order, the order will become a final and non-appealable order.<sup>5</sup> Whether to seek a rehearing of a referee's order or to pursue a direct appeal in the appellate courts is always the client's decision.

Commentary:

When discussing the possibility of an appeal, the child's lawyer should explain both the positive and negative effects of an appeal, including how the appeal could affect the child's goals.

**B. If the client decides to appeal, the child's lawyer should timely and thoroughly facilitate the appointment of appellate lawyer.**

Action:

The child's attorney should take all steps necessary to facilitate appointing appellate lawyer *e.g.*, appointed trial lawyer should refer the case for appeal to the Office of Public Defense Services and comply with that office's referral procedures. The trial lawyer should work with the appellate lawyer and identify to the appellate lawyer the parties to the case (for example whether there are any interveners), appropriate issues for appeal and promptly respond to all requests for additional information or documents necessary for appellate lawyer to prosecute the appeal. The child's trial lawyer should promptly comply with the court's order to return exhibits necessary for appeal.

Commentary:

Pursuant to 419A.200(4), the child's lawyer must file the notice of appeal or if court-appointed, the trial attorney may discharge his or her duty to file the notice of appeal by referring the case to the Juvenile Appellate Section of the Office of Public Defense Services (OPDS) using the on-line referral form and complying with OPDS procedures.

To comply with OPDS procedures, trial lawyer referring a case to OPDS for appeal must satisfy the following conditions:

- 1) Electronically complete and submit the referral form to OPDS at least five (5) days prior to the due date for the notice of appeal. (if the referral is within fewer than 5 business days of the notice of appeal due date, trial lawyer remains responsible for filing the notice of appeal and should contact OPDS for assistance locating counsel on appeal.); and

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<sup>5</sup> ORS 419A.150(4).

- 2) Fax (503.378.2163) or email ([juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us)) to OPDS a copy of the judgment being appealed.

If OPDS must refer a case to non-OPDS counsel due to a conflict or workload issues, the following procedures apply:

- 1) OPDS will prepare a draft notice of appeal and related documents in the trial lawyer's name;
- 2) OPDS will email the draft documents to the trial lawyer for review and approval—but not for filing. If counsel notes a defect in the form of the documents, counsel should notify OPDS immediately by email at [juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us) or by telephone at 503.378.6236;
- 3) If the trial lawyer does not contact OPDS within two business days of document transmission, OPDS will assume that counsel has reviewed and approved the documents; and
- 4) An OPDS attorney will sign the notice of appeal and related documents in the trial lawyer's name, file the notice of appeal and motion to appoint appellate lawyer with the Court of Appeals, serve the parties and initiate transcript production. OPDS will also forward a copy of the documents to the client with a cover letter that includes the name and contact information of the appellate lawyer appointed to represent the client on appeal.

## **STANDARD 10 - APPEALS**

### **A. The child's trial lawyer should timely file the notice of appeal.**

#### Action:

The lawyer filing the notice of appeal must comply with statutory and rule requirements in filing the notice of appeal.

#### Commentary:

A proper notice of appeal is a jurisdictional requirement.<sup>6</sup> Consequently, the notice must satisfy statutory requirements in order to prosecute the appeal.<sup>7</sup>

ORS 419A.200(5) permits the appellate lawyer to move the court for leave to file a late notice of appeal after the statutory 30-day time limit (up to 90 days after entry of judgment). A motion to file a notice of appeal after the 30-day period, to be successful,

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<sup>6</sup> ORS 19.270.

<sup>7</sup> See ORS 19.250 (contents of notice of appeal), ORS 19.255 (time for filing notice) and ORS 419A.200(3) (juvenile appeals); see also Oregon Rules of Appellate Procedure ORAP 2.05 (contents of notice of appeal), ORAP 2.10 (separate notices of appeal) and ORAP 2.22 (appeals in juvenile cases).

must demonstrate (1) that the failure to file a timely notice of appeal was not personally attributable to the parent, *and* (2) “a colorable claim of error” exists in the proceeding from which the appeal is taken.<sup>8</sup>

## **B. The child’s appellate lawyer should communicate with the client**

### Action:

The appellate lawyer should consult with the child client in an age appropriate fashion to confirm that the client wishes to pursue the appeal and to advise the child client about the appellate process and timelines. If the client is of diminished capacity, and it is not reasonably possible to obtain direction from the child client, the appellate lawyer should determine what the child would decide if the child were capable of making an adequately considered decision. Appellate lawyers should not be bound by the determinations of the client’s position and goals made by the child’s lawyer at trial and should independently determine the client’s position and goals on appeal.

### Commentary:

The child’s appellate lawyer should explain to the child client the difference between representation for appeal and the ongoing representation in the dependency case. Because the dependency case will almost always be ongoing during the appeal, the appellate lawyer and the child’s lawyer should consult and collaborate as necessary to advance the client’s interests in both cases. Although the child’s appellate lawyer may wish to obtain information from the child’s lawyer or other parties to the case below when determining the position of a child client with diminished capacity, the appellate lawyer has the duty to make a separate determination of the child’s position on appeal in such situations.

## **C. Prosecuting or defending the appeal – Issue selection and briefing**

### Action:

The child’s appellate lawyer should review the trial court record and any opposing briefs, identify and research issues, and prepare and timely file and serve the brief on behalf of the client. The brief should reflect relevant case law and present the best legal arguments available under Oregon and federal law to advance the client’s position. Novel legal arguments that might develop favorable law in support of the client’s position should also be advanced if available. The appellate lawyer should send the child client who is able to read and the trial lawyer a copy of the filed brief.

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<sup>8</sup> See *State ex rel Dept. of Human Services v. Rardin*, 338 Or. 399, 408, 110 P3d 580 (2005). (A “colorable claim of error” in this context means “a claim that a party reasonably may assert under current law and that is plausible given the facts and the current law (or a reasonable extension or modification of current law.”)).

Commentary:

The court-appointed appellate lawyer has considerable authority over the manner in which an appeal is presented. It is the appellate attorney's responsibility to exercise his or her professional judgment to raise issues that, in the attorney's judgment, will provide the best chance of success on appeal—even when the client disagrees with the attorney's judgment.<sup>9</sup>

**D. Prosecuting or defending the appeal – Oral Argument.**

Action:

The child's appellate lawyer should determine whether to request the oral argument. The client should be informed of the lawyer's decision and if the oral argument has been requested, the lawyer should inform the client of when the oral argument will take place. If appropriate, the appellate lawyer should make arrangements for the client to attend the oral argument.

Commentary:

The child's appellate lawyer should consider whether the oral argument might advance the client's goals in the appeal and if the oral argument is desirable make a timely request for oral argument.<sup>10</sup>

**E. Communicate the results of the appeal and its implications to the client.**

Action:

The child's appellate lawyer should communicate the result of the appeal and its implications in an age appropriate fashion to the child client. If the client is able to read, a copy of the appellate decision should be provided to the child client. The appellate lawyer should also communicate the result of the appeal to the trial lawyer and provide a copy of the appellate decision as well as any needed consultation. The appellate lawyer should consider whether to petition for review in the Oregon Supreme Court and advise the child client about such a petition. Whether to petition for review is ultimately the client's decision unless the child client is of diminished capacity. When the child client is of diminished capacity, and it is not reasonably possible to obtain direction from the child client, the appellate lawyer should determine what the child would decide if the child were capable of making an adequately considered decision and proceed according to that determination.

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<sup>9</sup> See *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed2d 987 (1983).

<sup>10</sup> ORAP 6.05.

# THE OBLIGATIONS OF THE LAWYER FOR PARENTS IN CHILD PROTECTIVE PROCEEDINGS WITH ACTION ITEMS AND COMMENTARY

## STANDARD 1 - ROLE OF THE LAWYER FOR PARENTS

- A. The parent’s lawyer must maintain a normal lawyer-client relationship with the parent, including advocating for the parent’s goals and empowering the parent to direct the representation and make informed decisions.**

### Action:

Lawyers representing parents must understand the parent’s goals and pursue them vigorously. The lawyer should explain that the lawyer’s job is to represent the parent’s interests and regularly inquire as to the parent’s goals, including ultimate case goals and interim goals. The lawyer should explain all legal aspects of the case including the advantages and disadvantages of different options. At the same time, the lawyer should be careful not to usurp the parent’s authority to decide the case goals.

### Commentary:

Since many parents distrust the child welfare system, the parent’s lawyer must take care to distinguish him or herself from others in the system so the parent can see that the lawyer serves the parent’s interests. The lawyer should be mindful that parents often feel disempowered in child welfare proceedings and should take steps to make the parent feel comfortable expressing goals and wishes without fear of judgment. The lawyer should clearly explain the legal issues as well as expectations of the court and the agency, and potential consequences of the parent failing to meet those expectations. The lawyer has the responsibility to provide expertise and to make strategic decisions about the best ways to achieve the parent’s goals, but the parent is in charge of deciding the case goals and the lawyer must act accordingly.

- B. When representing parents with diminished capacity because of minority, mental impairment or for some other reason, the lawyer should as far as reasonably possible, maintain a normal lawyer/ client relationship with the parent. A parent may have the capacity to make some decisions but not others.**

Action:

The parent's lawyer must be aware of the parent's mental health status and be prepared to assess whether the parent can assist with the case.

Commentary:

Lawyers representing parents must be able to determine whether a parent's mental status (including mental illness and mental intellectual disability or developmental delay) interferes with the parent's ability to make decisions about the case. The lawyer should be familiar with any mental health diagnosis and treatment that a parent has had in the past or is presently undergoing (including any medications for such conditions). The lawyer should get consent from the parent to review mental health records and to speak with former and current mental health providers. The lawyer should explain to the parent that the information is necessary to understand the parent's capacity to work with the lawyer.

- C. When it is not reasonably possible to maintain a normal lawyer-client relationship generally or with regard to a particular issue, the parent's lawyer should conduct a thorough investigation and then determine what course of action is most consistent with protecting the parent's interests in the particular situation and represent the parent in accordance with that determination. This determination should be based on objective facts and information and not the lawyer's personal philosophy or opinion.**
- D. When the parent's lawyer reasonably believes that the parent has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the parent's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the parent.**

Action:

The lawyer should choose the protective action that intrudes the least on the lawyer-client relationship and is as consistent as possible with the wishes and values of the client.

Action:

In extreme cases, i.e. where the client is at risk of substantial physical harm and cannot act in his or her own interest and where the client's lawyer has exhausted all other protective action remedies, the client's lawyer may request the court to appoint a Guardian Ad Litem.



Commentary:

When a client with diminished capacity is unable to protect him or herself from substantial harm, ORPC 1.14 allows the lawyer to take action to protect the client. Oregon Rules of Professional Responsibility 1.6(a) implicitly authorizes a lawyer to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.<sup>11</sup> Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 and Rule 1.14 of the Oregon Rules of Professional Conduct.

It is generally accepted that it is error for a court to proceed without appointment of a Guardian Ad Litem (GAL) for a party when facts strongly suggest the party has diminished capacity and is unable to meaningfully the lawyer. Similarly, it is a violation of due process to fail to appoint a GAL for a parent with diminished capacity in a termination-of parental-rights proceeding. However, a parent's lawyer must maintain as regular a lawyer-parent relationship as possible and adjust representation to accommodate a parent's limited capacity.<sup>12</sup> This is not inconsistent with Oregon RPC 1.14. It states that when a client has diminished capacity and the lawyer believes the client is at risk of substantial harm, the lawyer may take certain steps to protect the client. Such steps may include consulting with family members or protective agencies or, if necessary, requesting the appointment of a guardian ad litem.

Information relating to the representation of a parent with diminished capacity is protected by Rule 1.6. When taking protective action, the lawyer is implicitly authorized under Rule 1.6(a) to reveal information about the parent, but only to the extent reasonably necessary to protect the parent's interests. Consequently, and as a general proposition, lawyers for parents should not invade a typical parent's rights beyond the extent to which it reasonably appears necessary for the lawyer to do so. In other words, lawyers should request GALs for their parents only when a parent consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the parent will be able to attain the requisite mental capacity to assist in the proceedings in a reasonable time.

According to a 9<sup>th</sup> circuit case from 1986, counsel for other parties to the proceeding may be obligated to advise the court of the parent's incompetence.<sup>13</sup> If it appears

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<sup>11</sup> ORCP 1.14(c)

<sup>12</sup> Oregon State Bar Formal Opinion No. 2005-159.

<sup>13</sup> United States v. 30.64 Acres, 795 F2d 796 (9<sup>th</sup> Cir 1986).

“during the course of proceedings that a party may be suffering from a condition that materially affects his ability to represent himself (if pro se), to consult with his lawyer with a reasonable degree of rational understanding... or otherwise to understand the nature of the proceedings... that information should be brought to the attention of the court promptly.”<sup>14</sup>

When a GAL is appointed for a parent, the GAL must consult with the parent’s lawyer.<sup>15</sup> The GAL also has the statutory authority to control the litigation and provide direction to the parent’s lawyer on decisions that would ordinarily be made by the parent in the proceeding.<sup>16</sup> The parent’s lawyer is required to follow such directions provided by the GAL, but must inquire at every critical stage of the proceedings as to whether the parent’s competence has changed.<sup>17</sup> If appropriate, the lawyer must request removal of the GAL.

## **STANDARD 2 - RELATIONSHIP WITH THE PARENT CLIENT**

### **A. The parent’s lawyer must meet and communicate regularly with the parent.**

#### Action:

A lawyer should make an initial contact with the parent within 24 hours and, when feasible, conduct an initial interview within 72 hours.

#### Action:

A lawyer should have contact with parents before court hearings and CRB (Citizen Review Board) reviews, in response to contact by the parent, when a significant change of circumstances must be discussed with the parent or when a lawyer is apprised of emergencies or significant events impacting the child.

#### Action:

The lawyer should ensure a qualified interpreter is involved when the lawyer and client are not fluent in the same language.

#### Commentary:

The lawyer should be available for in-person meetings or telephone calls to answer the client’s questions and address the client’s concerns. The lawyer and parent client

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<sup>14</sup> Id. at 806.

<sup>15</sup> ORS 419B.234(3)(a).

<sup>16</sup> ORS 419B.234(3)(d).

<sup>17</sup> ORS 419B.234(5).

should work together to identify and review short and long-term goals, particularly as circumstances change during the case.

**B. The parent’s lawyer should provide the parent with contact information in writing and establish a message system that allows regular lawyer-parent contact.**

Action:

The parent’s lawyer should ensure the parent understands how to contact the lawyer and that ongoing contact is integral to effective representation of the client. The lawyer should explain that even when the lawyer is unavailable, the parent should leave a message.

Action:

The lawyer must respond to parent’s messages in a reasonable time period.

Commentary:

Gaining the parent’s trust and establishing ongoing communication are two essential aspects of representing the parent. The parent may feel angry and believe that all of the lawyers in the system work with the child welfare agency and against that parent. It is important that the parent’s lawyer, from the beginning of the case, is clear with the parent that the lawyer works for the parent, is available for consultation and wants to communicate regularly. This will help the lawyer support the parent, gather information for the case and learn of any difficulties the parent is experiencing that the lawyer might help address. The lawyer should explain to the parent the benefits of bringing issues to the lawyer’s attention rather than letting problems persist. The lawyer should also explain that the lawyer is available to intervene when the parent’s relationship with the agency or provider is not working effectively. The lawyer should be aware of the parent’s circumstances, such as whether the parent has access to a telephone, and tailor the communication system to the individual parent. For example, it may involve telephone contact, email or communication through a third party when the parent agrees to it.

Communicating with parents and other parties by email may be the most effective means of regular contact. However, lawyers should also understand the pitfalls associated with communicating sensitive case history and material by email. Not only can email create greater misunderstanding and misinterpretation, it can also become documentary evidence in later proceedings. The lawyer should treat this form of communication as not confidential and advise the client accordingly.

- C. The lawyer should counsel the parent about all legal matters related to the case, including specific allegations against the parent, the conditions for return, the parent’s rights in the pending proceeding, any orders entered against the parent and the potential consequences of failing to obey court orders or meet Court approved conditions for return.**

Action:

The lawyer should clearly explain the allegations made against the parent, what is likely to happen before, during and after trial and each hearing.

Action:

The lawyer should explain what steps the parent can take to increase the likelihood of reuniting with the child. Specifically, the lawyer should discuss in detail the Court-approved conditions for return.

Action:

The lawyer should explain any settlement options and determine whether the parent wants the lawyer to pursue such options.

Action:

The parent’s lawyer should provide or insure that the parent is provided with copies of all petitions, court orders, service plans and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule, or court order.

Action:

If the parent has difficulty reading, the lawyer should read the documents to the parent. In all cases, the lawyer should be available to discuss and explain the documents to the parent.

Commentary:

The parent’s lawyer’s job extends beyond the courtroom. The lawyer should be a counselor as well as litigator. The lawyer should be available to talk with the parent to prepare for hearings and to provide advice and information about ongoing concerns. Open lines of communication between lawyers and clients help ensure parents get answers to questions and lawyers get the information and documents they need.

The lawyer should review: the parent client's rights; the role and responsibilities of the lawyer; the role of each player in the system; alternatives and options available to the parent, including referrals to available resources in the community to resolve domestic relations issues; the consequences of selecting one option over another in light of applicable timelines, including the impact of the timelines established by the ASFA; the impact of concurrent case planning required under the AFSA on the case and the parent's participation in such planning; and the consequences of the parent client failing to appear in particular proceedings.

The lawyer should help the parent client access information about the child's developmental and other needs by speaking to service providers and reviewing the child's records. The parent client needs to understand these issues to make appropriate decisions for the child's care.

The parent's lawyer and the parent client should identify barriers to the parent engaging in services such as employment, transportation, financial issues, inability to read and language differences. The lawyer should work with the parent, caseworker and service provider to remove the barriers and advocate with the child welfare agency and court for appropriate accommodations.

A lawyer should give the parent client time to ask questions and consider the alternatives. A lawyer should obtain information from the parent about: the parent's prior contacts with the agency; the parent's knowledge about the allegations of the petition; the accuracy of information provided by the state supporting the petition; alternative or amended allegations that should be sought as part of the negotiations with the parties; services provided before removal or intervention (i.e. In-Home Safety and Reunification Services "ISRS" ); reasons for removal or intervention; services the parent feels would have avoided the need for removal; alternatives to removal, including relative placements, in-home services, or removal a person who allegedly endangers the child from the parent's and child's home; current efforts to reunify the family; family history, including paternity issues, if any, and identity of prior caretakers of the child; services needed by the child, parents or guardians; the parent's concerns about placement; the parent's long and short-term goals; and current visitation and the parent's desires concerning visitation.

The lawyer must be aware of any allegations of domestic violence in the case and not share confidential information about an alleged or potential victim's location.

A parent's lawyer should read the provisions of local court rules, state and federal law governing confidentiality of records and documents in juvenile court proceedings and understand which records and documents are deemed confidential under

applicable law. The parent's lawyer must appreciate the existing conflict or tension that exists about what documents and records that the parent's lawyer can give to the parent client and which they cannot. He or she must understand that this is an evolving area of the law and regularly review the statutes and case law in this area.

**D. The parent's lawyer should work with the parent client to develop a case timeline and calendar system.**

Action:

At the beginning of a case, the parent's lawyer should develop a timeline that reflects projected deadlines and important dates and a calendar system to remember the dates. The timeline should specify what actions the lawyer and parent will need to take and dates by which they will be completed. The lawyer and the parent should know when important dates will occur and should be focused on accomplishing the objectives in the case plan in a timely way. The lawyer should provide the parent with a timeline, outlining known and prospective court dates, service appointments, deadlines and critical points of lawyer and parent contact. The lawyer should record federal and state law deadlines in the case timeline.

Commentary:

Parents should be encouraged to create a system for keeping track of important dates and deadlines related to the case. This helps parents stay focused on accomplishing the service plan goals and meeting court-imposed deadlines.

**E. A parent's lawyer must show respect and act professionally with the client.**

Action:

A parent's lawyer should support the parent and be sensitive to the parent's individual needs. The lawyer should be vigilant against allowing the lawyer's own interests in relationships with others in the system to interfere with the lawyer's primary responsibility to the parent

Commentary:

Often lawyers practicing in abuse and neglect court are a close-knit group who work and sometimes socialize together. Maintaining good working relationships with other players in the child welfare system is an important part of being an effective advocate. The lawyer should not give the impression to the parent that relationships with other lawyers are more important than the representation the lawyer is providing the parent.

The parent must feel that the lawyer believes in him or her and is actively advocating on the parent's behalf. A parent's lawyer should remember that they may be the client's only advocate in the system.

**F. A parent's lawyer must understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client.**

Action:

A parent's lawyer must understand the laws and rules governing confidentiality. Consistent with the parent's interests and goals, the lawyer must seek to protect from disclosure confidential information concerning the parent.

Commentary:

Confidential information contained in a parent's substance abuse treatment records, domestic violence treatment records, mental health records and medical records is often at issue in abuse and neglect cases. Improper disclosure of confidential information may adversely affect the parent's chances of achieving his or her goals. For this reason, it is crucial for the lawyer to advise the parent promptly as to the advantages and disadvantages of releasing confidential information, and for the lawyer to take all necessary steps necessary to protect the parent's privileges and rights to confidentiality.

**G. The parent's lawyer must be alert to and avoid potential conflicts of interest or the appearance of a conflict of interest that would interfere with the competent representation of the parent.**

Action:

The parent's lawyer must not represent both parents if their interests differ. The lawyer should not represent both parents when there is even a potential for conflicts of interest. In situations involving allegations of domestic violence, the lawyer should never represent both parents.

Commentary:

In most cases, lawyers should not represent both parents in an abuse or neglect case. Even in cases in which there is no apparent conflict at the beginning of the case, conflicts may arise as the case proceeds. If this occurs, the lawyer will likely be required to withdraw from representing both parents. This could be difficult for the parents and delay the case. Other examples of potential conflicts of interest that the lawyer should avoid include representing multiple fathers in the same case or representing a different

party in a separate case where the same individual is a party to or has interests in the current case.

In analyzing whether a conflict of interest exists, the lawyer must consider whether : “(1) the representation of one parent will be directly adverse to another parent; (2) there is a significant risk that the representation of one or more parents will be materially limited by the lawyer’s responsibilities to another parent, a former parent or a third person or by a personal interest of the lawyer; or (3) the lawyer is related to another lawyer, as a parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.”<sup>18</sup>

**H. The parent’s lawyer must act in a culturally competent manner and with regard to the socioeconomic position of the parent throughout all aspects of representation.**

Action:

The parent’s lawyer should learn about and understand the parent’s background, determine how that has an impact on the parent’s case and always show the parent respect. The lawyer must understand how cultural, linguistic and socioeconomic differences impact interaction with parents, and must interpret the parent’s words and actions accordingly.

Commentary:

Clients and other parties involved in the child welfare system are a diverse group of people. Each person comes to this system with his or her own set of values and expectations, but it is essential that each person try to learn about and understand the backgrounds of others. An individual’s race, ethnicity, gender, sexual orientation and socioeconomic position all have an impact on how the person acts and reacts in particular situations. The parent’s lawyer must be vigilant against imposing the lawyer’s values onto the parent, and should, instead, work with the parent within the context of their culture and socioeconomic position. While the court and the child welfare agency have expectations of parents concerning their treatment of their children, the parent’s lawyer must strive to explain these expectations to the parents in a sensitive way. The parent’s lawyer should also try to explain to the court and agency how the parent’s background might affect the parent’s ability to comply with court orders and agency requests.

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<sup>18</sup> Oregon Rules of Professional Conduct, Rule 1.7(a).



**I. The parent’s lawyer should take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.**

Action:

The parent’s lawyer should attempt to locate and communicate with a missing parent client. If communication is established with the parent client, the lawyer should formulate positions the lawyer should take at hearings, and to understand what information the parent wishes the lawyer to share with the child welfare agency and the court.

Action:

If, after diligent steps, the lawyer is unable to communicate with the parent client, the lawyer should assess whether the parent’s interests are better served by advocating for the parent’s last clearly articulated position, or declining to state a position in further court proceedings and should act accordingly.

Action:

After a prolonged period without contact with the parent, the lawyer should consider withdrawing from representation.

Commentary:

To represent a parent adequately, the lawyer must know what the parent wishes. It is, therefore, important for parents’ lawyers to take diligent steps to locate missing parents. The lawyer should be aware that in some circumstances, it is contrary to the client’s interests to advise DHS or other parties that they have lost contact with their client. Diligent steps may include speaking with the parent’s family, the caseworker, the foster care provider and other service providers and checking OJCIN Odyssey and jail rosters. It may include sending mail to the client’s last known address as well as visiting the client’s last known address and ask anyone who lives there for information about the client’s whereabouts. Additionally, the lawyer may leave business cards with contact information with anyone who might have contact with the client as long as this does not compromise confidentiality.

If the lawyer is unable to find and communicate with the client after initial consultation, the lawyer should assess what action would best serve the parent client’s interests. This decision must be made on a case-by-case basis. In some cases, the lawyer may decide to take a position consistent with the client’s last clearly articulated position. In other cases the client’s interests may be better served by the lawyer declining to participate in the court proceedings in the absence of the client because that may better protect the client’s right to vacate orders made in the client’s absence.

A parent's lawyer should be familiar with the grounds and procedures for motions to set aside under ORS 419B.923 as well the time requirements.

**J. The parent's lawyer must be aware of the unique issues an incarcerated parent faces and provide competent representation to the incarcerated parent.**

Action:

The parent's lawyer should counsel the parent as to any effects incarceration has on the agency's obligations.

Action:

The parent's lawyer must be prepared to argue against an agency's motion to be relieved of the requirements to make reasonable efforts or active efforts if the Indian Child Welfare Act (ICWA) applies toward reunification.

Action:

The parent's lawyer may need to advocate for reasonable/active efforts to be made for the incarcerated parent and to assist the parent and the agency caseworker in accessing services. The lawyer must assist the parent client by advocating both with the agency and the jail or correctional facility for these services.

Action:

Lawyers must know Oregon's statutory and case law concerning incarceration as a basis for termination of parental rights.

Action:

The parent's lawyer should counsel the parent on the importance of maintaining regular contact with the child while incarcerated. The lawyer should assist in developing a plan for communication and visitation by obtaining necessary court orders and working with the caseworker as well as the correctional facility's social worker.

Action:

The lawyer for an incarcerated parent may need to visit the parent in the jail or prison or engage in more extensive phone or mail contact than with other clients. The lawyer should be aware of the challenges to having a confidential conversation with the parent client and must attempt to obtain a confidential setting for meetings with the client.

Action:

If the parent wants to be transported to court for a hearing, the lawyer should move the court for a transport order to do so. If the parent does not want to be present, or if having the parent present is not possible, the lawyer should explore what other means are available to have the parent participate, such as by telephone or video conference. The lawyer should obtain the necessary court order and make the necessary arrangements for the parent to participate in the hearing.

Action:

The parent's lawyer should communicate with the parent's criminal defense lawyer about issues related to self-incrimination and concerns about delaying the abuse and neglect case to strengthen the criminal case or vice versa.

Commentary:

A lawyer must be particularly diligent when representing an incarcerated parent. The lawyer should make efforts to visit an incarcerated parent at the correctional institution in which he or she is incarcerated as soon as possible after being appointed. The purpose of visiting the incarcerated parent at the correctional facility is to establish an attorney-client relationship and engage the client in case preparation. The lawyer must know why the parent client is incarcerated, the length of client's incarceration and post incarceration release requirements if applicable, particularly any potential restrictions or limitations on contact with children. If the parent is incarcerated as a result of an act against the child or another child in the family, the child welfare agency may seek an order excusing the agency from making reasonable efforts, allowing the case to be fast-tracked toward other permanency goals. If the parent opposes this step, the lawyer must oppose such a motion.

The lawyer should help the parent identify potential kinship placements and relatives who can provide care for the child while the parent is incarcerated. Lawyers must understand the implications of ASFA for an incarcerated parent who has difficulty visiting and planning for the child.

If the parent will be incarcerated for a lengthy period, and the child is not placed with the parent's relative, the lawyer should ensure that any potential placement options for the child with a relative of the parent, or other caretaker proposed by the parent, are made known to the agency and explored thoroughly.

Obtaining services such as substance abuse treatment, parenting skills or job training while in jail or prison is often difficult. The lawyer must learn about and advocate for available resources, contact the placements and attempt to get the

support of the agency and child's lawyer. Without services, it is unlikely the parent will be reunified with the child upon discharge from prison.

An incarcerated parent's contact with the child should generally, at a minimum, include cards and letters. In some instances, prisons may have technology such as videoconferencing and/or Skype that can be used for parent-child visitation. Because the time to process the required visitation paperwork varies from institution, the lawyer should begin the process of filling out and filing the forms to allow visitation between the parent client and their children. The parent's lawyer should also consult with the DHS caseworker and the parent's Department of Corrections counselor on ways to expedite approval of the parent's request for visitation.

Some prisons, such as Coffee Creek Correctional Facility in Wilsonville, Oregon, have a specialized unit for incarcerated parents and their children in a supported, child-friendly environment. If the client agrees, the lawyer should advocate for transfer of the parent to such a program as well as encouraging visits with the child through these programs.

The parent client's appearance in court frequently raises issues that require the lawyer to take action well in advance of the hearing or trial. The lawyer should find out from the parent if the parent wants to be present in court. In some prisons, inmates lose privileges if they are away from the prison, and the parent may prefer to stay at the prison rather than lose their privileges. The lawyer should explain to any parent hesitant to appear that the case will proceed without the parent's presence and discuss the potential consequences of the parent client's decision not to attend the proceeding.

**K. The parent's lawyer should take appropriate actions on collateral issues.**

Action:

The parent's lawyer should be aware of collateral issues arising during the course of representation of the client and identify such issues and, if able, counsel the client on options for advocacy on such issues. Examples include:

- 1) Pending criminal matters;
- 2) SSI and other public benefits;
- 3) Custody;
- 4) Paternity;
- 5) Immigration issues;
- 6) Child support;
- 7) Options to secure health and mental health services; and
- 8) Challenges to DHS administrative findings including denial of benefits or findings of abuse and neglect.

Commentary:

The parent's lawyer does not have an ethical duty to represent the parent client in these collateral matters where the terms of the lawyer's appointment and/or employment limit the lawyer's representation to the dependency case. A parent's lawyer must be aware of the ethical obligations to avoid providing legal advice on areas of law which they are not qualified to advise the client on. In some circumstances, the lawyer may have a duty to take limited steps to protect the parent client's rights, such as asserting the client's 5th Amendment rights to remain silent pending potential criminal prosecution.

**STANDARD 3 - TRAINING REQUIREMENTS FOR COMPETENT REPRESENTATION OF PARENT CLIENTS**

- A. A lawyer must provide competent representation to a parent client. Competent representation requires the legal knowledge, skill, training, experience, thoroughness and preparation reasonably necessary for the representation. A lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy for the client.**

Action:

A lawyer representing a parent in a dependency case should obtain and maintain proficiency in applicable substantive and procedural law and stay current with changes in constitutional, statutory and evidentiary law and local or statewide court rules.

Action:

A lawyer representing a parent in a dependency case should have adequate time and resources to competently represent the client, including maintaining a reasonable caseload and having access to sufficient support services.

- B. Before accepting an appointment or retainer as a lawyer for a parent in a child dependency or termination of parental rights case, the lawyer should gain experience by observing and serving as co-counsel in dependency and termination of parental rights cases. While accepting appointment or retainers for parents in dependency and termination of parent rights cases, the lawyer should participate in at least 16 hours of continuing legal education (CLE) related to juvenile law each year.**

Action:

A lawyer representing a parent in a dependency case must have served as counsel or co-counsel in at least two dependency cases adjudicated before a judge or have observed at least five dependency cases adjudicated before a judge.

Action:

A lawyer representing a parent in a termination-of-rights case must have served as counsel or co-counsel in or observed dependency cases as described above and have served as counsel or co-counsel in at least two termination of parental trials, or have observed or reviewed the transcripts of at least two termination of parental rights trials.

Commentary:

As in all areas of law, it is essential that lawyers learn the substantive law as well as local practice. Lawyers should be familiar with the Qualification Standards for Court Appointed Counsel, Office of Public Defense Services, Standard 4(7). Lawyers should consider the contractually-mandated training requirements as a floor rather than a ceiling, and actively pursue additional training opportunities. Newer lawyers are encouraged to work with mentors for the first three months and at a minimum should observe juvenile court hearings.

**C. A parent’s lawyer should acquire working knowledge of all relevant state and federal laws, regulations, policies and rules.**

Action:

A parent’s lawyer must read and understand all state laws, policies and procedures regarding child abuse and neglect, including but not limited to the following:

- 1) Oregon Revised Statutes chapters 419A and 419B, Oregon Juvenile Code;
- 2) Oregon Revised Statutes chapter 418, Child Welfare Services;
- 3) Refugee Child Act, ORS 418.925–418.945;
- 4) Oregon Revised Statutes concerning paternity, guardianships and adoption;
- 5) Interstate Compact on Placement of Children, ORS 417.200-417.260 and OAR;
- 6) Uniform Child Custody Jurisdiction and Enforcement Act, ORS 109.701-109.834 and OAR;
- 7) the basic structure and functioning of DHS and the juvenile court, including court procedures, the functioning of the citizen review board (hereinafter referred to as CRB) and court-appointed special advocates (hereinafter referred to as CASA) programs; and
- 8) Indian Child Welfare Act 25 USC §1901 -1963; BIA Guidelines; and OAR.

Action:

A parent's lawyer must be thoroughly familiar with Oregon evidence law and the Oregon Rules of Professional Conduct.

Action:

A parent's lawyer must be sufficiently familiar with the areas of state and federal law listed in Appendix A so as to be able to recognize when they are relevant to a case, and he or she should be prepared to research them when they are applicable.

- D. A parent's lawyer should have a working knowledge of placement alternatives, child development, family dynamics and parental discipline, as well as case and permanency planning, and services for children and families in dependency cases.**

Action:

The parent's lawyer must be familiar with case planning and permanency planning principles and with child welfare and family preservation services available through the Oregon Department of Human Services and available in the community and the problems they are designed to address. A parent's lawyer is encouraged to seek training in the areas listed in Appendix B.

Commentary:

The parent's lawyer should know the kinds and types of services within their communities which serve parents and children. Based on the conditions and circumstances which brought the parent and their children into the dependency system, the parent's lawyer should identify the services which will help remove the barriers to reunify the parent and their child(ren). The parent's lawyer should consult with the client about such services and whether the services address the client's needs. The parent's lawyer must be aware of cultural issues within the parent's community and be prepared in appropriate circumstances, to advocate services be made available to a parent that are culturally appropriate and meet the client's unique conditions and circumstances.

## **STANDARD 4 - GENERAL PRINCIPLES GOVERNING CONDUCT OF A CASE**

- A. A parent's lawyer should actively represent a parent in the preparation of a case, as well as at hearings.**

Action:

A parent's lawyer should develop a theory and strategy of the case to implement at hearings, including the development of factual and legal issues.

Action:

A parent's lawyer should identify family members and professionals who may already be, or who may become, a stable and long-term resource for the family.

Action:

A parent's lawyer should inform other parties and their representatives that he or she is representing a parent and expects reasonable notification prior to case conferences, changes of placement and other changes of circumstances affecting the child and the child's family.

- B. A parent's lawyer should, when consistent with the parent's interest, take every appropriate step to expedite the proceedings.**

Commentary:

Delaying a case often increases the time a family is separated and can reduce the likelihood of reunification. Appearing in court often motivates parties to comply with orders and cooperate with services. When a judge actively monitors a case, services are often put in place more quickly, visitation may be increased or other requests by the parent may be granted. If a hearing is continued and the case is delayed, the parent may lose momentum in addressing the issues that led to the child's removal or the parent may lose the opportunity to prove compliance with case plan goals. Additionally, the Adoption and Safe Families Act (ASFA) timelines continue to run despite continuances.

- C. A parent's lawyer should cooperate and communicate regularly with other professionals in the case.**

Action:

The parent's lawyer should communicate with lawyers for the other parties, the court appointed special advocates (CASA), the caseworker and service providers to learn about the client's progress and their views of the case, as appropriate.

Action:

The child's lawyer should respond promptly to inquiries from other parties and their representatives.



Commentary:

The parent's lawyer must have all relevant information to effectively represent the parent. This requires open and ongoing communication with the other lawyers and service providers working with the parent, the child and family. The parent's lawyer must be aware of local rules on this issue and seek permission to speak with represented parties when that would further the client's interests. When communicating with other parties, service providers and lawyers, the parent's lawyer should be especially mindful of confidentiality requirements.

**D. The parent's lawyer may not contact represented parties without the consent of their lawyer.**

Commentary:

Where the agency is represented by the counsel, the parent's lawyer should not talk with a caseworker without the lawyer's permission. However, in many cases, the agency has not retained the Department of Justice to represent it and in those cases the parent's lawyer may talk to caseworkers without permission. If the parent's lawyer is unsure whether the DOJ has been retained in a particular case, ask the caseworker.

In some counties, the District Attorney may appear representing the state. The DA is not counsel for the agency in these cases.

**E. The parent's lawyer should engage in case planning and advocate for social services in which the client wishes to participate.**

Action:

The parent's lawyer should advocate for the client both in and out of court.

Action:

The lawyer should counsel the client about the advantages and disadvantages of engaging in services prior to the court ordering them to engage in such services and determine whether the client is willing to engage in services. If the client is willing to engage in services, the parent's lawyer should advocate for those services.

Action:

The parent's lawyer should actively engage in case planning, including attending substantive case meetings, such as initial treatment planning meetings and case reviews of treatment plans. If the lawyer is unable to attend a meeting, the lawyer should send a delegate or advise the client not to attend.

Action:

The parent's lawyer should ensure the client asks for and receives needed services. The lawyer should not agree to services that are beyond the scope of the case. The services in which the client is engaged must be tailored to the client's needs and not merely hurdles over which the client must jump (e.g., if the client is taking parenting classes, the classes must be relevant to the underlying issue in the case).

Action:

Whenever possible, the parent's lawyer should use a social worker as part of the parent's team to help determine an appropriate case plan, evaluate social services suggested for the client and act as a liaison and advocate for the client with the service providers.

Action:

The lawyer for the parent should consider whether the child's lawyer or the CASA might be an ally on service and visitation issues. If so, the lawyer should solicit their assistance.

Action:

Pursuant to ORS 419B.389, a lawyer for a parent who believes that financial, health or other problems will prevent or delay the parent's compliance with an order of the court must inform the court of the relevant circumstances as soon as reasonable possible. If appropriate, the lawyer should also seek relief from the order under ORS 419B.923.

Commentary:

For a parent to succeed in a child welfare case, the parent should receive and cooperate with social services and maintain strong bonds with the child. It is therefore necessary that the parent's lawyer does whatever is possible to obtain appropriate services for the client and then counsel the client about participating in the services. Examples of services common to child welfare cases include: evaluations; family preservation or reunification services; medical and mental health care; drug and alcohol treatment; domestic violence prevention, intervention or treatment; parenting education; education and job training; housing; child care; and funds for public transportation so the client can attend services.

**F. The parent's lawyer should advocate strongly for frequent visitation in a family-friendly setting.**

Action:

When necessary, the parent's lawyer should seek court orders to compel the child welfare agency to provide frequent, unsupervised visitation to the client. The lawyer may also need to take action to enforce previously entered orders.

Action:

The parent's lawyer should advocate for an effective visiting plan and counsel the parent on the importance of regular contact with the child. Courts and the Department of Human Services (DHS) may need to be pushed to develop visitation plans that best fit the needs of the individual family. Factors to consider in visitation plans include:

- 1) Developmental age of child;
- 2) Frequency;
- 3) Length;
- 4) Location;
- 5) Supervision;
- 6) Types of activities; and
- 7) Visit coaching - having someone at the visit who could model effective parenting skills.

Commentary:

Frequent high quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the parent's lawyer seek a visitation order that will allow the best possible visitation. The lawyer should advocate that visits be unsupervised or at the lowest possible level of supervision, e.g. families often are more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than caseworkers.

Lawyers should advocate for visits to occur in the most family-friendly locations possible, such as in the family's home, parks, libraries, restaurants, places of worship or other community venues.

A lawyer for an incarcerated parent must be aggressive in ensuring frequent, high quality visitation. In general, visits in prison are governed by the Department of Corrections directives, available on line, which tend to be far more generous than the practices (as opposed to the policies) of DHS. A lawyer may need to be personally familiar with the visitation rules and visiting rooms of a particular prison to be an effective advocate for the parent.

## **STANDARD 5 - INVESTIGATION**

- A. The parent’s lawyer should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial and hearings.**

**Action:**

The parent’s lawyer must thoroughly prepare each case including working with investigators and social workers to prepare the case. If necessary, the lawyer should request OPDS for funds for investigation.

**Action:**

The parent’s lawyer should review the record of the case (formerly the legal file) and the supplemental confidential file (formerly the social file).

**Action:**

The parent’s lawyer should contact lawyers for the other parties and any court-appointed special advocate (CASA) for background information.

**Action:**

The parent’s lawyer should contact and meet with the child, with permission of the child’s lawyer.

**Action:**

The lawyer should obtain necessary authorizations for the release of information.

**Action:**

The lawyer should interview individuals involved with the parent and the child.

**Action:**

The parent’s lawyer should review relevant photographs, video or audio recordings, and other evidence.

**Action:**

The lawyer should attend treatment, placement and administrative hearings involving the parent and child as needed.

Action:

The parent's lawyer should determine whether obtaining independent evaluations or assessments of the client is needed for the investigation of the case.

Action:

A parent's lawyer should research and review relevant statutes and case law to identify defenses and legal arguments to support the parent's case.

Commentary:

If possible, the parent's lawyer should work with a team that includes social workers and investigators who can meet with parents and assist in investigating the underlying issues that arise as the case proceeds. If not possible, the lawyer is still responsible for gaining all pertinent case information, being mindful of not making himself or herself a witness.

A thorough investigation is an essential element of preparation. The parent's lawyer cannot rely solely on what the agency caseworker reports about the parent. Rather, the lawyer should review the agency file; meet with the parent as soon as possible and thoroughly interview the parent for information pertaining to the issues; and contact and interview any potential witnesses, including, but not limited to service providers who work with the parent and or the parent's child or family, relatives who can discuss the parent's care of the child(ren), community supports such as clergy, neighbors, child care providers, the child(ren)'s teacher or other natural supports who can clarify information relevant to the case.

**B. The parent's lawyer should counsel the parent well before each hearing, in time to use parent information for the case investigation.**

Action:

The parent's lawyer should meet with the parent regularly throughout the case. The meetings should occur well before any hearings, not at the courthouse just minutes before the case is called before the judge. The lawyer should ask the parent questions to obtain information to prepare the case and strive to create a comfortable environment so the parent can ask the lawyer questions. The lawyer should use these meetings to prepare for court as well as to counsel the parent concerning issues that arise during the course of the case. Information obtained from the parent should be used to propel the investigation. The lawyer should work collaboratively with the parent to ascertain independent sources to corroborate the parent's information.

Commentary:

Often, the parent is the best source of information for the lawyer and the lawyer should set aside time to obtain that information. Since the interview may involve disclosure of sensitive or painful information, the lawyer should explain lawyer-parent confidentiality to the parent. The lawyer may need to work hard to gain the parent's trust, but if a trusting relationship can be developed, the lawyer will be a better advocate for the parent. The investigation will be more effective if guided by the parent, as the parent generally knows firsthand what occurred in the case.

**C. The parent's lawyer should review the child welfare agency case file.**

Action:

The parent's lawyer should ask for and review the agency case file as early during the course of representation as possible and at regular intervals throughout the case.

Action:

After a review of the agency file, the lawyer should determine if any records or case notes of any social worker or supervisor have not been placed in the file and move to obtain those records as well either through informal or formal discovery.

Commentary:

Even if the lawyer is voluntarily given contents of the DHS file in paper or electronic format, the lawyer should also look at the actual file in the DHS office and request disclosure of all documents relating to the case from DHS, since the department may have additional items not given to the lawyer. If requests to obtain copies of the agency file are unsuccessful or slow in coming, the lawyer should pursue formal disclosure under the statute. If the agency case file is inaccurate, the lawyer should seek to correct it. The lawyer must read the case file and request disclosure of documents periodically because information is continually being received by the agency.

**D. The parent's lawyer must obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties and respond to requests for documents from other parties.**

Action:

A lawyer should comply with disclosure statutes and use the same to obtain names and addresses of witnesses, witness statements, results of evaluations or other information relevant to the case.

Commentary:

As part of the discovery phase, the lawyer should review the following kinds of documents:

- 1) Social service records, including information about services provided in the past, visitation arrangements, the plan for reunification and current and planned services;
- 2) Medical records;
- 3) School records;
- 4) Evaluations of all types;
- 5) Housing records ; and
- 6) Employment records.

**E. The parent’s lawyer should have potential witnesses, including adverse witnesses, interviewed by an investigator and, when appropriate, subpoenaed.**

Action:

The lawyer should have potential witnesses interviewed by an investigator. Potential witnesses may include:

- 1) School personnel;
- 2) Neighbors;
- 3) Relatives;
- 4) Caseworkers;
- 5) Foster parents and other caretakers;
- 6) Mental health professionals;
- 7) Physicians;
- 8) Law enforcement personnel; and
- 9) The child(ren).

Action:

If a lawyer conducts a witness interview, the lawyer should do so in the presence of a third person who can be available to appear as a witness at trial.

Action:

If an investigative report is written, and the parent’s lawyer intends to call the individual as a witness, the parent’s lawyer must comply with the disclosure requirements of 419 B.881.

Commentary:

It is a good practice to have interviews conducted by an investigator employed by the lawyer. If the lawyer conducts the interview, a third person, such as a member of the lawyer's office, should be present so that the third person can be used at trial to impeach the witness.

Action:

When appropriate, the parent's lawyer, or the lawyer's trained and qualified staff, should observe visitations between the parent and child.

**STANDARD 6 - COURT PREPARATION**

**A. The parent's lawyer should develop a case theory and strategy to follow at hearings and negotiations.**

Action:

Once the parent's lawyer has completed the initial investigation and discovery, including interviews with the client, the lawyer should develop a strategy for representation.

Commentary:

The strategy may change throughout the case, as the client makes or does not make progress, but the initial theory is important to assist the lawyer in staying focused on the client's wishes and on what is achievable. The theory of the case should inform the lawyer's preparation for hearings and arguments to the court. It should also be used to identify what evidence is needed for hearings and the steps to move the case toward the client's ultimate goals (e.g., requesting increased visitation, reunification services, etc.).

**B. The parent's lawyer should timely file all pleadings, motions, objections and briefs, and research applicable legal issues and advance legal arguments when appropriate.**

Action:

The parent's lawyer must file answers and responses, motions, objections and discovery requests and responsive pleadings or memoranda that are appropriate for the case. The pleadings and memoranda must be thorough, accurate and timely. The pleadings must be served on the lawyers or unrepresented parties.



Action:

When a case presents a complicated or new legal issue, the parent's lawyer should conduct the appropriate research before appearing in court. The lawyer should be prepared to distinguish case law that appears unfavorable.

Action:

If it would advance the client's case, the parent's lawyer should present a memorandum of law to the court.

Commentary:

Filing motions, pleadings and memoranda benefits the client. The lawyer who actively litigates issues highlights important issues for the court and builds credibility for the lawyer. In addition to filing responsive papers and discovery requests, the lawyer should seek court orders when that would benefit the client, e.g., filing a motion to enforce court orders to ensure the child welfare agency is meeting its reasonable/active efforts obligations. When out-of-court advocacy is not successful, the lawyer should not wait to bring the issue to the court's attention. Arguments in child welfare cases are often fact-based. Nonetheless, lawyers should ground their argument in statutes, OARs and case law. Additionally, while non-binding, law from other jurisdictions can be used to persuade a court.

At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Lawyers should preserve legal issues for appellate review by making a record even if the argument is unlikely to prevail at trial level.

Appropriate pretrial motions include but are not limited to:

- 1) Discovery motions;
- 2) Motions challenging the constitutionality of statutes and practices;
- 3) Motions to strike, dismiss or amend the petitions;
- 4) Motions to transfer a case to another county;
- 5) Evidentiary motions and motions in limine;
- 6) Motions for additional shelter hearings;
- 7) Motions for change of venue;
- 8) Motions to consolidate; and
- 9) Motions to sever.

Note: Under ORS 28.110, when a motion challenges the constitutionality of a statute, it must be served on the Attorney General.

Action:

A lawyer should make motions to meet the client's needs pending trial.

Commentary:

Examples of such motions include:

- 1) Motion for family reunification services;
- 2) Motion for medical or mental health treatment;
- 3) Motion for change of placement;
- 4) Motion to increase, parental or sibling visitation;
- 5) Motion seeking child support or waiver of obligation to pay child support;
- 6) Motion seeking contempt for violations of court orders; and
- 7) Motion to establish, disestablish or challenge paternity pursuant to chapter 419B.

**C. With the client's permission, and when appropriate, the parent's lawyer should engage in settlement negotiations and mediation to resolve the case quickly.**

Action:

The parent's lawyer should, when appropriate (e.g., after sufficient investigation determines that the petition will likely be granted), participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the client's goals.

Commentary:

Negotiation and mediation often result in detailed agreement among parties about actions the participants must take. Generally, when agreements have thoroughly been discussed and negotiated, all parties, including the parents, feel as if they had a say in the decision and are more willing to adhere to a plan. Mediation can resolve a specific conflict in a case, even if it does not result in an agreement about the entire case. Negotiated agreement about facts sufficient to allow the court to enter jurisdictional findings can move a case along more swiftly.

Action:

Parent's lawyers should be trained in mediation and negotiation skills and be comfortable resolving cases outside a courtroom setting when consistent with the client's position. With the agreement of the client, the parent's lawyer should share information about services in which the parent is engaged and provide copies of

favorable reports from service providers. This information may affect settlement discussions.

Action:

The lawyer must communicate all settlement offers to the client and discuss their advantages and disadvantages with the client. Specifically, the lawyer should fully explain to the client the rights that would be waived by a decision to admit to facts sufficient to establish jurisdiction, including the impact of time-lines established by ORS 419B.470 et. seq.

Action:

The lawyer should explain to the client the conditions and limits of the settlement and the effect of the settlement, especially when admissions made to allegations could give rise to a criminal charge or finding of aggravated circumstances or extreme conduct. These admissions could affect future actions such as domestic relations proceedings, immigration proceedings, criminal proceedings or termination-of-parental rights petitions.

Action:

It is the client's decision whether to settle. The lawyer must be willing to try the case and not compromise solely to avoid the hearing.

Commentary:

While the parents may admit to facts, parents cannot stipulate to jurisdiction.<sup>19</sup> Jurisdiction is a legal conclusion for the judge to determine.

The facts to which the parent admits will frame the court's inquiry at all subsequent hearings as well as what actions the parent must take, the services provided and the ultimate outcome. Thus, the parent's lawyer must take care to ensure that the factual admissions made by the client are specific and limited to the allegations in the petition.

A written, enforceable agreement should be prepared whenever possible, so that all parties are clear about their rights and obligations. The parent's lawyer should ensure agreements accurately reflect the understandings of the parties. The parent's lawyer should request a hearing or move for contempt, if appropriate, if orders benefiting the parent are not obeyed.

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<sup>19</sup> Dept. of Human Services v. D.D., 238 Or. App. 134, 138, 241 P3d 1177 (2010), rev den 349 Or. 602, 249 P3d 123 (2011).

**D. The parent’s lawyer should thoroughly prepare the parent client to testify.**

Action:

The parent’s lawyer should discuss and practice the questions that the lawyer will ask the parent, as well as types of questions the parent should expect opposing counsel to ask. The parent’s lawyer should help the parent think through the best way to present information, familiarize the parent with the court setting, and offer guidance on logistical issues regarding getting to court on time and appropriate court attire.

Commentary:

Testifying in one’s own case can be affirming, but it also can be intimidating without sufficient preparation. The parent’s lawyer should be attuned to the client’s comfort level about the hearing, and ability to testify accurately and persuasively. The lawyer should provide the client with a written list of questions that the lawyer will ask, if this will help the client.

Unlike in a criminal proceeding, a parent generally cannot invoke the right not to testify in a dependency case unless the client’s testimony would potentially expose the client to criminal liability.

**E. The parent’s lawyer should identify, locate and prepare all witnesses.**

Action:

The parent’s lawyer, in consultation with the parent, should develop a witness list well before a hearing. The lawyer should not assume the agency will call a witness, even if the witness is named on the agency’s witness list. The lawyer should contact the potential witnesses to determine if they can provide helpful testimony and issue a subpoena to such witnesses.

Action:

When appropriate, witnesses should be informed that a subpoena is on its way. The lawyer should also ensure the subpoena is served. The lawyer should subpoena potential agency witnesses (e.g., a previous caseworker) who have favorable information about the client.

Action:

The parent’s lawyer should set aside time to fully prepare all witnesses personally. The lawyer should remind the witnesses about the court date.

Commentary:

Witnesses may be people with direct knowledge of the allegations against the parent, service providers working with the parent or individuals from the community who could testify generally about the client's strengths.

When appropriate, the parent's lawyer should consider working with other parties who share the parent's position (such as the child's representative) when creating a witness list, issuing subpoenas and preparing witnesses. Doctors, nurses, teachers, therapists and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing. The parent's lawyer should review ORS 419B.899 and 419B.902 and local supplemental rules for the proper process and time to issue subpoenas.

Witnesses are often nervous about testifying in court. Lawyers should prepare them thoroughly so they feel comfortable with the process. Preparation will generally include rehearsing the specific questions and answers expected on direct and anticipating the questions and answers that might arise on cross-examination. Lawyers should provide written questions for those witnesses who need them.

- F. The parent's lawyer should identify, secure, prepare and qualify expert witnesses when needed. When possible, the parent's lawyer should interview opposing counsel's experts.**

Action:

Often a case requires multiple experts with different expertise, such as medicine, mental health treatment, drug and alcohol treatment, or social work. Experts may be needed for ongoing case consultation in addition to providing testimony at trial. The lawyer should consider whether the opposing party is calling expert witnesses and determine whether the parent needs to call any experts on behalf of the parent to respond to the opponent's experts.

Action:

When opposing counsel plans to call expert witnesses, the parent's lawyer should seek to interview the witnesses in advance. Lawyers should scrupulously comply with standing orders of the juvenile court regarding contact with court-ordered evaluators.

Commentary:

By contacting opposing counsel's expert witnesses in advance, the parent's lawyer will know what evidence will be presented against the client and whether the expert has any favorable information that might be elicited on cross-examination. The lawyer will

be able to discuss the issues with the client, prepare a defense and call experts on behalf of the client, if appropriate. Conversely, if the lawyer does not talk to the expert in advance, the lawyer could be surprised by the evidence and unable to represent the client competently.

## **STANDARD 7 - HEARINGS**

### **A. The parent's lawyer should prepare for and attend all hearings, including pretrial conferences.**

#### **Action:**

The parent's lawyer must prepare for and attend all hearings and participate in all telephone and other conferences with the court.

#### **Action:**

If the court proceeds in the absence of the parent's lawyer, the lawyer should file a motion to set aside.

#### **Commentary:**

The lawyer must be prepared to present in court in order to adequately represent the parent. Participating in pretrial proceedings may improve case resolution for the parent. The parent's lawyer's failure to participate in the proceedings in which all other parties are represented may disadvantage the parent. Therefore, the parent's lawyer should be actively involved in this stage. If a lawyer has a conflict with another courtroom appearance, the lawyer should notify the court and the other parties and request a short continuance. The parent's lawyer should avoid having another lawyer stand in to represent the client in court if the other lawyer is unfamiliar with the client or case.

Becoming a strong courtroom lawyer takes practice and attention to detail. The lawyer must be sure to learn the rules about presenting witnesses, impeaching testimony and entering evidence. The lawyer may wish to seek out training in trial skills and watch other lawyers to learn from them. Presenting and cross-examining witnesses are skills with which the parent's lawyer must be comfortable.

### **B. The parent's lawyer should prepare and make all appropriate motions and evidentiary objections. The parent's lawyer must be aware of the need to make a record for appeal.**

Action:

The parent's lawyer should make appropriate motions and evidentiary objections to advance the client's position during the hearing. If necessary, the lawyer should file memoranda of points and authorities in support of the client's position on motions and evidentiary issues. The parent's lawyer should always be aware of preserving legal issues for appeal.

Commentary:

It is essential that parents' lawyers understand the applicable rules of evidence and all court rules and procedures. The lawyer must be willing and able to make appropriate motions, objections and arguments (e.g., objecting to the qualification of expert witnesses, the competence of child or other witnesses, or raising the issue of the child welfare agency's lack of reasonable/active efforts).

**C. The parent's lawyer must present and cross-examine witnesses, prepare and present exhibits.**

Action:

The parents' lawyer must be able to effectively present witnesses to advance the client's position. Witnesses must be prepared in advance and the lawyer should know what evidence will be presented through the witnesses. The lawyer must also be skilled at cross-examining opposing parties' witnesses. The lawyer must know how to offer documents, photos, physical objects, electronic records, etc. into evidence.

Action:

At each hearing the lawyer should advocate for the client's goals, keeping in mind the case theory. This should include advocating for appropriate services and requesting that the court state its expectations of all parties on the record.

**D. The parent's lawyer should the opportunity to make opening and closing arguments.**

Action:

The parent's lawyer should make opening and closing arguments in the case to frame the issues around the parent's lawyer's theory of the case and ensure the judge understands the issues from the parent's perspective.

Commentary:

In many child abuse and neglect proceedings, lawyers waive the opportunity to make opening and closing arguments. However, these arguments can help shape the way the judge views the case, and therefore can help the client. Argument may be especially critical, for example, in complicated cases when information from expert witnesses should be highlighted for the judge, in hearings that take place over a number of days, or when there are several children and the agency is requesting different services or permanency goals for each of them.

It is important to be able to read the judge. The attorney shall move along when the judge is tracking the argument and elaborate on the areas that appear to need more attention.

- E. The parent’s lawyer should ensure that findings of fact, conclusions of law and orders that benefit the parent are included in the court’s decision.**

Action:

The parent’s lawyer must be familiar with the standard forms and ensure that they are completed correctly and findings beneficial for your client are included.

Commentary:

By preparing proposed findings of fact and conclusions of law, the parent’s lawyer frames the case and ruling for the judge. This may result in orders that are more favorable to the parent, preserve appellate issues and help the lawyer clarify desired outcomes before a hearing begins. The lawyer should offer to provide the judge with proposed findings and orders in electronic format. When an opposing party prepares the order, the parent’s lawyer should review it for accuracy prior to it being submitted to the judge for signature.

**STANDARD 8 - POST HEARING**

- A. The parent’s lawyer should review court orders to ensure accuracy and clarity and review with client.**

Action:

At the conclusion of the hearing, the parent’s lawyer should request and obtain a copy of the written order or judgment to ensure it reflects the court’s verbal order. If the order or judgment is incorrect, *i.e.*, it does not reflect the court’s verbal rulings, the lawyer should take whatever steps are necessary to correct it to the extent that the corrections are beneficial to the client. The parent’s lawyer should provide the client



with a copy of the order or judgment and should review the order or judgment with the client to ensure the client understands it and the client's obligations under the order. If the client is unhappy with the order, the parent's lawyer should counsel the client about any options to appeal or request a rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured.

Commentary:

The parent may be angry about being involved in the child welfare system and a court order that is not in the parent's favor could add stress and frustration. It is essential that the parent's attorney take time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the client. The parent's lawyer should counsel the client about all options, including appeal (see Standard 10).

- B. The parent's lawyer should take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.**

Action:

If the client is attempting to comply with the order but other parties, such as DHS, are not meeting their responsibilities, the parent's lawyer should approach the other party and seek assistance on behalf of the client. If necessary, the parent's lawyer should request a hearing to review the order and the other party's noncompliance or take other steps to ensure that appropriate social services are available to the client.

Commentary:

The parent's lawyer should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The attorney should speak with the client regularly about progress and any difficulties the client is encountering while trying to comply with the court order or service plan. When DHS neglects or refuses to offer appropriate services, especially those ordered by the court, the lawyer should file motions to compel or motions for contempt. When DHS does not offer appropriate services, the parent's lawyer should consider making referrals to independent social service providers.

## **STANDARD 9 - MODIFYING OR VACATING AN ORDER**

- A. The parent's lawyer may move the court to modify or set aside an order if appropriate.**

### Action:

If the client fails to appear at a hearing, and the court enters an adverse judgment because of the parent's non-appearance, the parent's lawyer should not ask the court to allow him or her to withdraw. Instead, the parent's lawyer should object to entry of the judgment or order and should take prompt action to contact the client. The parent's lawyer should advise the client that if he or she is dissatisfied with the court's order or judgment the lawyer may move the court to modify or vacate the order pursuant to ORS 419B.923. If the client directs the lawyer to pursue a motion to modify or vacate the judgment, the lawyer should take prompt action to do so.

### Commentary:

The parent's lawyer should be aware that ORS 419B.923 requires that a motion to modify or vacate an order or judgment of the juvenile court must be filed within a "reasonable period of time." In light of that requirement, *inter alia*, it is particularly important that the parent's lawyer inform the court that he or she wishes to continue his or her appointment in the face of the parent's non-appearance. That is particularly so in cases where the juvenile court terminates a parent's parental rights based on the parent's non-appearance. Should the parent's lawyer withdraw upon a parent's non-appearance in a termination of parental rights matter, the parent is then left without counsel to offer advice about the option of filing a motion to set aside the judgment and is without counsel to properly prepare and file the motion should one be warranted. Further, when the court has allowed the lawyer to withdraw in a termination of parental rights matter, it is unlikely that court will grant a parent's request for appointment of counsel to litigate a motion under ORS 419B.923 because upon the termination of the parent's parental rights, the parent is no longer a party to the case. In sum, in most instances, the lawyer for the parent's withdrawal upon a parent's nonappearance effectively forecloses the parenting from obtaining relief under ORS 419B.923. Thus, only after the parent's lawyer has made a good faith effort to locate his or her client and has been unable to do so during the pendency of a "reasonable period of time," should the parent's lawyer seek withdrawal or acquiesce to termination of his or her appointment.

## **STANDARD 10 - APPEALS ISSUES FOR TRIAL LAWYER**

### **A. Consider and discuss the possibility of appeal with the client.**

#### Action:

The parent's lawyer should immediately consider and discuss with the client, preferably in person, the possibility of appeal when a court's ruling is contrary to the client's position or interests. Regardless of whether the parent's lawyer believes an appeal is appropriate or that there are any viable issues for appeal, the lawyer should advise the

client—at the conclusion of each hearing—that he or she has a right to appeal from any judgment or order resulting from a jurisdictional hearing, review hearing, permanency hearing or termination of parental rights trial. Further, if the hearing was held before a juvenile court referee, the parent’s lawyer should advise the client that he or she is entitled to a rehearing before a juvenile court judge. Unless a rehearing is requested within 10 days following the entry of the referee’s order, the order will become a final and non-appealable order.<sup>20</sup> Whether to seek a rehearing of a referee’s order or to pursue a direct appeal in the appellate courts is always the client’s decision.

Commentary:

When discussing the possibility of an appeal, the lawyer should explain both the positive and negative effects of an appeal, including how the appeal could affect the parent’s goals. For instance, the appellate court could reverse the juvenile court and vindicate the client’s belief that the juvenile court’s jurisdiction was not warranted. Further, the filing of a notice of appeal vests the appellate court with jurisdiction to stay the juvenile court’s orders while the appeal is pending.<sup>21</sup> Alternatively, an appeal could delay the case for a long time.

**B. If the client decides to appeal, the parent’s lawyer should timely and thoroughly facilitate the appointment of appellate lawyer.**

Action:

The parent’s lawyer should take all steps necessary to facilitate appointing appellate lawyer *e.g.*, the parent’s lawyer should refer the case for appeal to the Office of Public Defense Services and comply with that office’s referral procedures. The parent’s lawyer should work with the appellate lawyer and identify to the appellate lawyer the parties to the case (for example whether there are any interveners), appropriate issues for appeal and promptly respond to all requests for additional information or documents necessary for appellate lawyer to prosecute the appeal. The parent’s lawyer should promptly comply with the court’s order to return exhibits necessary for appeal.

Commentary:

Pursuant to 419A.200(4)<sup>22</sup>, the trial attorney must file the notice of appeal or if court-appointed, the trial attorney may discharge his or her duty to file the notice of

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<sup>20</sup> ORS 419A.150(4)

<sup>21</sup> See ORS 19.360.

<sup>22</sup> ORS 419A.200(4) “The counsel in the proceeding from which the appeal is being taken shall file and serve those documents necessary to commence an appeal if the counsel is requested to do so by the party the counsel represents. If the party requesting an appeal is represented by court-appointed counsel, court appointed counsel

appeal by referring the case to the Juvenile Appellate Section of OPDS using the on-line referral form and complying with OPDS procedures.

To comply with OPDS procedures, the parent's lawyer referring a case to OPDS for appeal must satisfy the following conditions:

- 1) Electronically complete and submit the referral form to OPDS at least five (5) days prior to the due date for the notice of appeal (If the referral is within fewer than 5 business days of the notice of appeal due date, the trial lawyer remains responsible for filing the notice of appeal and should contact OPDS for assistance locating counsel on appeal.); and
- 2) Fax (503.378.2163) or email ([juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us)) to OPDS a copy of the judgment being appealed.

If OPDS must refer a case to non-OPDS counsel due to a conflict or workload issues, the following procedures apply:

- 1) OPDS will prepare a draft notice of appeal and related documents in trial lawyer's name;
- 2) OPDS will email the draft documents to trial lawyer for review and approval—but not for filing. If counsel notes a defect in the form of the documents, counsel should notify OPDS immediately by email at [juvenile@opds.state.or.us](mailto:juvenile@opds.state.or.us) or by telephone at 503.378.6236;
- 3) If the trial lawyer does not contact OPDS within two business days of the document transmission, OPDS will assume that counsel has reviewed and approved the documents; and
- 4) An OPDS attorney will sign the notice of appeal and related documents in the trial lawyer's name, file the notice of appeal and motion to appoint appellate lawyer with the Court of Appeals, serve the parties and initiate transcript production. OPDS will also forward a copy of the documents to the client with a cover letter that includes the name and contact information of the appellate lawyer appointed to represent the client on appeal.

## **STANDARD 11 - APPEALS ISSUES FOR APPELLATE LAWYER**

### **A. Timely file the notice of appeal**

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may discharge the duty to commence and appeal under this subsection by complying with policies and procedures established by the office of public defense services for appeals of juvenile court judgments.”

Action:

The parent's appellate lawyer should timely file the notice of appeal including timely serving all parties.

Commentary:

A proper notice of appeal is a jurisdictional requirement.<sup>23</sup> Consequently, the notice must satisfy statutory requirements in order to prosecute the appeal.<sup>24</sup>

ORS 419A.200(5) permits an appellate lawyer to move the court for leave to file a late notice of appeal after the statutory 30-day time limit (up to 90 days after entry of judgment). A motion to file a notice of appeal after the 30-day period, to be successful, must demonstrate that (1) the failure to file a timely notice of appeal was not personally attributable to the parent, *and* (2) "a colorable claim of error" exists in the proceeding from which the appeal is taken.<sup>25</sup>

**B. The parent's appellate lawyer should maintain communication with the client.**

Action:

If the appellate lawyer differs from the trial lawyer, the appellate lawyer should write to the client as soon as possible and confirm that he or she wishes to pursue a direct appeal and advise the client of the appellate process including relevant timelines.

Commentary:

The appellate lawyer should not be bound by the determinations of the client's position and goals as made by trial lawyer and should independently determine his or her client's position and goals on appeal.

In all cases, except appeals from a judgment, terminating a parent's parental rights the appeal from a discrete judgment and the ongoing dependency litigation will be occurring concurrently. The appellate lawyer and the trial lawyer should be thoughtful about their respective roles and relationship with the client. For example, the trial lawyer should be careful to safeguard the appeal by consulting with the appellate lawyer prior to upcoming hearings and immediately notifying the appellate lawyer

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<sup>23</sup> ORS 19.270.

<sup>24</sup> See ORS 19.250 (contents of notice of appeal), ORS 19.255 (time for filing notice) and ORS 419A.200(3) (juvenile appeals); see also Oregon Rules of Appellate Procedure (ORAP) 2.05 (contents of notice of appeal), ORAP 2.10 (separate notices of appeal) and ORAP 2.22 (appeals in juvenile cases).

<sup>25</sup> See *State ex rel Dept. of Human Services v. Rardin*, 338 Or. 399, 408, 110 P3d 580 (2005). (A "colorable claim of error" in this context means "a claim that a party reasonably may assert under current law and that is plausible given the facts and the current law (or a reasonable extension or modification of current law.)").

should the court enter any new order or judgment to determine whether the new judgment should be referred for appeal. The appellate lawyer should consult with the trial lawyer about the issues raised in the opening brief and offer to consult about properly raising issues at upcoming hearings.

The appellate lawyer should advise the client about the limited scope of his or her representation and, should the client have concerns about their ongoing case, the appellate lawyer should refer the client to trial lawyer. Ideally, the trial lawyer and the appellate lawyer will work collaboratively and strategically to obtain the best result for the client. For example, the appellate lawyer may assist the trial lawyer in identifying issues to litigate at upcoming hearings and in properly preserving issues for a subsequent appeal in the event that the parent does not prevail at trial.

### **C. Prosecuting the appeal**

#### **a. Issue Selection and Briefing**

##### Action:

The appellate lawyer should thoroughly review the judgment to ensure that it comports with the requirements of the juvenile code.<sup>26</sup> The appellate lawyer should thoroughly review the record of the hearing that is subject to appeal and identify appropriate issues to raise on direct appeal.

##### Action:

The appellate brief should be clear, concise and comprehensive and also timely filed. The brief should reflect all relevant case law and present the best legal arguments available under Oregon and federal law for the client's position. The brief should include novel legal arguments if there is a chance of developing favorable law in support of the parent's claim. The appellate lawyer should send the client and the trial lawyer a copy of the brief when it is filed.

##### Commentary:

The court-appointed appellate lawyer has considerable authority over the manner in which an appeal is presented. It is the appellate lawyer's responsibility to exercise his or her professional judgment to raise issues that, in the attorney's

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<sup>26</sup> See for example ORS 419B.476(5) (setting out requirements of a valid permanency judgment).

judgment, will provide the best chance of success on appeal—even when the client disagrees with the attorney’s judgment.<sup>27</sup>

**b. Oral argument**

Action:

If oral arguments are scheduled, the appellate lawyer should be prepared, organized and direct. The appellate lawyer should inform the client of whether he or she intends to present oral argument or submit the case on the briefs. If counsel intends to present oral argument, counsel should inform the client of date, time and place scheduled for oral argument. The oral argument may be waived at the discretion of the appellate lawyer in consideration of the merits of the appeal, the efficient use of resources and whether there are strategic reasons to allow the case to be submitted on the briefs.

Commentary:

As with the determination of which issues to raise on direct appeal, the appellate lawyer must exercise his or her professional judgment in determining whether to present oral argument to the appellate court.

**c. The appellate lawyer should communicate the results of the appeal and its implications to the client.**

Action:

The parent’s appellate lawyer should communicate the result of the appeal and its implications, and provide the client with a copy of the appellate decision. This appellate lawyer should promptly communicate with the trial lawyer and assist the trial lawyer with interpreting the appellate court’s decision and preparing for the next trial level event. In the event that the client does not prevail on direct appeal in the Oregon Court of Appeals, the appellate lawyer may petition for review in the Oregon Supreme Court. Whether to petition for review in the Oregon Supreme Court is ultimately the client’s decision.

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<sup>27</sup> *See Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L Ed2d 987 (1983). *See also, Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L Ed 2d 434 (1986) (“[T]he process of winnowing out weakened arguments on appeal and focusing on those more likely to prevail \*\*\* is the hallmark of effective appellate advocacy.”).

APPENDIX A –

ANCILLARY AREAS OF LAW WITH WHICH LAWYERS SHOULD BE SUFFICIENTLY FAMILIAR TO  
RECOGNIZE THEIR RELEVANCE TO PARTICULAR CASES

- (1) State laws and rules of civil procedure including Uniform Trial Court Rules and Supplemental Trial Court Rules;
- (2) State laws and rules of criminal procedure;
- (3) State laws and rules of administrative procedure;
- (4) State laws concerning public benefits, education and disabilities;
- (5) State laws regarding domestic violence;
- (6) State domestic relations laws, especially those regarding paternity, guardianships and adoption;
- (7) The rights a client might have as a result of being the victim of a crime;
- (8) Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963, the ICWA Regulations, 25 C.F.R. Part 23 and the Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979);
- (9) Individuals with Disabilities Education Act (IDEA), P.L. 91-230;
- (10) Interstate Compact on Placement of Children (ICPC);
- (11) The Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act;
- (12) Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357;
- (13) Child Abuse Prevention Treatment Act (CAPTA), P.L. 108-36;
- (14) Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351;
- (15) McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11431-11435;
- (16) Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622 (b)(9) (1998), 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. § 1996b (1998);
- (17) Foster Care Independence Act of 1999 (FCIA), P.L. 106-169;
- (18) Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 (1982);
- (19) Family Education Rights Privacy Act (FERPA), 20 U.S.C. § 1232g;
- (20) Health Insurance Portability and Accountability Act of 1996 (HIPPA), P.L., 104-192 § 264, 42 U.S.C. § 1320d-2 (in relevant part);
- (21) Public Health Act, 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2 (pertaining to confidentiality of individual information);
- (22) Immigration laws relating to child welfare and child custody;
- (23) ORS 419B.851(3), statutory implementation of the Vienna Convention on Consular Relations, April 24, 1963, Article 36, regarding service of process, and 8 C.F.R. § 236.1;



- (24) The Hague Convention of May 29, 1993 on Protection of Children and Co-operation in Respect of Intercounty Adoption;
- (25) The International Parental Kidnapping Crime Act of 1993 (IPKCA), 18 U.S.C § 1204 (1993);
- (26) The Hague Convention on the International Aspects of Child Abduction, implemented by ICARA, 42 U.S.C. § 11603 et seq.; and
- (27) The Hague Convention on the Service of Judicial and Extrajudicial Documents Abroad.

## APPENDIX B –

### ADDITIONAL AREAS IN WHICH LAWYERS SHOULD SEEK TRAINING

- (1) Stages of child development and patterns of growth as related to child abuse and neglect;
- (2) Cultural and ethnic differences as they relate to child-rearing;
- (3) Substance abuse and resources for substance abusing families;
- (4) Domestic violence, its effect on parents, children and families and appropriate resources;
- (5) Family preservation services;
- (6) Resources for diagnosis and treatment of sexual abuse, physical abuse and emotional abuse;
- (7) Resources for the treatment and recognition of non-organic failure to thrive;
- (8) Educational, mental health and other resources for special needs children, including infants and preschoolers;
- (9) The appropriateness of various types of placement;
  - (a) The efforts that should be made to ensure a smooth, timely transition between placements;
  - (b) The effect of the placement on visitation by parents, siblings and other relatives and on the services needs of the child; and
  - (c) The transracial, transcultural and language aspects of the placement.
- (10) The importance of placing siblings together when appropriate;
- (11) Risk assessment prior to reunification;
- (12) The use and appropriateness of psychotropic drugs for children;
- (13) Government benefits available in dependency cases, such as Social Security payments including non-needy relative grants; AFDC, AFDC-FC, adoption assistance programs and crime victims programs;
- (14) Transition plans and independent living programs for teens, including emancipation issues; and
- (15) Accessing private insurance for services.

APPENDIX C –

CHECKLISTS FOR SPECIFIC HEARINGS FOR ATTORNEYS FOR CHILDREN:

**A. SHELTER HEARINGS:** At the **Shelter Hearing (as well as subsequent hearing)**, the child's lawyer should:

1. Obtain copies of all discovery including but not limited to:
  - a. Shelter report;
  - b. Police report; and
  - c. Prior Child Welfare referrals.
2. Talk with child before hearing if possible:
  - a. Purpose of hearing;
  - b. Placement preference if applicable; and
  - c. Child's preferred outcome.
3. Evidentiary Hearing:
  - a. Jurisdiction sufficient of the petition;
  - b. Appropriateness of venue;
  - c. Adequacy of notice provided to parties and Indian child's tribe if applicable:
    - 1) Determine applicability of the Indian Child Welfare Act or the Uniform Child Custody Jurisdictional Enforcement Act; and
    - 2) Transfer of the case to tribal court if appropriate.
  - d. Determine if paternity established;
  - e. Child's position on return to home without danger of suffering physical injury or emotional harm;
  - f. Has the agency made reasonable efforts (active efforts if ICWA) to prevent the need for removal;
  - g. Have diligent efforts been made to place with family;
  - h. Legal standard:
    - 1) Least restrictive and most family-like placement;
    - 2) Parent can parent at a minimally adequate level; and
    - 3) Removal (or continuation in the home) not in the best interest or welfare of the child.
  - i. Is continuation of the child in the home contrary to the child's expressed desires or whether it is in the best interest of welfare of the child to be removed from home; and
  - j. Child should remain in current school unless it is in the best interest of the child.
4. The lawyer should request any temporary orders that the client directs, including but not limited to:
  - a. Temporary restraining orders, including orders expelling an allegedly abusive parent from the home;

- b. Orders governing future conduct of the parties including not discussing allegations with child, etc.;
  - c. Orders for any services agreed-on before adjudication;
  - d. Visitation orders that are reasonable and flexible and take into consideration the child's age and activities and counseling schedules and available transportation and that specify the terms and conditions of visitation:
    - 1) OAR 419B.337(3). Under this provision, the juvenile court may, at the minimum, order that DHS provide a certain number of visits weekly and that the visits be supervised or unsupervised; and
    - 2) Lack of resources on behalf of the agency is not enough to limit visits OAR 413-070-0870(1); see also OAR 413-070-0860(1)(d)(B)(ii); OAR 413-070-0860(2)(f)(B). Visits must meet the best interest of the child.
  - e. Orders for child support if appropriate;
  - f. Order for DHS-CW to investigate relatives and friends of the family as potential placements or to place sibling groups together; and
  - g. Orders for DHS to provide appropriate treatment for the child.
5. Review the Order with the child client or child's care provider if child with diminished capacity:
    - a. Orders by referee's can be reviewed by a sitting judge; and
    - b. Right (and process) to appeal.
  6. Review the Consequences of not abiding by the Order.

**B. JURISDICTION/ADJUDICATION HEARING:** The lawyer should be fully prepared by:

1. Review and prepare materials (including fact and legal argument) available at the trial, including all pleadings, discovery and investigate reports, as well as, relevant statutes, case law and the evidence code;
2. A draft outline of:
  - a. Opening and closing statements;
  - b. Direct and cross examination plans for all witnesses based on allegations in petition; and
  - c. Findings of fact and conclusions of law to be requested at the conclusion of the hearing.
3. The child's lawyer should ensure that the child is informed of and understand the nature, obligations and consequences of the decision, and the need for the child or the child with diminished capacity's care provider to cooperate with the trial court's orders. A child's lawyer should also explain the child's rights and possibilities of post-trial motions to reconsider, set aside, modify or review the jurisdictional finding, as well as the right to appeal. The child's lawyer should explain to the child, or the care provider of a child with diminished capacity, the consequences of violating the trial court's order and the continuing jurisdiction of the court; and

4. After the jurisdictional hearing or adjudication, the child's lawyer should:
  - a. Carefully review the judgment and advise the child about potential issues for appeal;
  - b. Advise the child in writing of the timelines for filing a notice of appeal and the child lawyer's ability to represent the client on appeal; and
  - c. Assist the child in locating a lawyer to handle the appeal if the lawyer is unable to undertake such representation and take whatever steps are necessary to preserve the client's right to appeal the judgment.

If the trial lawyer is court appointed they shall timely refer the case to OPDS pursuant to OPDS procedures.

**C. DISPOSITION HEARINGS:** Explain the nature of the hearing to the child, the issues involved and alternatives available to the Court:

1. When court has found sufficient evidence to support jurisdiction - the lawyer should still, when appropriate, ask the court to not exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the child because the child and family do not require supervision, treatment or placement;
2. A lawyer should advocate the least restrictive disposition possible that can be supported and is consistent with the child's needs and desires;
3. Respond to inaccurate or unfavorable information presented by other parties;
4. Ensure that all reasonably available and mitigating factors and favorable information is presented to the court; and
5. When appropriate the lawyer should:
  - a. Request the Court to order the department to provide services and set concrete conditions of return of the child to the parent;
  - b. Be prepared to present evidence on whether the reasonableness or unreasonableness of the agency's efforts and alternative efforts were active or reasonable;
  - c. Request a no reasonable/no active efforts finding;
  - d. Request an order specifying what future services will make the changes in the family needed to correct the problems necessitating intervention and constituting "reasonable efforts" by the agency;
  - e. Request orders for services or agreements that include (but are not limited to):
    - 1) Family Preservation Services;
    - 2) Medical and mental health care;
    - 3) Drug and alcohol treatment;
    - 4) Parenting education;
    - 5) Housing;
    - 6) Recreational or social services;
    - 7) Domestic violence counseling;
    - 8) Anger-management counseling;

- 9) Independent living services;
  - 10) Sex-offender treatment; and
  - 11) Other individual services.
- f. The lawyer should assure the order includes a description of actions to be taken by parents to correct the identified problems as well as a timetable for accomplishing the changes required;
  - g. The lawyer should request specific visitation orders addressing visitation between child and parent, between siblings and between the child and other significant persons in the child's life;
  - h. The child's lawyer should, when appropriate, request an educational advocate (surrogate) for the child. When appropriate the child's lawyer should seek child support orders;
  - i. The child's lawyer should seek to ensure continued representation of the child at all future hearings and reviews - set a next date; and
  - j. The lawyer should assure that the child is informed of and understands the nature, obligations and consequences of the dispositional decision, and the need for the child to cooperate with the dispositional orders. The lawyer should also explain the child's rights and possibilities of post-trial motions to reconsider, set aside, modify or review the disposition, as well as the right to appeal. The lawyer should explain the consequences of violating the dispositional order and continuing jurisdiction of the court.

**D. REVIEW HEARINGS AND CITIZEN REVIEW BOARD REVIEWS:** The child's lawyer has a critical role at review hearings and CRB review because at the hearing the court or CRB panel reviews the child's conditions and circumstances, evaluates the parties progress toward achieving the case plan, assesses the adequacy of the services offered to the family and child, and considers whether jurisdiction should continue. The child's lawyer should be fully prepared to represent the child at all reviews and CRB's.

- 1. A child is entitled to request reviews to review issues in the case as issues arise that cannot be resolved without court intervention. The child's lawyer should seek a review to court intervention if necessary to resolve a dispute over such matters as visitation, placement or services;
- 2. Whether a review is periodic or at the request of one of the parties, the child's lawyer should conduct appropriate investigation to prepare for the review which may include:
  - a. Reviewing the agency file and the report prepared for the review and obtaining all relevant discovery;
  - b. Interviewing the child prior to the hearings and obtain supplemental reports and information for child prior to the hearings;
  - c. Interviewing the caseworker to determine his or her assessment of the case, the case plan, the child's placement and progress, and the parent's cooperation and progress;

- d. Contacting other agencies and professionals who are providing services to the child or parents and seeking appropriate documentation to verify the progress;
  - e. Interviewing other potential witnesses, which may include relatives, neighbors, school personnel and foster parents; and
  - f. Subpoenaing needed witnesses and records.
3. At all review hearings and CRB reviews, the child’s lawyer should be prepared to present information supporting the child’s position and whether the parties are taking the necessary steps to achieve the chosen plan in a timely fashion. The child’s lawyer should consider submitting a written report on behalf of the child. The child’s lawyer should address:
- a. Whether there is a basis for jurisdiction to continue;
  - b. Whether there is a need for continued placement of the child;
  - c. Reasons the child can or cannot presently be protected for the identified problems in the home even if services are provided;
  - d. Whether the agency is making reasonable or active efforts to rehabilitate and reunify the family or to achieve another permanent plan;
  - e. Why services have not been successful to date;
  - f. Whether the court-approved plan for the child meets the child’s expressed desires or for a child with diminished capacity, is the best plan for the child;
  - g. Whether the case plan or service agreement needs to be clarified or modified;
  - h. The child’s position on the development of the concurrent case plan;
  - i. The appropriateness of the child’s placement;
  - j. Whether previous court orders regarding visitation, services and other case related issues should be modified; and
  - k. Whether jurisdiction should continue.
4. At all review hearings and CRB reviews, the child’s lawyer should request specific findings and orders that advance the child’s position.

**E. PERMANENT PLANNING HEARINGS:** Because this is the hearing where the court determines what the permanent plan for the child should be, including return to parent, adoption, guardianship or other planned permanent living arrangements, the child’s lawyer should take particular care in preparing for a permanency hearing and ensure that she is well acquainted with the case history and case files involving the family. The child’s lawyer should be prepared to present evidence and zealously advocate the child’s position about the permanent plan.

- 1. The child’s lawyer should consult with the other parties prior to the permanent planning hearing to determine whether the parties are in agreement on the proposed permanent plan;

2. If the hearing will be a contested permanent plan hearing, the child's lawyer should be prepared to call witnesses and advocate the child's position during the hearing:
  - a. The child's lawyer should request sufficient court time to adequately present the client's position, including live witness testimony; and
  - b. The child's lawyer should consider submitting a written permanency memorandum in support of the client's position.
3. At the permanency hearing, the lawyer should be prepared to present evidence on what the permanent plan for the child should be, including whether to continue toward a plan of family reunification, a motion to dismiss or implementation of a concurrent plan;
4. At a permanency hearing, the lawyer should request specific findings and orders that advance the child's position, including but not limited to a specific extension of time for reunification if appropriate and the specific services and progress required during that time; and
5. The child's lawyer should carefully review the court order from the permanency hearing with the child including if appropriate, the option to seek review of the order including appellate review of any final orders.

**F. TERMINATION OF PARENTAL RIGHTS HEARINGS:** Termination of parental rights is a drastic and permanent deprivation of the fundamental right of family membership which can permanently sever the legal relationship of a child from his parents as well as other members of his or her extended family. It has been said that only the death penalty is a more severe intrusion into personal liberty. Thus, the child's lawyer should be zealous and meticulous in investigating and preparing for termination of parental rights trial.

1. In preparation for a termination trial, the child's lawyer should:
  - a. Thoroughly review the entire record of the case, carefully analyzing court orders and CRB findings and recommendations;
  - b. Completely investigate the case, paying particular attention to issues unique to termination, such as the adoptability of the child and whether termination of parental rights is in the child's best interest, including:
    - 1) The child's relationship with his or her parents;
    - 2) The importance of the maintaining a relationship with the child's siblings and other relatives;
    - 3) The child's ability to bond to an adoptive resource; and
    - 4) Preserving the child's cultural heritage.
  - c. Prepare a detailed chronology of the case to use in case presentation and in developing a theory and strategy for the case;
  - d. Research termination statutes and case law, with particular attention to constitutional issues, and prepare trial memorandum if necessary;



- e. Obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents;
  - f. Subpoena and carefully prepare witnesses;
  - g. If the child will be called as a witness, carefully prepare the child to testify at the termination trial;
  - h. Evaluate evidentiary issues and file motions in limine as appropriate and lay proper evidentiary foundations as needed during trial;
  - i. Be aware of the heightened standard of proof in termination cases - clear and convincing evidence for most cases, and beyond a reasonable doubt in cases covered by the Indian Child Welfare Act;
  - j. Evaluate and be prepared if necessary to move to recuse or disqualify the trial judge; and
  - k. Be aware of alternatives to termination of parental rights, including but not limited to guardianship and open adoption to achieve permanency for the child and if appropriate advocate the child's preferred permanency option.
2. The child's lawyer should meet with the child to discuss the termination petition and determine the child's position on termination of parental rights; and
3. In preparation for and during the termination trial, the child's lawyer should be:
- a. Prepared to submit a trial memorandum in support of child's position;
  - b. Prepared to offer or agree to stipulations regarding the evidence;
  - c. Prepared to offer and stipulate to facts;
  - d. Prepared to examine witnesses both on direct and cross-examination;
  - e. Prepared to lay the proper evidentiary foundations;
  - f. Prepared to make opening and closing statements; and
  - g. Create an adequate record of the case and preserve any issues appropriate for appeal.

## APPENDIX D –

### CHECKLIST FOR SPECIFIC HEARINGS FOR LAWYERS FOR PARENTS:

#### A. SHELTER HEARINGS:

1. Discovery: Obtain copies of all relevant documents:
  - a. Shelter report;
  - b. Police report; and
  - c. Prior Child Welfare referrals.
2. Client interview: Take time to talk to the client (before court), caution the client about self-incrimination, inquire about other available relatives, or safety service providers, and ask for a recess or a continuance if necessary;
3. If appropriate, assert the client's Fifth Amendment and other constitutional rights;
4. Assist the client in exercising his or her right to an evidentiary hearing to require the department to demonstrate to the court that the child can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process before adjudication;
5. When appropriate, present facts regarding:
  - a. Jurisdictional sufficiency of the petition;
  - b. Appropriateness of venue;
  - c. Adequacy of notice provided to parties, and tribes if applicable, particularly if they are not present;
  - d. The necessity of shelter care;
  - e. Why continuation of the child in the home would be contrary to the child's welfare or why it is not in the best interest or welfare of the child to be removed;
  - f. Whether reasonable or active efforts were made to prevent removal;
  - g. Whether diligent efforts have been made to place with family;
  - h. Do not move the child's school unless it is in the best interest of the child;
  - i. Whether reasonable and available services can prevent or eliminate the need to separate the family;
  - j. Whether the placement proposed by DHS-CW is the least disruptive and most family-like setting that meets the needs of the child;
  - k. The possibility of placement with appropriate non-custodial parents and relatives - again diligent efforts requirement;
  - l. A place for return of the child prior to the jurisdictional hearing;
  - m. If the child remains in shelter care, arrangements for visits and alternatives to shelter care to be explored such as relative placement, intensive in-home services, and medication; and

- n. Applicability of the Indian Child Welfare Act, appropriate parties and tribes to receive notice, expert testimony of ICWA cases.
6. The lawyer should: propose return to parents or placement that is the least restrictive;
  7. The lawyer should request any temporary orders that the client directs, including:
    - a. Temporary restraining orders, including orders expelling an allegedly abusive parent from the home;
    - b. Orders governing future conduct of the parties (so that they are on notice...), i.e., remaining clean and sober while the child is present, etc.;
    - c. Orders for any services agreed-on before adjudication;
    - d. Visitation orders that are reasonable and flexible and take into consideration the parties' work and counseling schedules and available transportation and that specify the terms and conditions of visitation. Take note of OAR 419B.337(3). Under this provision, the juvenile court may, at a minimum, order that DHS provide a certain number of visits weekly and that the visits be supervised or unsupervised. Further lack of resources on behalf of the agency is not enough to limit visits OAR 413-070-0870(1); see also OAR 413-070-0860(1)(d)(B)(ii); OAR 413-070-0860(2)(f)(B). Visits must meet the best interest of the child;
    - e. Orders for child support if appropriate. Be prepared to rebut the presumption - argue inability to pay and treatment costs etc. are more valuable to the child etc. See ORS 25.245, ORS 25.280;
    - f. Order for DHS-CW to investigate relatives and friends of the family as potential placements, or to place sibling groups together; and
    - g. Orders for the agency to provide appropriate treatment for the child.
  8. The lawyer should consult with the client about transfer of the case to tribal court and take appropriate action as directed by the client;
  9. Review order, rehearing, appeal or habeas. The lawyer should inform the client of the possibility of a review of the referee's or court's order at the shelter care hearing and the possibility of pursuing a writ of habeas corpus; and
  10. Review the safety plan and the consequences for not following it. If the Court sets conditions of the child's placement, the lawyer should explain to the client and any third party the conditions and potential consequences of violating those conditions. The lawyer should seek review of shelter care decisions as appropriate and advise clients or any third parties of changes in conditions for pretrial placement that would be likely to get the court to agree with the client's plan.

**B. JURISDICTION/ADJUDICATION HEARING:**

1. Have all relevant materials (including fact and legal argument) available at the trial, including all pleadings, discovery, and investigate reports, as well as, relevant statutes, case law and the evidence code;

2. Have a draft outline of:
  - a. Opening and closing statements;
  - b. Direct and cross examination plans for all witnesses;
    - 1) Prepare the client to testify; and
    - 2) If there is potential for criminal liability, the lawyer should advise the client whether to answer specific questions or assert the client's Fifth Amendment right not to answer specific questions;
  - c. If the State makes an amendment to the petition make sure there is sufficient notice/time to defend. Request continuance if necessary; and
  - d. Findings of fact and conclusions of law to be requested at the conclusion of the hearing.
3. The lawyer should ensure that the client is informed of and understands the nature, obligations, and consequences of the decision, and the need for the client to cooperate with the trial court's orders. A lawyer should also explain the client's rights and possibilities of post-trial motions to reconsider, set aside, modify, or review the jurisdictional finding, as well as the right to appeal. The lawyer should explain the consequences of violating the trial court's order and the continuing jurisdiction of the court;
4. After the jurisdictional hearing or adjudication, the lawyer should:
  - a. Carefully review the judgment and advise the client about potential issues for appeal;
  - b. Advise the client in writing of the timelines for filing a notice of appeal and the lawyer's ability to represent the client on appeal; and
  - c. Assist the client in locating a lawyer to handle the appeal if the lawyer is unable to undertake such representation and take whatever steps are necessary to preserve the client's right to appeal the judgment. If the trial lawyer is court appointed they shall timely refer the case to OPDS pursuant to OPDS procedures.
5. If a child is found within the jurisdiction of a court following a parent's failure to appear and the lawyer has been relieved as counsel, the lawyer should promptly notify the client of the entry of the judgment and advise them of the steps necessary to set aside the judgment based on excusable neglect. If the lawyer is court-appointed and the client wishes to request that the judgment be set aside, the lawyer should immediately contact the court to request re-appointment and thereafter promptly file the necessary pleadings on behalf of the client.

**C. DISPOSITION HEARINGS:** At the hearing, the parent's lawyer should be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties, ensuring that all reasonably available and mitigating factors and favorable information is presented to the court and obtaining all appropriate order to protect the client's rights and interests. The lawyer shall be prepared to:

1. Explain to the client the nature of the hearing, the issues involved and the alternatives open to the court;
2. Investigate all sources of evidence that will be presented at the hearing and interview material witnesses. The lawyer also has an independent duty to investigate the client's circumstances, including such factors as previous history, family relations, economic conditions, and any other information relevant to disposition;
3. When court has found sufficient evidence to support jurisdiction - the lawyer should still, when appropriate, ask the court to not exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the child because the child and family do not require supervision, treatment, or placement;
4. A lawyer should advocate the least restrictive disposition possible that can be supported and is consistent with the client's needs and desires; and
5. At the hearing, a lawyer should, when appropriate should:
  - a. Request the Court to order the department to provide services and set concrete conditions of return of the child/ren to the parent;
  - b. Be prepared to present evidence on whether the reasonableness or unreasonableness of the agency's efforts and alternative efforts were active or reasonable;
  - c. Request a no reasonable/no active efforts finding;
  - d. Request an order specifying what future services will make the changes in the family needed to correct the problems necessitating intervention and constituting reasonable/active efforts by the agency;
  - e. Request orders for services or agreements that include (but are not limited to):
    - 1) Family preservation services;
    - 2) Medical and mental health care;
    - 3) Drug and alcohol treatment;
    - 4) Parenting education;
    - 5) Housing;
    - 6) Recreational or social services;
    - 7) Domestic violence counseling;
    - 8) Anger-management counseling;
    - 9) Independent living services;
    - 10) Sex-offender treatment; and
    - 11) Other individual services.
  - f. The lawyer should assure the order includes a description of actions to be taken by parents to correct the identified problems as well as a timetable for accomplishing the changes required;
  - g. The lawyer should request specific visitation orders covering visitation between child and parent, between siblings, and between the child and other significant persons;

- h. The lawyer should, when appropriate, request that the court appoint counsel, a court-appointed special advocate (CASA) or an educational advocate (surrogate parent) for the child. When appropriate the lawyer should seek child support orders;
- i. The lawyer should seek to ensure continued representation of the client at all future hearings and reviews; and
- j. The lawyer should assure that the client is informed of and understands the nature, obligations, and consequences of the dispositional decision, and the need for the client to cooperate with the dispositional orders. The lawyer should also explain the client's rights and possibilities of post-trial motions to reconsider, set aside, modify, or review the disposition, as well as the right to appeal. The lawyer should explain the consequences of violating the dispositional order and continuing jurisdiction of the court.

(Note: Rules of evidence do not apply at disposition hearings. See ORS 419B.325)

**D. REVIEW HEARINGS AND CITIZEN REVIEW BOARD REVIEWS:** The lawyer's role is critical at review and CRB review because at the hearing the court or CRB panel reviews the child's conditions and circumstances, evaluates the parties progress toward achieving the case plan, assesses the adequacy of the services offered to the family, and considers whether jurisdiction should continue. The lawyer should be fully prepared to represent the client at all reviews and CRB's.

Clients are also entitled to request reviews in the case as they arise. The lawyer should seek a review to request return of the child when any event happens that may significantly affect the need for continued placement. The lawyer should also request a review when court intervention is necessary to resolve a dispute over such matters as visitation, placement, or services.

1. Whether a review is periodic or at the request of one of the parties, the lawyer should conduct appropriate investigation to prepare for the review which may include:
  - a. Reviewing agency files and the report prepared for the review and obtaining all relevant discovery;
  - b. Interviewing the client prior to the hearings and obtain supplemental reports and information for client prior to the hearing;
  - c. Interviewing the caseworker to determine his or her assessment of the case, the case plan, the child's placement and progress, and the parent's cooperation and progress;
  - d. Contacting other agencies and professionals who are providing services to the child or parents and seeking appropriate documentation to verify the progress by the client;

- e. Interviewing other potential witnesses, which may include relatives, neighbors, school personnel, and foster parents; and
  - f. Subpoenaing needed witnesses and records.
2. At all review hearings and CRB reviews, the lawyer should be prepared to present information supporting the client's position and whether the parties are taking the necessary steps to achieve the chosen plan in a timely fashion. The lawyer should consider submitting a written report on behalf of the client. The lawyer should specifically address:
    - a. Whether there is a basis for jurisdiction to continue;
    - b. Whether there is a need for continued placement of the child;
    - c. Reasons the child can or cannot presently be protected for the identified problems in the home even if services are provided;
    - d. Whether the agency is making reasonable or active efforts to rehabilitate and reunify the family or to achieve another permanent plan;
    - e. Why services have not been successful to date;
    - f. Whether the court-approved plan for the child remains the best plan;
    - g. Whether the case plan or service agreement needs to be clarified or modified;
    - h. The client's position on the development of the concurrent case plan;
    - i. The appropriateness of the child's placement;
    - j. Whether previous court orders regarding visitation, services, and other case related issues should be modified; and
    - k. Whether jurisdiction should continue.
  3. At all review hearings and CRB reviews, the lawyer should request specific findings and orders that advance the client's case; and
  4. At all review hearings and CRB reviews, the lawyer should ensure that parents receive a clear and authoritative statement of the court's expectations, the statutory time-lines, the possibility of return of the child if sufficient progress is made, and the risk of implementation of the concurrent case plan. The lawyer should ask the court to schedule a subsequent hearing (unless wardship terminated).

**E. PERMANENT PLANNING HEARINGS:** This is the hearing where the court determines what the permanent plan for the child should be, including return to parent, adoption, guardianship, or other planned permanent living arrangements. The lawyer should take particular care in preparing for a permanency hearing and ensure that the lawyer is well acquainted with the case history and case files. The lawyer should be prepared to present favorable evidence and zealously advocate the client's position about the permanent plan.

It is the Department's burden to prove its efforts were reasonable and despite those efforts progress on behalf of the parents has not been sufficient, measured against the pled and proven basis for jurisdiction.

1. The lawyer should consider requesting that the court schedule a permanency hearing in furtherance of the client's goals;
2. The lawyer should conduct an investigation as described above. In addition the lawyer should be prepared to address what the long-term plan for the child should be, including:
  - a. A specific date on which the child is to be returned home;
  - b. A date on which the child will be placed in an alternative permanent placement;
  - c. Whether the child will remain in substitute care on a permanent or long term basis; and
  - d. Whether substitute care will be extended for a specific time, with a continued goal of family reunification.
3. At the permanency hearing, the lawyer should be prepared to present evidence on what the permanent plan for the child should be, including whether to continue toward a plan of family reunification, a motion to dismiss or implementation of a concurrent plan. The lawyer should request sufficient court time to adequately present the client's position, including live witness testimony. The lawyer should consider submitting a written permanency memorandum in support of the client's position;
4. At a permanency hearing, the lawyer should request specific findings and orders that advance the client's position, including but not limited to a specific extension of time for reunification is appropriate and the specific services and progress required during that time; and
5. The lawyer should carefully review the court order from the permanency hearing with the client and discuss a client's option to review, including appellate review of any final orders.

**F. TERMINATION OF PARENTAL RIGHTS HEARINGS** is a drastic and permanent deprivation of the fundamental right of family membership. As such, the lawyer should be zealous and meticulous in investigating and preparing for termination of parental rights hearings.

1. For zealous and meticulous advocacy, the lawyer should:
  - a. Thoroughly review the entire record of the case, carefully analyzing court orders and CRB findings and recommendations and review the case with the client;
  - b. Completely investigate the case, paying particular attention to issues unique to termination, such as the adoptability of the child and whether termination of parental rights is in the child's best interest, including:
    - 1) The child's relationship with his or her parents;
    - 2) The importance of the maintaining a relationship with the child's siblings and other relatives;



- 3) The child's ability to bond to an adoptive resource; and
  - 4) Preserving the child's cultural heritage.
- c. Prepare a detailed chronology of the case to use in case presentation and in developing a theory and strategy for the case;
  - d. Research termination statutes and case law, with particular attention to constitutional issues, and prepare trial memorandum if necessary;
  - e. Obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents;
  - f. Subpoena and carefully prepare witnesses;
  - g. Carefully prepare the client to testify at the termination trial and advise the client of the consequences of failing to appear at a mandatory court appearance in termination proceeding;
  - h. Evaluate evidentiary issues and file motions in limine as appropriate and lay proper evidentiary foundations as needed during the trial;
  - i. Be aware of the heightened standard of proof in termination cases - clear and convincing evidence for most cases, and beyond a reasonable doubt in cases covered by the Indian Child Welfare Act;
  - j. Be prepared to present evidence of or address the agency's failure to adequately assist parents;
  - k. Evaluate and be prepared if necessary to move to recuse or disqualify the trial judge; and
  - l. Be aware of alternatives to termination of parental rights, including but not limited to guardianship and open adoption to achieve permanency for the child.
2. The lawyer should meet with the client to discuss the termination petition and the consequences of an involuntary judgment of termination of parental rights. The lawyer should also discuss alternatives to trial with the client, including voluntary relinquishments of parental rights, open adoption agreements, post-adoption contact agreements, guardianship, other planned permanent living agreements, conditional relinquishments and continuance of the trial. If the client wishes to pursue an alternative to trial, the lawyer should advocate for the client's position;
  3. When a parent fails to appear at a mandatory termination proceeding the lawyer should consider the following options:
    - a. To seek a continuance in order to allow the client to appear; and
    - b. To request withdrawal as lawyer of record for the absent parent.
  4. In preparation for and during the termination trial, the lawyer should be:
    - a. Prepared to submit a trial memorandum in support of client's position;
    - b. Prepared to offer or agree to stipulations regarding the evidence;
    - c. Prepared to offer and stipulate to facts;
    - d. Prepared to examine witnesses both on direct and cross-examination;
    - e. Prepared to lay the proper evidentiary foundations;
    - f. Prepared to make opening and closing statements; and

- g. Create an adequate record of the case and preserve any issues appropriate for appeal.