

Oregon State Bar

# Specific Standards for Representation in Juvenile Dependency Cases

**June 23, 2017**

# Foreword

The Oregon State Bar has assisted in the development and dissemination of the Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases (hereafter, the performance standards) since 1996. 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.

MICHAEL D. LEVELLE

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Oregon State Bar President

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# Report of the Specific Standards for 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 and in 2014 the Dependency and Delinquency Standards were further updated.

During the 2015 Legislative Session, the Legislature passed Senate Bill (SB) 222. The bill created a Task Force charged with recommending models for legal representation in juvenile court proceedings. The Task Force, made up of 18 members with input from numerous interested parties, met over ten months and issued the Oregon Task Force on Dependency Representation Report (hereinafter the “Report”) in July 2016. The Report included a variety of recommendations focused on improving services for children, parents, and practitioners in the juvenile dependency system, including updating the “Specific Standards for Representation in Juvenile Dependency Cases.”

In the fall of 2016, at the direction of the Oregon State Bar Board of Governors, a work group was created to address the issues raised by the Report by updating the performance standards for representation in juvenile dependency cases. This work group included members from academia as well as from both private practice and public defender offices. Task force members were Lea Ann Easton, Dorsey & Easton LLP (Chair); Amy Benedum, Oregon Judicial Department; Linn Davis, Oregon State Bar; Susan Grabe, Oregon State Bar; Joseph Hagedorn, Hagedorn Law; Leslie Harris, University of Oregon School of Law; the Honorable Megan Jacquot, Oregon Judicial Department; Amy Miller, Oregon Public Defense Services; Angela Sherbo, Youth, Rights & Justice; Shannon Storey, Office of Public Defense Services; Elizabeth Wakefield, Metropolitan Public Defenders, Inc.; and Inge Wells, Oregon Department of Justice.

The following pages include a new, fourth version of the juvenile dependency performance standards produced by the juvenile dependency task force. These standards are recommended to replace what is currently published on the Oregon State Bar website, “Specific Standards for Representation in Juvenile Dependency Cases.”

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. Updates to the Standards include:

- Adding language addressing communication via social media
- Adding language addressing special immigrant juvenile cases/immigrant family cases,
- Adding language addressing cross-over standards for parent and child attorneys,
- Adding language addressing prepetition standards for the parent's lawyer,
- Adding language addressing the use of a *Balfour* brief,
- Clarification of the role of a child's appellate counsel in the child attorney standard,
- Clarification regarding appellate representation and ineffective assistance of counsel, and
- Correcting clerical errors and inconsistencies.

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 3.

The Obligations of the Lawyer for Parents begins on page 51.

The appendices begin on page 98.

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

## STANDARD 1 – ROLE OF THE LAWYER FOR THE CHILD

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

Action:

Consistent with Oregon Rules of Professional Conduct (Oregon RPC) 1.14, the child-client’s lawyer should determine whether the child client has sufficient maturity to understand and form a lawyer-client relationship and whether the child client is capable of making reasoned judgments and engaging in meaningful communication.

Action:

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

Action:

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

Action:

The child-client's lawyer may not request the appointment of a court-appointed special advocate (CASA) or other advocate for the child's best interests when the child client is competent to make decisions.

Commentary:

When a child client has the capacity to instruct a 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.

A child client's ability to express a preference constitutes a threshold requirement for determining ability to instruct a lawyer. When a lawyer can discern the child client's preference through investigation rather than eliciting the child client'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 child 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 the Department of Human Services (hereinafter "agency");
3. Accept a conditional postponement or dismissal; or
4. Agree to specific services or placements.

As with any client, the child-client's lawyer may counsel against the pursuit of a particular position sought by the child client. Without unduly influencing the child client, the lawyer should advise the child client by providing options and information to assist the child client 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 client, other family members, and future legal proceedings. The lawyer should recognize that the child client may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the lawyer should ensure that the decision the child client ultimately makes reflects the child client's actual position.

- B. For a child client with diminished capacity, the child-client's lawyer should maintain a normal lawyer-client relationship with the child as far as reasonably possible and take**

**direction from the child client as the child develops capacity. A child client may have the capacity to make some decisions but not others.**

Commentary:

The question of diminished capacity should not arise unless the child-client's lawyer has some reason to believe that the child client does not have the ability to make an adequately considered decision. A child's age is not determinative of diminished capacity.

The assessment of a child's capacity must be based upon objective criteria, not the personal philosophy or opinion of the child-client's lawyer. The assessment should be grounded in insights from child development science and should focus on the child client's decision-making process rather than the child client's choices. Lawyers should be careful not to conclude that a child client suffers diminished capacity from a child client's insistence upon a course of action that the child-client's lawyer considers unwise or at variance with their views. For example, the decision of a 13-year-old to return home to a marginally fit parent may not be in the child's best interests, but the child client may well be competent to make that decision.

In determining whether a child client has diminished capacity, the *Report of the Working Group on Determining the Child's Capacity to Make Decisions*, 64 Fordham L Rev 1339 (1996), suggests that a child-client's lawyer may consider the following factors:

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

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

- C. When it is not reasonably possible to maintain a normal lawyer-client relationship generally or with regard to a particular issue, the child-client's lawyer should conduct a thorough investigation and then determine what course of action is most consistent**

**with protecting the child client in the particular situation and represent the child client in accordance with that determination. This determination should be based on objective facts and information and not the personal philosophy or opinion of the child-client's lawyer.**

Action:

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

Action:

In determining what course of action to take when the child client cannot provide direction, the child-client's lawyer must take into consideration the child client'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 client is able to verbalize a preference but is not capable of making an adequately considered decision, the child client's verbal expressions are an important factor to consider in determining what course of action to take. The child client's needs and interests, not the adult's or professional's interests, must be the center of all advocacy. The child-client'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-client'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 child-client's lawyer reasonably believes the child client has diminished capacity, is at risk of physical, sexual, psychological or financial harm, and cannot adequately act in their own interest, the child-client's lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the child client.**

Action:

Information relating to the representation of a child with diminished capacity is protected by Oregon RPC 1.6 and Oregon RPC 1.14. When a child with diminished

capacity is unable to protect themselves from substantial harm, Oregon RPC 1.14 allows the child-client's lawyer to take action to protect the child client. Oregon RPC 1.6 and Oregon RPC 1.14(c) implicitly authorize the child-client's lawyer to reveal information about the child client, but only to the extent reasonably necessary to protect the child client's interests.

Action:

The child-client's 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 client.

Action:

In extreme cases, that is, when the child client is at risk of substantial physical harm and cannot act in his or her own interest and when the child-client's lawyer has exhausted all other protective action remedies, the 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 client.

Action:

When a child client has been injured or suffers from a disability or congenital condition that results in the child client 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, the child-client's lawyer should consult with the parent if appropriate. Further, the lawyer should 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 Oregon RPC 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, requesting the appointment of a guardian *ad litem*.

Substantial harm includes physical, sexual, financial, and psychological harm. Protective action includes consultation with family members or professionals who work with the child client. 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 client's capacity.

Ordinarily, under Oregon RPC 1.6, unless authorized to do so, the child-client’s lawyer may not disclose information related to representation of the child client. When taking protective action pursuant to this section, the child-client’s lawyer is implicitly authorized to make necessary disclosures, even when the child client directs the lawyer to the contrary. However, the lawyer should make every effort to avoid disclosures if at all possible. When 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 child client’s position and whether the individual receiving the information is a party who might use the information to further the party’s own interests. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the child client’s interests before discussing matters related to the child client. If any disclosure by the lawyer will have a negative impact on the child-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 court-appointed special advocate (CASA) or other best-interest advocate may undermine the relationship the child-client’s lawyer has established with the child client. It also potentially compromises confidential information the child client 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-client’s lawyer should not advise the court of the lawyer’s determination of the child client’s capacity, and, if asked, should reply that the relationship between the child client and the lawyer is privileged.**

Commentary:

The child-client’s 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 child-client’s lawyer is acting at the child 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 client.

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

- A. The child-client’s lawyer should ensure that the child client is aware that they have a trial lawyer and should communicate regularly and effectively with the child client.**

Action:

The child-client's lawyer should make an initial contact with the child client within 24 hours of appointment and, when feasible, conduct an initial interview within 72 hours. During the first meeting with the child client, the child-client's lawyer must explain the lawyer's role.

Action:

At the first meeting the child-client's lawyer should provide the child client with contact information in writing and establish an effective system for the child client to communicate with the lawyer. The child-client's lawyer should explain that even when the lawyer is unavailable, the child client should leave a message. The child-client's lawyer should respond to the child client's messages within a reasonable time.

Action:

The child-client's lawyer should meet with the child client 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 child-client's lawyer should ask the child client questions to obtain information to prepare the case and strive to create a comfortable environment so the child client can ask the trial lawyer questions. The child-client's lawyer should use these meetings to prepare for court as well as to counsel the child client concerning issues that arise during the course of the case. Information obtained from the child client should be used to propel the investigation. The child-client's lawyer should work collaboratively with the child client to ascertain independent sources to corroborate the child client's information.

Action:

After the first meeting, the child-client's lawyer should have contact with the child client:

1. before court hearings, case status and pretrial conferences, mediations, and Citizen Review Board (CRB) reviews;
2. before any important decision affecting the child-client's life;
3. in response to contact by the child client;
4. following (and, when possible, before) significant transitions, including but not limited to, initial removal and changes in placement;
5. when a significant change of circumstances must be discussed with the child client or when a child-client's lawyer learns of emergencies or significant events affecting the child client; and

6. at least quarterly.<sup>1</sup>

Action:

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

Action:

The child-client's lawyer should be available for in-person meetings or telephone calls to answer the child client's questions and address the child client's concerns. The child-client's lawyer and child client should work together to identify and review short- and long-term goals, particularly as circumstances change during the case.

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 client. Meeting with the child client personally and regularly allows the child-client's lawyer to develop a relationship with the child client and to assess the child client's circumstances. The child client's position, interests, needs, and wishes change over time. The child-client's lawyer cannot be fully informed of such changes without developing a relationship through frequent contacts.

In order to provide competent representation, the child-client's lawyer should initially meet with the child client in the child's environment to understand the child client's personal context, unless the child client indicates that he or she does not want this. The benefits of meeting with an older child client who can convey information and express the client's wishes are obvious. However, meeting with younger children, including preverbal children, is equally important. Oregon RPC 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-client's lawyer should determine whether developing and maintaining a lawyer-client relationship requires that the meetings occur in person in the child client's environment or whether other forms of communication, such as a telephonic or electronic communication, are sufficient.

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<sup>1</sup> The extraordinary circumstances under which the child client's trial lawyer may have contact with a child client less than quarterly include situations when the child client is "on the run" and the child's whereabouts are unknown, when there is strong evidence that the child client will be adversely affected by communicating with the child-client's lawyer, or when the child client refuses to communicate with the lawyer.

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

The child-client's 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 child client are interviewing the child client. The child-client's lawyer should become familiar with interpreter services that are available for out-of-court activities such as client conferences, provider meetings, etc.

**B. The child-client's lawyer should communicate with the child client in a developmentally and culturally appropriate manner.**

Action:

The child-client's lawyer should explain to the child client in a developmentally appropriate way all information and ascertain the child client's position on the information. This includes the result of all court hearings and administrative proceedings, which will assist the child client in having maximum input in determining the client's position. Interviews should be conducted in private.

Action:

The child-client's lawyer should be aware of the child client's cultural background and how that background affects effective communication with the child client.

Commentary:

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

In addition to communicating with the child client, the child-client's lawyer should review records and consult with appropriate professionals and others with knowledge of the child client. The child-client's lawyer also may find it helpful to observe the child client's interactions with foster parents, birth parents, and other significant individuals.

This information will help the child-client's lawyer to better understand the child client's perspective, priorities, and individual needs, and will assist the child-client's lawyer in identifying relevant questions to pose to the child client.

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

Action:

The child-client's lawyer should support the client and be sensitive to the child client's individual needs. The child-client's lawyer may be the child client's only advocate in the system and should act accordingly.

Commentary:

Often lawyers practicing in juvenile court are a close-knit group who work and sometimes socialize together. Maintaining good working relationships with other participants in the child welfare system is an important part of being an effective advocate. The child-client's 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 child client. The child-client's lawyer should not give the impression to the child client that relationships with other lawyers are more important than the representation the child-client's lawyer is providing the child client. The child client must feel that the child-client's lawyer believes in, and is actively advocating on, the child's behalf.

**D. The child-client's lawyer must abide by confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the child client.**

Action:

The child-client's lawyer must fully explain to the child client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. If the child-client's lawyer determines that the child client 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 child client's position in the overall litigation.

Commentary:

Gaining the child client's trust and establishing ongoing communication are two essential aspects of representing the child client. The child-client's lawyer should also explain that the child-client's lawyer is available to intervene when the child's client's relationship with an agency or provider is not working effectively. The child-client's

lawyer should be aware of the child client's circumstances, such as whether the child client has access to a telephone, and tailor the communication system to the individual child client. For example, it may involve telephone contact, communication through a third party, or electronic communication when the child client agrees to it.

Action:

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

Action:

The child-client's lawyer may only report abuse or neglect discovered through lawyer-client communication only if the child client 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.

Under ORS 419B.010(1), "An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client." Lawyers should consult with the General Counsel's Office at the Oregon State Bar when they face a close question under these rules.

Action:

The child-client's lawyer should try to avoid publicity connected with the case that is adverse to the child client's interests. The child-client's lawyer should be cognizant of the emotional nature of these cases, the confidential nature of the proceedings, and the privacy needs of the child client. The child-client's lawyer should protect the child client's privacy interests, including asking for closed proceedings when appropriate. The child-client's lawyer must be aware that Article I, Section 10 of the Oregon constitution limits the ability for closed proceedings.

Action:

The child-client's lawyer should discuss with the child client the potential consequences of communicating via electronic communication or broadcasting over social media.

Commentary:

Communicating with the child client and other parties through electronic communication may be the most effective means of maintaining regular contact.

However, the child-client's lawyer should also understand the pitfalls associated with communicating sensitive case history and material electronically. Not only can electronic communication create greater misunderstanding and misinterpretation, it can also become documentary evidence in later proceedings. The child-client's lawyer should be aware that the use of electronic communication may require special precautions in particular circumstances.

Communication through social media raises additional confidentiality concerns. The child-client's lawyer should alert the child client that anything that is part of a public posting is accessible to, and can be used by, opposing counsel. Additionally, it may be helpful to inform the child client that opposing counsel (or their agent) may request to see the child's private information or information set behind privacy settings. If this happens, the child client should not agree or accept the request and should contact the child-client's lawyer immediately. Under Oregon RPC 4.3, the attorney's contact with a represented child client may be a violation of rules of ethics.

While social media may be a convenient way to locate and communicate with the child client, the child-client's lawyer and child client should be aware that communications may not be confidential or protected by attorney-client privilege.

**E. The child-client's lawyer must avoid conflicts of interest, and should avoid the appearance of a conflict of interest.**

Action:

A child-client's lawyer, or a lawyer associated in practice, must 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. The child-client's lawyer should follow Oregon RPC 1.7 to 1.13 relating to conflicts of interest and duties to former clients.

Commentary:

The child-client's lawyer should be especially cautious when accepting representation of more than one child. The child-client's 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 child-client's 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 directing the representation but a younger child is not, or if older children object to the permanency plan for younger children.

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

**F. The child-client's lawyer should advocate for actions necessary to meet the child client's educational, health, cultural, and mental health needs.**

Action:

Consistent with the child client's wishes, the child-client's lawyer should identify the child client's needs and seek appropriate services (by court order if necessary) to access entitlements, to protect the child client'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 client'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 client's wishes, the child-client's lawyer should ensure that a child client receives the most 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.

**G. The child-client's lawyer should take appropriate actions on collateral issues.**

Action:

The child-client's lawyer should inquire regarding prior delinquency, status offense, or criminal history. The child-client's lawyer should advise the child client to contact the lawyer immediately if the child client is contacted by law enforcement, school authorities, or is otherwise under investigation.

Action:

The child-client's lawyer should identify and preserve relevant evidence related to mental health, cognitive functioning, disability, medical treatment, family history, and other mitigating factors.

Action:

Whenever possible, the child-client's lawyer in the dependency case should also represent the child client in the delinquency case. If the child client has two individual lawyers, they should collaborate regarding case strategy.

Commentary:

The purpose of identifying crossover cases should be to, wherever possible, prevent crossover from dependency into delinquency systems; to assure, whenever possible, that the intervention is based on the child client's conditions and circumstances and the child client is placed in the least restrictive setting possible; and when dual system involvement is necessary, to ensure a coordinated streamlined response to the overlapping issues that bring the child client into multiple legal systems.

Action:

If a child-client's lawyer, in the course of representing a child client under the age of 18, becomes aware that the child client has a possible claim for damages that the child client cannot pursue because of the child's age or disability, the child-client's lawyer should consider asking the court that has jurisdiction over the child client to either

appoint a guardian *ad litem* (GAL) for the child client 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 GAL to pursue a possible claim.

Action:

The child-client's lawyer may pursue, personally or through a referral to an appropriate specialist, issues on behalf of the child client, 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-client's lawyer may request authority from the appropriate authority to pursue issues on behalf of the child client, 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. If the child client might be eligible for Special Immigrant Juvenile Status, the child-client's lawyer should consider consulting with a dependency attorney experienced in these cases and, if appropriate, consulting with an immigration attorney.<sup>2</sup> If the child client appears eligible for Special Immigrant Juvenile Status, the child's trial attorney should advocate for immigration representation by the agency, if relevant. If the child client does not qualify for representation by the agency in the immigration matter, the child-

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<sup>2</sup> If the child client is eligible for court-appointed counsel at state expense, the child client's trial lawyer should consider seeking funding from the Office of Public Defense Services for consultation with an immigration attorney.

client's lawyer should consider attempting to locate an immigration attorney to represent the child client.

The child-client's lawyer does not have an ethical duty to represent the child client in these collateral matters when the terms of the lawyer's employment limit duties to the dependency case. However, the child-client's lawyer may have a duty to take limited steps to protect the child client's rights, ordinarily by notifying the child-client's legal custodian about the possible claim unless the alleged tortfeasor is the legal custodian. In the latter case, ordinarily the child-client's lawyer adequately protects the child client 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. A juvenile court judge might well expect the child-client's lawyer to recommend someone to whom the case could be referred. In this situation, the child-client's lawyer should research the other lawyer's reputation and communicate clearly to the court and to the child client that the child's lawyer is turning the work over to the receiving lawyer and is not vouching for the receiving lawyer's work or monitoring the receiving lawyer's 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 CHILD CLIENTS**

- A. The child-client's 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. The lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy for the child client.**

Action:

The child-client's lawyer 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:

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

Commentary:

As in all areas of law, it is essential that the child-client's lawyer learn the substantive law as well as local practice. The child-client's lawyer should be familiar with the Office of Public Defense Services, Qualification Standards for Court-Appointed Counsel, 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.

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

Action:

The child-client's lawyer must read and understand all state laws, policies, and procedures regarding child abuse, neglect, and other related matters, including but not limited to the following:

1. Oregon Revised Statutes (ORS) chapters 419A, 419B, and 419C, Oregon Juvenile Code;
2. ORS chapter 418, Child Welfare Services;
3. ORS 418.925–418.945, Refugee Child Act;
4. Oregon Revised Statutes concerning paternity, guardianships, and adoption;
5. ORS 417.200–417.260, Interstate Compact on Placement of Children, and Oregon Administrative Rules;
6. ORS 109.701–109.990, Uniform Child Custody Jurisdiction and Enforcement Act, and Oregon Administrative Rules;
7. The basic structure and functioning of the Department of Human Services and the juvenile court, including court procedures, the functioning of the CRB and CASA programs; and
8. Indian Child Welfare Act 25 USC §§ 1901 -1963; Bureau of Indian Affairs Guidelines; and Oregon Administrative Rules.

Action:

The child-client's lawyer must be thoroughly familiar with Oregon evidence law and the Oregon Rules of Professional Conduct.

Action:

The child-client'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 they should be prepared to research these and other applicable issues.

The child-client'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:

The child-client's lawyer should become familiar with normal growth and development in children and adolescents as well as common types of condition and impairments.

Action:

The child-client's lawyer 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; or
5. A state child or adolescent psychiatric ward.

Action:

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

Commentary:

The child-client's lawyer should know the kinds and types of services within their communities that serve children and parents. Based on the conditions and circumstances that brought the child client and the child's family into the dependency system, the child-client's lawyer should identify the services that will help remove the

barriers to reunify the child client with the parent. The child-client's lawyer should consult with the child client about such services and whether the services address the child client's needs. The child-client's lawyer should be aware of cultural issues within the child-client's community and be prepared, in appropriate circumstances, to advocate that services be made available that are culturally appropriate and meet the child client's unique conditions and circumstances.

## **STANDARD 4 – GENERAL PRINCIPLES GOVERNING CONDUCT OF THE CASE**

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

#### Action:

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

#### Action:

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

#### Action:

The child-client's lawyer should inform other parties and their representatives that they are representing the child client and that the lawyer expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child client and the child's family. When necessary, the child-client's lawyer should also remind other lawyers involved in the case that the child client has a lawyer and, therefore, they should not communicate with the child client without the child-client's lawyer's permission.

#### Commentary:

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

### **B. When consistent with the child client's interest, the child-client'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 child client may be granted. If a hearing is continued and the case is delayed, momentum may be lost and the child client's permanency delayed. Additionally, the Adoption and Safe Families Act (ASFA) timelines continue to run despite continuances.

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

Action:

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

Action:

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

Commentary:

The child-client'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 client, parent, and family.

The child-client's lawyer must be aware of local rules about discovery and must always seek the consent of the attorney for a represented party before speaking with that party.

The child-client's lawyer should be especially mindful of confidentiality requirements when communicating with other parties, service providers, and lawyers.

**D. The child-client's lawyer or the lawyer's agent may not contact a represented party without the consent of the party's lawyer(s).**

Oregon RPC 4.2 requires that before a child-client's lawyer, or a nonlawyer staff person under the supervision or direction of the lawyer (Oregon RPC 5.3), may speak to a represented party on the "subject of the representation," she or he must obtain the consent of the represented party's lawyer. In dependency cases this most frequently

arises when the child-client's lawyer wishes to visit and talk with the client who is in the physical custody of a represented party (usually a parent). Assuming a child client is old enough to speak privately with the lawyer, it is possible to limit conversation with the represented party to pleasantries and a request to speak privately with the child client. When the child client is younger, it would be almost impossible not to discuss the "subject of the representation" with the parent, as the subject matter is the child client. The child-client's lawyer must have permission in the latter instance. In the former, (older child) the child-client's lawyer should, as a professional courtesy, notify the parent's lawyer that they will be making a visit to the child client and will speak to the parent only to schedule and facilitate a private conversation with the child client. Of course, even in the case of an older child, the child-client's lawyer could seek consent to have additional conversation with the represented party. The child-client's lawyer should be careful not to disclose confidential information or to elicit any information from the parent on the subject of the representation unless consent has been given.

The agency is often unrepresented in dependency cases and in those instances Oregon RPC 4.2 does not prevent a child-client's lawyer from talking to the caseworker or other staff. When the agency is represented by counsel in a particular case, the child-client's lawyer may not talk with a caseworker without the agency lawyer's permission. If the child-client's lawyer is unsure whether an agency attorney has been retained in a particular case, the child-client's lawyer should ask the caseworker.

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

Action:

A child-client's lawyer who plans to attend meetings about the case should be aware that other represented parties may be present without their lawyers and should take necessary steps to comply with the Rules of Professional Conduct.

A child-client's lawyer who does not plan to attend meetings about the case should be aware that other represented parties will attend with their lawyers at the meeting and thus should take steps to protect the client's interests.

Action:

The child-client's lawyer should determine the child client's goals and advocate consistently with those goals.

Action:

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

Action:

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

Action:

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

Action:

The child-client's lawyer should consider whether one or both of the parents' lawyers or CASA might be an ally on placement, service, or visitation issues. If so, the child-client's lawyer should solicit their assistance.

Commentary:

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

The child-client's lawyer should ensure that the child client's plan for permanency addresses not only the permanency goal but also the child client's developmental, medical, emotional, educational, and independent living needs. Permanency includes minimizing the child client's disruptions during the child's 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 client may have a placement preference or have an existing relationship with a relative or adult friend that can be certified as a placement for the child client. The child-client's lawyer should advocate for the child client's preferred placement and ensure the agency fully explores placements suggested by the child client.

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

Action:

When the child client desires visits and when necessary, the child-client’s lawyer should seek court orders to compel the child welfare agency to provide appropriate visitation for the child client, consistent with the child client’s wishes. The child-client’s lawyer may also need to take action to enforce previously entered orders.

Action:

The child-client’s lawyer should advocate for an effective visiting plan consistent with the child client’s wishes. Courts and the agency may need to be encouraged 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. 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 a child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the child-client’s lawyer seek a visitation order that will allow the best possible visitation. The child-client’s lawyer should advocate that visits be unsupervised if safe for the child client or at the lowest safe level of supervision; for example, families often are more comfortable when relatives, family friends, clergy, or other community members are recruited to supervise visits rather than caseworkers.

The child-client’s lawyer 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 client’s activities.

## **STANDARD 5 - PREPETITION**

- A. The child-client's lawyer should actively represent the child client to achieve the child client's goals during the prepetition phase of a dependency case.**

**Action:**

The child-client's lawyer should counsel the child client about his or her rights in the investigation stage as well as the realistic possibility of achieving the child client's goals.

**Action:**

The child-client's lawyer should discuss available services and help the child client gain access to those in which they wish to participate.

**Action:**

If a child client would likely be eligible for appointed counsel at state expense if the subject of a juvenile court dependency petition and prepetition representation is necessary to preserve and protect the rights of the child client, the child-client's lawyer may seek approval from the Office of Public Defense Services (OPDS) for funding to commence representation prior to court appointment. Contact OPDS for more information.

**Commentary:**

A child client may seek the services of a lawyer regarding a situation that could be the basis for a dependency case before a petition is filed, or the child client may be referred for such services by a community agency or other source. If the child-client's lawyer agrees to represent the child client, the goal of representation should depend on the child client's wishes when the child client is capable of instructing the lawyer or expressing a preference. Sometimes this may mean avoiding having a petition filed, while other times it may mean filing a petition. For example, an adolescent in conflict with his or her parents might seek the help of a lawyer to determine whether to file a petition under ORS 419B.100 in an attempt to resolve the problem, or an undocumented child might seek representation to obtain a dependency adjudication as a step toward obtaining a favorable immigration status.<sup>3</sup>

During the prepetition phase of a dependency case, the child-client's lawyer has the opportunity to work with the child client and help the child client fully understand the issues and the child client's chances of securing desired outcomes. The child-client's lawyer also has the chance to encourage the agency to make reasonable efforts to work

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<sup>3</sup> The attorney for a child in a dependency case may also learn of a law enforcement investigation regarding the child client. See Standard 6 for a discussion of the attorney's responsibilities in this situation.

with the family, rather than filing a petition, when that is consistent with the child client's ultimate goals. During this phase, the child-client's lawyer should work intensively to explore all appropriate services, including assistance with legal problems involving housing, public benefits, services for children, domestic violence, and alternate placement plans that might resolve the case.

If the child client is removed from the parent's home, the child-client's lawyer should determine with the child client whether it is in the best interests of the child client to have visits with the parent(s) and, if so, how frequent those visits should be and where the visits should occur.

If the child client is removed, the child-client's lawyer may prepare the case by proposing early evaluations of the parent(s) and the family unit and by making a more complete record, during the hearing, of the facts leading up to the removal of the child client.

The child-client's lawyer should ensure that the child client receives services that are needed immediately, such as medical care, psychological evaluation, and trauma counseling.

The child-client's lawyer should work to prevent any unnecessary interruption in the child client's education and ensure that educational services for the child client will be appropriate.

## **STANDARD 6 – INVESTIGATION**

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

**Action:**

The child-client's lawyer should not rely solely on the disclosure information provided by the agency caseworker, the state, or other parties as the investigation of the facts and circumstances underlying the case.

**Action:**

The child-client's lawyer should review the case record of the child client and the supplemental confidential file, and the case record of the child-client's siblings when permitted by the juvenile code, Oregon Rules of Professional Conduct, and other confidentiality statutes.

Action:

The child-client's lawyer should contact lawyers for the other parties and CASAs for background information.

Action:

The child-client's lawyer should contact and meet with the parents, legal guardians, or caretakers of the child with permission of their lawyer(s).

Action:

The child-client's lawyer should obtain necessary releases of information in order to thoroughly investigate the case.

Action:

The child-client's lawyer should review relevant photographs, video or audio tapes, and other evidence. When necessary, the child-client's lawyer should obtain protective orders to keep information confidential once obtained.

Action:

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

Action:

If the child client is not a U.S. citizen and does not have Lawful Permanent Resident status, the child-client's lawyer should determine if the child client likely qualifies for Special Immigrant Juvenile status. To qualify, the child client must either:

1. be subject to the juvenile court's jurisdiction under ORS 419B.100; or
2. be placed by the juvenile court in the custody of an agency or department of the state or an individual or entity appointed by the juvenile court.

At the disposition, the court must find that reunification with one or both of the parents is not viable due to abuse, neglect, abandonment, or similar basis under state law. The court must be able to find that it is not in the child client's best interest to return to their home country. If these guidelines seem to apply to the child client, the child-client's lawyer should obtain an immigration consultation.

Action:

The child-client's lawyer should interview individuals involved with the child client and the parent such as:

1. Domestic partners;
2. Educators;
3. Friends;
4. Neighbors; and/or
5. Church members.

Action:

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

Action:

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

Commentary:

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

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 parent(s).

The child-client's lawyer should be familiar with procedures to obtain funds for evaluation or assessment of the child client.

Action:

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

Commentary:

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

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

Action:

The child-client'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 reviewing the agency file, the child-client's 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 child-client's lawyer is voluntarily given contents of the agency file in paper or electronic format, the child-client's lawyer should also look at the actual file in the agency office and request disclosure of all documents relating to the case from the agency, since it 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 child-client's lawyer should pursue formal disclosure under the statute. If the agency case file is inaccurate, the child-client's 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-client’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:

The child-client’s 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. The child-client’s lawyer should obtain and examine all available discovery and other relevant information.

Commentary:

As part of the discovery phase, the child-client’s 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. The child-client’s lawyer should have potential witnesses, including adverse witnesses, interviewed by an investigator or other appropriately trained person. If appropriate, witnesses should be subpoenaed.**

Action:

When appropriate, the child-client’s lawyer, or another trained and qualified person, should observe visitations between the parent and the child client.

Action:

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

Commentary:

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

- E. The child-client's lawyer should consult with the child client well before each hearing, in time to use the child client's information for the case investigation.**

Commentary:

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

## **STANDARD 7 – COURT PREPARATION**

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

Action:

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

Commentary:

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

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

Action:

The child-client'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 all lawyers or unrepresented parties.

Action:

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

Action:

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

Commentary:

Filing motions, pleadings, and memoranda benefit the child client. This practice highlights important issues for the court and builds credibility for the child-client's lawyer. In addition to filing responsive papers and discovery requests, the child-client's lawyer should seek court orders when that would benefit the child client; for example, filing a motion to enforce court orders to ensure the child welfare agency is meeting its reasonable and active efforts obligations. When out-of-court advocacy is not successful, the child-client's 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, Oregon Administrative Rules (OARs), and case law. Additionally, while nonbinding, 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. The child-client's lawyer 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:

The child-client's lawyer should make motions to meet the child client's needs pending trial.

Action:

If applicable, the child-client's lawyer should advocate that the court enter an order with the appropriate findings for the child's Special Immigrant Juvenile Status petition, in consultation with the child's immigration attorney.

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 ORS 419B.395 and its cross-references.

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

Action:

The child-client'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 client's goals.

Commentary:

The child-client's lawyer should use suitable mediation resources. The child-client's lawyer should consult the child client in a developmentally appropriate way prior to any settlement becoming binding. The ultimate settlement agreement must be consistent with the child client'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-client's lawyer should ensure agreements accurately reflect the understandings of the parties. If appropriate, the child-client's lawyer should request a hearing or move for contempt if orders benefiting the child are not obeyed.

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

Action:

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

Commentary:

Children over the age of 12 must be served by summons under ORS 419B.839 (1)(f). If the child client is not properly served with the summons, the child-client's lawyer should consider whether a motion to dismiss is appropriate. If the child client will attend the hearing, the child-client's lawyer should meet with the child client to explain what will happen at the hearing and to prepare for it.

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

Action:

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

Action:

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

Commentary:

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

**E. The child-client's lawyer should identify, locate, and prepare all witnesses.**

Action:

The child-client's lawyer, in consultation with the child client to the extent developmentally appropriate, should develop a witness list well before a hearing or trial. The child-client's lawyer should not assume the agency will call a potential witness, even if the witness is named on the agency's witness list. The child-client's lawyer should, when possible, 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 child-client's lawyer should also ensure the subpoena is served. The child-client's lawyer should subpoena potential agency witnesses (e.g., a previous caseworker) who have favorable information about the child client.

Action:

The child-client's lawyer should set aside time to fully prepare all witnesses in person before the hearing. The child-client's 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 family's situation.

When appropriate, the child-client's lawyer should consider working with other parties who share the child client's position when developing the child-client'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 a hearing. The child-client's lawyer should review ORS 419B.899 and ORS 419B.902 and local supplemental rules for the proper process and time to issue subpoenas.

Witnesses are often nervous about testifying in court. The child-client's lawyer should thoroughly prepare the witnesses so the witnesses feel comfortable with the process and understand the scope of their testimony. Preparation generally includes rehearsing the specific questions and answers expected on direct, and anticipating the questions and answers that might arise on cross-examination.

**F. The child-client's lawyer should identify, secure, prepare, and qualify expert witnesses when needed. When possible, the child-client'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 child-client's lawyer should consider whether the opposing party is calling expert witnesses and determine whether the child client needs to call any experts on behalf of the child client to respond to the opponent's experts.

Action:

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

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

Action:

The child-client’s lawyer should decide whether to call the child client as a witness, although the child-client’s lawyer is bound by the wishes of a child client capable of considered judgment. The decision should consider the child client's need or desire to testify, the necessity of the child client's direct testimony, the availability of other evidence or hearsay exceptions that may substitute for direct testimony by the child client, the child client'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 client and on the possible reunification of the family.

Action:

The child-client’s lawyer must be familiar with the current law and empirical knowledge about children clients’ competency, memory, and suggestibility and, when appropriate, attempt to establish the competency and reliability of the child client.

Commentary:

There is no minimum age below which a child client is automatically incompetent to testify. To testify as a witness, the child client 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 client’s testimony. If necessary, the child-client’s lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child client on those bases.

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

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

Action:

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

Commentary:

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

The child-client's lawyer's preparation of the child client to testify should include attention to the child client's developmental needs and abilities, as well as to accommodations that 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 client's testimony outside the parents' presence.

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

## **STANDARD 8 - HEARINGS**

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

Action:

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

The child client's position may overlap with the positions of one or both parents, third-party caretakers, or the agency. Nevertheless, the child-client's lawyer should participate fully in every hearing and not merely defer to the other parties. The child-client's lawyer should be prepared to state and explain the child client's position at each hearing.

Commentary:

The child-client's lawyer's participation in pretrial proceedings may improve case resolution for the child client. Failing to participate in the proceedings may harm the child client's position in the case. Therefore, the child-client's lawyer should be actively involved in this stage.

Becoming a strong courtroom lawyer takes practice and attention to detail. The child-client's lawyer must be sure to learn the rules about presenting witnesses, impeaching testimony, and entering evidence. The child-client's lawyer should 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-client's lawyer must be comfortable. In particular, examining or cross-examining a child requires unique skills.

Action:

If the court proceeds in the absence of the child-client's lawyer, the lawyer should consider filing a motion to set aside.

Commentary:

If the child-client's lawyer has a conflict with another courtroom appearance, the child-client's lawyer should notify the court and the other parties and request a short continuance. The child-client's lawyer should avoid having another lawyer stand in to represent the child client in court if the other lawyer is unfamiliar with the child client or case.

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

Action:

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

Commentary:

In many child abuse and neglect proceedings, lawyers waive the opportunity to make opening statements and closing arguments. However, these opportunities can help shape the way the judge views the case and therefore can help the child client. They 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 child-client's lawyer should move along when the judge is tracking the argument and elaborate on the areas that appear to need more attention.

**C. The child-client's lawyer should prepare and make all appropriate motions and evidentiary objections. The child-client's lawyer must be aware of the need to make a record for appeal.**

Action:

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

Commentary:

It is essential that the child-client's lawyer understand the applicable rules of evidence and all court rules and procedures. The child-client's 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 the child or other witness, or raising the issue of the child welfare agency's lack of reasonable or active efforts).

**D. If the child client testifies, the child-client's lawyer should ensure that questions to the child client are phrased in an age and culturally appropriate manner.**

Action:

The child-client's lawyer should take into consideration the law and research regarding children's testimony, memory, and suggestibility in developing questions for the child witness. The information a child gives in interviews and during testimony is often misleading because adults may not understand how to ask children developmentally appropriate questions nor how to interpret answers properly. The child-client's lawyer must become skilled at recognizing the child client'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 developmentally inappropriate phrasing.

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

Action:

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

Action:

At each hearing, the child-client's lawyer should advocate for the child client's goals, keeping in mind the case theory.

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

Action:

The child-client's lawyer should advocate for appropriate services and request that the court state its expectations of all parties on the record.

Action:

The child-client's lawyer must be familiar with the standard forms and ensure that they are completed correctly and that findings beneficial to the child client are included.

Action:

The child-client's lawyer should consider preparing proposed findings of fact and conclusions of law to frame the case and ruling for the judge.

Commentary:

Framing the case for the judge may result in orders that are more favorable to the child client, preserve appellate issues, and help the child-client's lawyer clarify desired outcomes before a hearing begins. The child-client's lawyer should offer to provide the judge with proposed findings and orders in electronic format. When an opposing party prepares the order, the child-client's lawyer should review it for accuracy before it is submitted to the judge for signature.

## **STANDARD 9 – POST HEARINGS**

### **A. The child-client’s trial lawyer should review court orders to ensure accuracy and clarity and review with the child client.**

#### **Action:**

At the conclusion of the hearing, the child-client’s trial 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, that is, it does not reflect the court’s verbal rulings, the child-client’s trial lawyer should take whatever steps are necessary to correct it to the extent that the corrections are beneficial to the child client.

#### **Action:**

Once the order or judgment is final, the child-client’s trial lawyer should provide the child client with a copy of the order or judgment, if age appropriate, and should review the order or judgment with the child client to ensure the child client understands it and the obligations of all of the parties under the order or judgment. If the child client is unhappy with the order or judgment, the child-client’s lawyer should counsel the child client about any options to appeal, or, when the order was entered by a referee, request a rehearing pursuant to ORS 419A.150, but should explain that the order is in effect unless a stay or other relief is secured. It is important to remember, when explaining the court’s decision and the child client’s options, that communication with a child client should be developmentally and culturally appropriate. See Standard 2C.

#### **Commentary:**

The child client may be upset or frightened about being involved in the child welfare system and a court order that is adverse to the child client could add stress and frustration. It is essential that the child-client’s trial lawyer take the time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the child client. The child-client’s lawyer should counsel the child client about all options, including appeal.

The child-client’s trial lawyer should take reasonable steps to ensure the child client and all other parties comply with court orders and should continuously assess whether the case needs to be brought back to court.

#### **Action:**

If the child client is attempting to comply with the order but any other party is not meeting that party’s responsibilities, the child-client’s trial lawyer should approach the other party and seek assistance on behalf of the child client. If necessary, the child-client’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 child client.

Commentary:

The child-client's trial lawyer should play an active role in assisting the child client in complying with court orders, ensuring that other parties comply and in obtaining visitation and any other social services. The child-client's trial lawyer should speak with the child client regularly about progress and any difficulties the child client is encountering with the implementation of the court order or service plan. If the agency neglects or refuses to offer appropriate services, especially those ordered by the court, the child-client's lawyer should file appropriate motions, including those for an expedited hearing, for a change in the visitation plan, to compel disclosure of information or material, or for contempt.

When the agency does not offer appropriate services, the child-client's trial lawyer should be familiar with independent providers that could render services to the child and provide the information to the court to be included in the service plan.

**C. The child-client's trial lawyer should move the court to modify or set aside an order or judgment when appropriate.**

Action:

If an order or judgment adversely affects the child client, the child-client's trial lawyer should advise the client of the remedies, which include moving to modify or set aside the order or judgment. ORS 419B.923 permits a motion to modify or set aside an order or judgment in instances of clerical error, excusable neglect, and newly discovered evidence. Although other reasons may be permitted under the "include, but are not limited to" language of the statute, the extent of the trial court's discretion is not yet completely determined.

The motion must be filed within a "reasonable time" and may be filed while an appeal is pending. The child-client's trial lawyer should consider filing both the motion and referring the case for appeal when the time limitations make that necessary. In that instance, the motion must be served on the appellate court.

Additionally, a motion to modify or set aside an order or judgment may be made to assert a claim of inadequate assistance of counsel, which also may be made on direct appeal. When this issue may be the basis for a motion to modify or set aside, a request for a rehearing or an appeal to the court of appeals, the child-client's trial lawyer should be cognizant of all of the possible deadlines and immediately move the court to substitute counsel.

**D. The child-client’s trial lawyer should consider and discuss the possibility of appeal or rehearing with the child client.**

Action:

The child-client’s trial lawyer should immediately consider and discuss with the child client, preferably in person, the possibility of appeal when a court’s ruling is contrary to the child client’s position or interests. Regardless of whether the child-client’s lawyer believes an appeal is appropriate or that there are any viable issues for appeal, the child-client’s trial lawyer should advise the child client—at the conclusion of each hearing—that they have a right to appeal from any adverse order or judgment 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-client’s trial lawyer should advise the child client that the client is entitled to a rehearing before a juvenile court judge. Under ORS 419A.150(4), unless a rehearing is requested within 10 days following the entry of the referee’s order, the order will become final. Whether to seek a rehearing of a referee’s order or to pursue a direct appeal in the appellate courts is always the child client’s decision.

Commentary:

When discussing the possibility of an appeal, the child-client’s trial lawyer should explain both the positive and negative effects of an appeal, including how the appeal could affect the child client’s goals. For instance, the appellate court could reverse the juvenile court and vindicate the child client’s position. Further, under ORS 19.360, 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. Alternatively, an appeal could delay the case for a long time.

**E. If the child client decides to appeal, the child-client’s trial lawyer should timely and thoroughly facilitate the appointment of an appellate lawyer for the child client.**

Action:

The child-client’s trial lawyer should take all steps necessary to facilitate appointing an appellate lawyer; for example, the child’s court-appointed trial lawyer should refer the case for appeal to the Office of Public Defense Services (OPDS) and comply with that office’s referral procedures. The child’s court-appointed trial lawyer should work with the appellate lawyer and identify for the appellate lawyer: the parties to the case (for example whether there are any intervenors), appropriate issues for appeal, and promptly respond to all requests for additional information or documents necessary for

the appellate lawyer to prosecute the appeal. The child’s court-appointed trial lawyer should promptly comply with the court’s order to return exhibits necessary for appeal.

Commentary:

Pursuant to ORS 419A.200(4), the child-client’s trial lawyer must file the notice of appeal or if court-appointed, the child-client’s trial lawyer may discharge their duty to file the notice of appeal by referring the case to the Juvenile Appellate Section of the OPDS using the on-line referral form and complying with OPDS procedures.

- F. The child-client’s trial lawyer should monitor the progress of an appeal taken by another party to the juvenile case and continuously evaluate whether the child client should participate in the appeal.**

Action:

As a party to the underlying juvenile case, the child-client’s trial lawyer should monitor the appeal by reviewing the log of filings and the filed documents through the electronic Appellate Case Management System.

Oregon Rule of Appellate Procedure (ORAP) 2.22 requires that a party eFiling documents in a dependency case must use the “notification information” function of the appellate courts’ eFiling system to notify the attorney for any person who was a party in the juvenile court pursuant to ORS 419B.875(1)(a)(A)–(C), (H), or ORS 419B.875(1)(b). Notification must be made to each attorney whose client has not been designated a party in the notice of appeal and to each attorney whose client has not filed a notice of intent to participate in the appeal under ORAP 2.25(3).

ORAP 2.22 explains that the notification will notify the attorney that the document has been eFiled, but will not permit the attorney to view the document unless the attorney has juvenile case permissions in the Appellate Case Management System.

In order to access the documents, the child-client’s trial lawyer should obtain, complete, and submit a “Request for Access” form to the State Court Administrator.

Action:

The child-client’s trial lawyer should regularly monitor the electronic notifications and review the filed documents, when appropriate, and evaluate whether the child client should file a notice of intent to participate. Court-appointed counsel may do so by referring the case to the OPDS using the process explained in subsection E above.

## **STANDARD 10 – APPEALS ISSUES FOR CHILD’S LAWYER**

- A. The child-client’s appellate lawyer should communicate with the child client.**

Action:

The child-client's appellate lawyer should consult with the child client in an age appropriate fashion as soon as possible to confirm that the child client wishes to pursue the appeal and to advise the child client about the appellate process, including relevant timelines.

If the child client is of diminished capacity, and it is not reasonably possible to obtain direction from the child client, the child-client's appellate lawyer should determine what the child client would decide if the child was capable of making an adequately considered decision. Among the ways to determine this is to consult with the child-client's trial lawyer.

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

Commentary:

The child-client's trial lawyer should consider whether undertaking representation of the same child client on direct appeal protects the child client's interests on appeal. Representation of the child client on appeal by the child-client's trial lawyer potentially deprives the child client of an independent audit of the quality of the representation by the child-client's trial lawyer and, because a claim of inadequate assistance of counsel may be available on direct appeal, could implicate Oregon RPC 1.7(a)(2).

Action:

The child-client's appellate lawyer should explain to the child client the difference between representation for appeal and ongoing representation in the dependency case. Because the dependency case will almost always be ongoing during the appeal, the child-client's appellate lawyer and the child-client's trial lawyer should consult and collaborate as necessary to advance the child client's interests in both cases.

Action:

The child-client's appellate lawyer and the trial lawyer should be thoughtful about their respective roles and relationship with the child client. For example, the child-client's trial lawyer should be careful to safeguard the appeal by consulting with the child-client's appellate lawyer prior to upcoming hearings and immediately notifying the child-client's appellate lawyer should the court enter any new order or judgment to determine whether the new judgment should be referred for appeal. The child-client's appellate lawyer should consult with the child-client's trial lawyer about the issues

raised in the opening brief and offer to consult about properly raising issues at upcoming hearings.

Action:

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

**B. Unless the child-client's trial lawyer has filed the notice of appeal, the child-client's appellate lawyer must do so within the prescribed time limits.**

Action:

The child-client's appellate lawyer must comply with statutory and rule requirements in filing the notice of appeal.

When the child-client's trial lawyer has filed the notice of appeal before the child-client's appellate lawyer has assumed the representation, the appellate lawyer should promptly obtain and thoroughly review the notice of appeal for any jurisdictional or other defects, including whether the decisional document appealed from is an appealable judgment pursuant to ORS 419A.205.

Commentary:

Under ORS 19.270, a proper notice of appeal is a jurisdictional requirement. Consequently, the notice must satisfy both statutory requirements found in ORS 19.250, ORS 19.255, and ORS 419A.200(3), and in the Oregon Rules of Appellate Procedure found in ORAP 2.05, ORAP 2.10, and ORAP 2.22 in order to prosecute the appeal.

ORS 419A.200(5) permits the child-client's 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 (1) that the failure to file a timely notice of appeal was not personally attributable to the child, *and* (2) "a colorable claim of error" exists in the proceeding from which the appeal is taken.

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

Action:

The child-client's appellate lawyer should thoroughly review the judgment to ensure that it comports with the requirements of the juvenile code; for example, the requirements of a valid permanency judgment found under ORS 419B.476(5).

The child-client'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 child client. The brief should reflect relevant case law and present the best legal arguments available under Oregon and federal law to advance the child client's position. Novel legal arguments that might develop favorable law in support of the child client's position should also be advanced if available.

The child-client's appellate lawyer should, when appropriate, send a copy of the filed brief to the child client who is able to read, and to the child-client's trial lawyer.

Commentary:

The child-client's appellate lawyer has considerable authority over the manner in which an appeal is presented. It is that lawyer's responsibility to exercise his or her professional judgment to raise issues that, in the lawyer's judgment, will provide the best chance of success on appeal—even when the child client disagrees with the appellate lawyer's judgment about which arguments are most likely to advance the client's position.

If the child client insists on advancing a theory that the court-appointed appellate lawyer determines is not meritorious or uses too much of the allotted word limit so that better arguments cannot be effectively advanced, the court-appointed appellate lawyer should determine the strategy for the opening brief based on professional skill and judgment and consider counseling the child client to advance their arguments in a supplemental *pro se* brief pursuant to ORAP 5.92.

ORAP 5.90(4) allows the filing of a *Balfour*-type brief with the argument section to be drafted by the child client in a juvenile case when an appellate lawyer has been appointed. If the child-client's appellate lawyer, after consultation with the child client, is unable to identify any meritorious issues on appeal, the court-appointed appellate lawyer may consider filing a brief pursuant to ORAP 5.90(4). Before the child-client's appellate lawyer embarks on this course of action, the child-client's appellate lawyer must determine whether, in his or her professional judgment, the confidentiality constraints and ethical dilemmas caused by the unique circumstances involved in this type of case can be overcome.

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

##### Action:

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

##### Commentary:

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

##### Action:

If oral arguments are scheduled, the child-client's appellate lawyer should be thoroughly prepared to present the case to the court and to answer the court's questions.

#### **E. Communicating the result of the appeal.**

##### Action:

The child-client's appellate lawyer should communicate the result of the appeal and its implications in an age appropriate fashion to the child client. If the child has the ability to read and comprehend the decision, a copy of the appellate decision should be provided to the child client. The child-client's appellate lawyer should also communicate the result of the appeal to the child-client's trial lawyer and provide a copy of the appellate decision as well as any needed consultation.

#### **F. Petitioning for Review in the Oregon Supreme Court.**

##### Action:

The child-client's 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 child client's decision unless the child client is of diminished capacity.

##### Commentary:

When the child client is of diminished capacity, and it is not reasonably possible to obtain direction from the child client, the child-client's appellate lawyer should determine what the child client would decide if the child were capable of making an adequately considered decision and proceed according to that determination.

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

Action:

The parent-client’s lawyer must understand the parent client’s goals and pursue them vigorously. The parent-client’s lawyer should explain that the lawyer’s job is to represent the parent client’s interests and regularly inquire as to the parent client’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 client’s authority to decide the case goals.

Commentary:

Since many parent clients distrust the child welfare system, the parent-client’s lawyer must take care to distinguish himself or herself from others in the system so the parent client can see that the parent-client’s lawyer serves the parent client’s interests. The lawyer should be mindful that a parent client often feels disempowered in child welfare proceedings and should take steps to make the parent client 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 Department of Human Services (hereinafter “agency”), and potential consequences of the parent client 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 client’s goals, but the parent client is in charge of deciding the case goals and the lawyer must act accordingly.

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

Action:

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

Commentary:

Lawyers representing parents must be able to determine whether a parent client's mental status (including mental illness and mental intellectual disability or developmental delay) interferes with the parent client's ability to make decisions about the case. The parent-client's lawyer should be familiar with any mental health diagnosis and treatment that a parent client has had in the past or is presently undergoing (including any medications for such conditions). The lawyer should get consent from the parent client to review mental health records and to speak with former and current mental health providers. The lawyer should explain to the parent client that the information is necessary to understand the parent client'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-client's lawyer should conduct a thorough investigation and then determine what course of action is most consistent with protecting the parent client's interests in the particular situation and represent the parent client 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-client's lawyer reasonably believes that the parent client has diminished capacity; is at risk of physical, financial, or other harm unless action is taken; and cannot adequately act in the parent client's own interest, the parent-client's lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the parent client.**

Action:

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

Action:

In extreme cases, that is, when the parent client is at risk of substantial physical harm and cannot act in his or her own interest and when the parent-client's lawyer has

exhausted all other protective action remedies, the lawyer may request the court to appoint a guardian *ad litem*.

Commentary:

Information relating to the representation of a parent client with diminished capacity is protected by Oregon RPC 1.6 and Oregon RPC 1.14. When a parent client with diminished capacity is unable to protect himself or herself from substantial harm, Oregon RPC 1.14 allows the parent-client's lawyer to take action to protect the parent client. Oregon RPC 1.6(a) and Oregon RPC 1.14(c) implicitly authorize the parent-client's lawyer to reveal information about the parent client, but only to the extent reasonably necessary to protect the parent client's interests.

It is generally accepted that it is error for a court to proceed without appointment of a guardian *ad litem* for a party when facts strongly suggest the party has diminished capacity and is unable to meaningfully assist the party's lawyer. Similarly, it is a due-process violation to fail to appoint a guardian *ad litem* for a parent client with diminished capacity in a termination-of parental-rights proceeding. However, under Oregon State Bar Formal Opinion No. 2005-159, the parent-client's lawyer must maintain as regular a lawyer-client relationship as possible and adjust representation to accommodate a parent client's limited capacity. This is not inconsistent with Oregon RPC 1.14, which 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 client with diminished capacity is protected by Oregon RPC 1.6. When taking protective action, the parent-client's lawyer is implicitly authorized under Oregon RPC 1.6(a) to reveal information about the parent client, but only to the extent reasonably necessary to protect the parent client's interests. Consequently, and as a general proposition, lawyers for a parent should not invade a typical parent client's rights beyond the extent to which it reasonably appears necessary for the parent-client's lawyer to do so. In other words, a parent-client's lawyer should request a guardian *ad litem* for a parent client only when the client consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the parent client will be able to attain the requisite mental capacity to assist in the proceedings in a reasonable time.

According to a 1986 Ninth Circuit case, *United States v. 30.64 Acres*, 795 F2d 796 (9<sup>th</sup> Cir 1986), counsel for other parties to the proceeding may be obligated to advise the court of the parent client's incompetence. If it appears

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.

*30.64 Acres*, 795 F2d at 805.

When a guardian *ad litem* is appointed for a parent client, under ORS 419B.234(3)(a) the guardian *ad litem* must consult with the parent-client's lawyer. Under ORS 419B.234(3)(d), the guardian *ad litem* also has the statutory authority to control the litigation and provide direction to the parent-client's lawyer on decisions that would ordinarily be made by the parent client in the proceeding. Further, under ORS 419B.234(5), the parent-client's lawyer is required to follow such directions provided by the guardian *ad litem*, but must inquire at every critical stage of the proceedings as to whether the parent client's competence has changed. If appropriate, the parent-client's lawyer must request removal of the guardian *ad litem*.

## **STANDARD 2 – RELATIONSHIP WITH PARENT CLIENT**

### **A. The parent-client's lawyer should meet and communicate regularly and effectively with the parent client.**

#### Action:

The parent-client's lawyer should make an initial contact with the parent client within 24 hours of appointment and, when feasible, conduct an initial interview within 72 hours. During the first meeting with the parent client, the parent-client's lawyer must explain the lawyer's role.

#### Action:

The parent-client's lawyer should ensure that the parent client understands how to contact the lawyer and that ongoing contact is integral to effective representation of the parent client. The lawyer should explain that even when the lawyer is unavailable, the parent client should leave a message. The lawyer should respond to the parent client's messages within a reasonable time. The lawyer should provide the parent client with contact information in writing and establish a message system that allows regular lawyer-client contact.

Action:

After the first meeting, the parent-client's lawyer should have contact with the parent client before court hearings and Citizen Review Board (CRB) reviews, in response to contact by the parent client, when a significant change of circumstances must be discussed with the parent client, or when the lawyer is apprised of emergencies or significant events affecting the child.

Action:

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

Action:

The parent-client's lawyer should be available for in-person meetings or telephone calls to answer the parent client's questions and address the parent client's concerns. The lawyer and the parent client should work together to identify and review short- and long-term goals, particularly as circumstances change during the case.

Commentary:

The parent-client's lawyer should give the parent client time to ask questions and consider alternatives. The lawyer should obtain information from the parent client about the following: the parent client's prior contacts with the agency; the parent client's knowledge about the allegations of the petition; the accuracy of information 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 client feels would have avoided the need for removal; alternatives to removal, including relative placements, in-home services, or removal of a person who allegedly endangers the child from the parent-client'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, each parent, or guardian; the parent client's concerns about placement; the parent client's long- and short-term goals; and current visitation and the parent client's desires concerning visitation.

The parent-client's 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 parent client are interviewing the parent client. The lawyer should become familiar with interpreter services that are available for out-of-court activities such as client conferences, provider meetings, etc.

- B. The parent-client’s lawyer should counsel the parent client about all legal matters related to the case, including specific allegations against the parent client, the parent client’s rights in the pending proceeding, any orders entered against the parent client, and the potential consequences of failing to obey court orders.**

Action:

The parent-client’s lawyer should clearly explain the allegations made against the parent client; what is likely to happen before, during, and after trial and each hearing; and ascertain the parent client’s position on the allegations.

Action:

The parent-client’s lawyer should explain what steps the parent client can take to increase the likelihood of reuniting with the child. Specifically, the lawyer should discuss in detail the steps necessary to obtain the parent client’s desired outcome.

Action:

The parent-client’s lawyer should provide or ensure that the parent client 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 client has difficulty reading, the parent-client’s lawyer should read the documents to the parent client. In all cases, the lawyer should be available to discuss and explain the documents to the parent client.

Action:

The parent-client’s lawyer must advise the parent client of the parent’s rights, the lawyer’s role and responsibilities, the role of each participant in the system, and alternatives and options available to the parent client.

Commentary:

The parent-client’s lawyer’s job extends beyond the courtroom. The lawyer should be a counselor as well as a litigator. The lawyer should be available to talk with the parent client to prepare for hearings and to provide advice and information about ongoing concerns. Open lines of communication help to ensure a parent client gets answers to questions and the lawyer gets the information and documents the lawyer needs.

Issues to discuss include: 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 Adoption and Safe Families Act (ASFA); the impact of concurrent case planning required under the ASFA on the case and the parent client's participation in such planning; and the consequences of the parent client failing to appear in particular proceedings.

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

**C. The parent-client'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-client's lawyer should develop a timeline that reflects projected deadlines and important dates and a calendar system to remember the dates.

Commentary:

The parent-client's lawyer should provide the parent client 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.

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

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

Commentary:

Often lawyers practicing in juvenile court are a close-knit group who work and sometimes socialize together. Maintaining good working relationships with other participants in the child welfare system is an important part of being an effective advocate. The parent-client's lawyer should not give the impression to the parent client

that relationships with other lawyers are more important than the representation the parent-client's lawyer is providing the parent client. The parent client must feel that the lawyer believes in the client and is actively advocating on the parent client's behalf. The lawyer may be the parent client's only advocate in the system.

**E. The parent-client's lawyer must abide by confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the parent client.**

Action:

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

Commentary:

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

Commentary:

Confidential information contained in a parent client's substance abuse treatment records, domestic violence treatment records, mental health records, and medical records is often at issue in dependency cases. Disclosure of confidential information may adversely affect the parent client's chances of achieving his or her goals. For this reason, it is crucial for the parent-client's lawyer to advise the parent client promptly as to the advantages and disadvantages of releasing confidential information, and for the

lawyer to take all steps necessary to protect the parent client's privileges and rights to confidentiality.

Commentary:

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

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

Action:

The parent-client's lawyer should discuss with the parent client the potential consequences of communicating via electronic communication or broadcasting over social media.

Commentary:

Communicating with the parent client and other parties through electronic communication may be the most effective means of maintaining regular contact. However, the parent-client's lawyer should also understand the pitfalls associated with communicating sensitive case history and material electronically. Not only can electronic communication create greater misunderstanding and misinterpretation, it can also become documentary evidence in later proceedings. The lawyer should be aware that the use of electronic communication may require special precautions in particular circumstances.

Communication through social media raises additional confidentiality concerns. The parent-client's lawyer should alert the parent client that anything that is part of a public posting is accessible to, and can be used by, opposing counsel. Additionally, it may be helpful to inform the parent client that opposing counsel (or the counsel's agent) may request to see the client's private information or information set behind privacy settings. If this happens, the parent client should not accept and should contact the lawyer immediately. Under Oregon RPC 4.3, the attorney's contact with a represented parent client may be a violation of rules of ethics. While social media may be a convenient way to locate and communicate with the parent client, the parent-client's

lawyer and the parent client should be aware that communications may not be confidential or protected by attorney-client privilege.

Action:

The parent-client's lawyer should meet with the parent client 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 client questions to obtain information to prepare the case and strive to create a comfortable environment so the parent client can ask the lawyer questions. The parent-client's lawyer should use these meetings to prepare for court as well as to counsel the parent client concerning issues that arise during the course of the case. Information obtained from the parent client should be used to propel the investigation. The lawyer should work collaboratively with the parent client to ascertain independent sources to corroborate the parent client's information.

**F. The parent-client's lawyer must avoid conflicts of interest and should avoid the appearance of conflicts of interest.**

Action:

The parent-client's 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. The parent-client's lawyer should follow Oregon RPC 1.7 to 1.13 relating to conflicts of interest and duties to former clients.

Commentary:

In most cases, lawyers should not represent both parents in a dependency 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.

Under Oregon RPC 1.7(a), when 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 client, a former client 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.

There are, however, conditions under which, notwithstanding a current conflict, representation is allowed under Oregon RPC 1.7(b). These conditions include:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
- (4) each affected client gives informed consent, confirmed in writing.

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

Action:

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

Commentary:

Clients and other parties involved in the child welfare system are a diverse group. Each person comes to this system with a set of values and expectations, but it is essential that each person try to learn about and understand the backgrounds of others. Race, ethnicity, gender, gender identity, sexual orientation, and socioeconomic position all have an impact on how a person acts and reacts in a particular situation. The parent-client’s lawyer should not impose his or her values onto the parent client, but instead, work with the parent client within the context of the client’s culture and socioeconomic position. The court and child welfare agency have expectations of parents concerning treatment of their children, and the parent-client’s lawyer must strive to explain these expectations to the parent client in a sensitive way. The lawyer should vigorously defend against the court and agency imposing their values onto the parent client, and should advocate for court orders and agency requests that respect the parent client’s background, culture, and socioeconomic status. The lawyer should be familiar with the

Indian Child Welfare Act (25 USC § 1901 et seq.) and the Refugee Child Welfare Act (ORS 418.925–418.945), and ensure that these laws are applied when appropriate.

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

Action:

The parent-client’s lawyer should attempt to locate and communicate with a missing parent client.

Action:

If communication is established with the parent client, the parent-client’s lawyer should formulate positions that the lawyer should take at hearings, and to understand what information the parent client wishes the lawyer to share with the child welfare agency and the court.

The parent-client’s lawyer should inform the parent client that if the parent does not appear at a hearing to which the parent has not been summoned or ordered to appear, the lawyer will exercise his or her best judgment about whether to advocate for the parent client’s last known position, remain silent, and/or request a continuance.

The parent-client’s lawyer should inform the parent client that if the parent client fails to appear for any hearing on a petition to establish jurisdiction or terminate parental rights to which the parent client has been summoned or ordered to appear, the court has no discretion to allow the lawyer to appear on the merits of the case on the parent client’s behalf and that the court may allow the other parties to proceed in the parent client’s absence.

Action:

If a parent fails to attend a hearing, the parent-client’s lawyer may appear to explain the parent client’s failure to appear and move to continue the hearing.

Action:

If the parent client fails to attend a hearing to which the parent has not been summoned or ordered to appear, the parent-client’s lawyer should assess whether the parent client’s interests are better served by advocating for the parent client’s last clearly articulated position, or declining to state a position in further court proceedings, and act accordingly.

Action:

If the parent client fails to appear after being summoned or ordered to appear for any hearing on a petition to establish jurisdiction or terminate parental rights, the court has no discretion to allow the parent-client's lawyer to appear on the merits of the case on the parent client's behalf and the court may allow the other parties to proceed in the parent client's absence. However, the lawyer may appear for the purpose of raising any available procedural objections to the court proceeding in the parent client's absence.

Action:

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

Commentary:

To represent a parent client adequately, the parent-client's lawyer must know what the parent client wishes. If the parent client is out of contact with the lawyer, it is important that the lawyer take diligent steps to locate the parent client to determine the parent client's wishes.

In attempting to locate the parent client, the parent-client's lawyer should recall that (1) the attorney-client relationship continues, and (2) the lawyer's ethical obligation to maintain the parent client's confidences and secrets continues. The lawyer should be mindful that his or her inquiries may reveal confidential or secret information to others, including other parties and the court and could be detrimental to the parent client. If the lawyer has gotten prior permission to speak with others about the parent's contact, they may choose to attempt contact via those avenues.

If the parent-client's lawyer has prior permission from the parent client, diligent steps to locate a parent client include speaking with the parent-client's family, the caseworker, the foster care provider and other service providers, and checking court records and jail rosters. It may include sending mail to the parent-client's last known address.

If the parent-client's lawyer is unable to find and communicate with the parent client after initial consultation, the lawyer should assess what action would best serve the parent client's stated interest in the litigation. This decision must be made on a case-by-case basis. Absent extraordinary circumstances, the lawyer should take a position consistent with the parent client's last clearly articulated position. However, if a parent client fails to appear after being summoned or ordered to appear for any hearing on a petition to establish jurisdiction or terminate parental rights, the lawyer may not appear and defend the merits of the petition on the parent client's behalf. However, the lawyer may raise any available procedural objections to the court proceeding in the parent client's absence.

The parent-client's lawyer should be familiar with the grounds and procedures for motions to set aside juvenile court orders and judgments under ORS 419B.923 as well as the time requirements.

**I. The parent-client's lawyer must be aware of the unique issues an incarcerated parent client faces in order to provide competent representation to the incarcerated parent client.**

Action:

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

Action:

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

Action:

The parent-client's lawyer should know Oregon's statutory and case law concerning incarceration as a basis for termination of parental rights.

Action:

The parent-client's lawyer should counsel the parent client 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 incarcerated parent's prison counselor.

Action:

The parent-client's lawyer may need to visit the incarcerated parent client in 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 parent client.

Action:

The parent-client's lawyer should advise the client that phone calls are recorded and that letters and electronic communication are read and monitored. Information gleaned from these communications can be used against the parent client in this case.

Action:

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

Commentary:

Arranging the parent client's appearance in court may require the parent-client's lawyer to take action well in advance of the hearing or trial. The lawyer should find out from the parent client 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 client may prefer to stay at the prison rather than lose his or her privileges. The lawyer should explain to any parent client hesitant to appear that the case will proceed without the parent client's presence and discuss the potential consequences of the parent client's decision not to attend the proceeding.

The parent-client's lawyer may need to contact the prison or jail to facilitate the parent client's participation, in person or otherwise, and take steps necessary to effectuate that the parent client appears. Different jurisdictions may have different practices or options to appear.

Action:

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

Commentary:

The parent-client's lawyer should be particularly diligent when representing an incarcerated parent client. The lawyer should make efforts to visit an incarcerated parent client at the correctional institution in which the client is incarcerated as soon as possible after being appointed. The purpose of visiting the incarcerated parent client at the correctional facility is to establish an attorney-client relationship and engage the

parent client in case preparation. The lawyer should know why the parent client is incarcerated, the length of the parent client's incarceration, and post-incarceration release requirements if applicable, particularly any potential restrictions or limitations on contact with children. If the parent client 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 client opposes this step, the parent-client's lawyer must oppose such a motion.

The parent-client's lawyer should help the parent client identify potential kinship placements and relatives who can provide care for the child while the parent client is incarcerated. The lawyer should understand the implications of the ASFA for an incarcerated parent client.

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

Obtaining services such as substance abuse treatment or parent or job training while in jail or prison is often difficult. The parent-client's lawyer should learn about and advocate for available resources, contact the services, and attempt to get the support of the agency and the child's lawyer. Without services, it is unlikely the parent client will be reunified with the child upon discharge from prison.

An incarcerated parent client's contact with the child should generally, at a minimum, include cards and letters. In some instances, prisons may have technology such as videoconferencing or Skype that can be used for parent-child visitation. Because the time to process the required visitation paperwork varies from institution to institution, the parent-client's lawyer should begin the process of filling out and filing the forms to allow visitation between the parent client and the client's children as soon as possible. The lawyer should also consult with the agency caseworker and the parent-client's Department of Corrections (DOC) counselor on ways to expedite approval of the parent client'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 parent client agrees, the parent-client's lawyer should advocate for transfer of the parent client to such a program as well as encouraging visits with the child through these programs.

**J. The parent-client’s lawyer should take appropriate actions on collateral issues.**

Action:

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

1. Pending criminal matters;
2. Supplemental Security Income (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 agency administrative findings including denial of benefits or findings of abuse and neglect.

Commentary:

The parent-client’s lawyer does not have an ethical duty to represent the parent client in these collateral matters when the terms of the lawyer’s appointment or employment limit the lawyer’s representation to the dependency case. The lawyer must be aware of the ethical obligation to avoid providing legal advice on areas of law with which the lawyer is unfamiliar. In some circumstances, the lawyer may have a duty to take limited steps to protect the parent-client’s rights, such as asserting the parent-client’s Fifth Amendment right to remain silent pending potential criminal prosecution.

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

- A. The parent-client’s 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. The lawyer should only accept an appointment or retainer if the lawyer is able to provide quality representation and diligent advocacy for the parent client.**

Action:

The parent-client's lawyer 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:

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

Commentary:

As in all areas of law, it is essential that the parent-client's lawyer learn the substantive law as well as local practice. The lawyer should be familiar with the Office of Public Defense Services, Qualification Standards for Court Appointed Counsel, 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.

**B. The parent-client's lawyer should acquire working knowledge of all relevant state and federal laws, regulations, policies, and rules.**

Action:

The parent-client's lawyer must read and understand all state laws, policies, and procedures regarding child abuse, neglect, and other related matters, including but not limited to the following:

1. Oregon Revised Statutes (ORS) chapters 419A, 419B and 419C, Oregon Juvenile Code;
2. ORS chapter 418, Child Welfare Services;
3. ORS 418.925–418.945, Refugee Child Act;
4. Oregon Revised Statutes concerning paternity, guardianships, and adoption;
5. ORS 417.200–417.260, Interstate Compact on Placement of Children, and Oregon Administrative Rules;
6. ORS 109.701–109.990, Uniform Child Custody Jurisdiction and Enforcement Act, and Oregon Administrative Rules;

7. The basic structure and functioning of the Department of Human Services and the juvenile court, including court procedures, the functioning of the CRB and court-appointed-special-advocate (CASA) programs; and
8. Indian Child Welfare Act, 25 USC §§ 1901–1963; Bureau of Indian Affairs Guidelines; and Oregon Administrative Rules.

Action:

The parent-client’s lawyer must be thoroughly familiar with Oregon evidence law and the Oregon Rules of Professional Conduct.

Action:

The parent-client’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 the lawyer should be prepared to research the laws when they are applicable.

- C. The parent-client’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-client’s lawyer must be familiar with case-planning and permanency-planning principles and with child welfare and family preservation services available through the agency and available in the community and the problems they are designed to address. The lawyer is encouraged to seek training in the areas listed in Appendix B.

Commentary:

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

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

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

Action:

The parent-client’s lawyer should develop a theory and strategy of the case to implement at hearings, including the development of factual and legal issues.

Action:

The parent-client’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 and/or a placement for the child.

Action:

The parent-client’s lawyer should inform other parties and their representatives that the lawyer is representing a parent client 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. The parent-client’s lawyer should, when consistent with the parent client’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 client may be granted. If a hearing is continued and the case is delayed, the parent client may lose momentum in addressing the issues that led to the child’s removal or the parent client may lose the opportunity to prove compliance with case plan goals. Additionally, the ASFA timelines continue to run despite continuances.

- C. The parent-client’s lawyer should cooperate and communicate regularly with other professionals in the case.**

Action:

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

Action:

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

Commentary:

The parent-client's lawyer must have all relevant information to effectively represent the parent client. This requires open and ongoing communication with the other lawyers and service providers working with the parent client, the child, and family.

The parent-client's lawyer must be aware of local rules about discovery and must always seek the consent of the attorney for a represented party before speaking with that party.

When communicating with other parties, service providers, and lawyers, the parent-client's lawyer should be especially mindful of confidentiality requirements.

**D. The parent-client's lawyer or the lawyer's agent may not contact represented parties without the consent of their lawyer(s).**

Commentary:

The agency often appears unrepresented in dependency cases and in those instances Oregon RPC 4.2 does not prevent a parent-client's lawyer from talking to the caseworker or other staff. When the agency is represented by counsel in a particular case, the parent-client's lawyer may not talk with a caseworker without the agency lawyer's permission. If the parent-client's lawyer is unsure whether the Department of Justice has been retained in a particular case, the parent-client's lawyer should ask the caseworker.

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

Action:

A parent-client's lawyer who plans to attend case-planning meetings should be aware that other represented parties may be present without their lawyers and should take necessary steps to comply with the Rules of Professional Conduct.

A parent-client's lawyer who does not plan to attend case-planning meetings should be aware that other represented parties will attend with their lawyers at the meeting and should take steps to protect the client's interests.

Action:

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

Action:

The parent-client's lawyer should ensure the parent 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 parent client is engaged must be tailored to the parent client's needs and not merely hurdles over which the parent 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-client's lawyer should use a social worker as part of the parent-client's team to help determine an appropriate case plan, evaluate social services suggested for the parent client, and act as a liaison and advocate for the parent client with the service providers.

Action:

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

Action:

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

Commentary:

For a parent client to succeed in a child welfare case, the parent client should receive and cooperate with social services and maintain strong bonds with the child. It is therefore necessary that the parent-client's lawyer does whatever is possible to obtain appropriate services for the parent client and then counsel the parent 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 parent client can attend services.

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

Action:

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

Action:

The parent-client's lawyer should advocate for an effective visiting plan and counsel the parent client on the importance of regular contact with the child. Courts and the agency may need to be encouraged 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-client'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; for example, families often are more comfortable when relatives, family friends, clergy, or other community members are recruited to supervise visits rather than caseworkers.

The parent-client's lawyer 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.

The parent-client's 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, which are available online. The 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 client.

## **STANDARD 5 – PREPETITION**

- A. The parent-client's lawyer should actively represent the parent client to achieve the client's goals during the prepetition phase of a dependency case.**

Action:

The parent-client's lawyer should counsel the parent client about the client's rights in the investigation stage as well as the realistic possibility of achieving the parent client's goals.

Action:

The parent-client's lawyer should discuss available services and help the parent client engage in those in which the parent client wishes to participate.

Action:

If a parent client would likely be eligible for appointed counsel at state expense if served with a juvenile court petition, and prepetition representation is necessary to preserve and protect the rights of the parent client, the parent-client's lawyer may seek approval from the Office of Public Defense Services (OPDS) for funding to commence representation prior to court appointment. Contact OPDS for more information.

### Commentary:

A parent client may seek the services of an attorney regarding a situation that could be the basis for a dependency case before a petition is filed, or the parent client may be referred for such services by a community agency or other source. If the parent-client's lawyer agrees to represent the parent client, the goal of representing a parent client in the prepetition phase of the case is often to deter the agency from deciding to file a petition or to deter the agency from attempting to remove the client's child if a petition is filed.

During the prepetition phase of a dependency case, the parent-client's lawyer has the opportunity to work with the parent client and help the client to fully understand the issues and the parent client's chances of securing desired outcomes. The lawyer also has the chance to encourage the agency to make reasonable efforts to work with the family, rather than filing a petition. During this phase, the lawyer should work intensively to explore all appropriate services, including assistance with legal problems involving housing, criminal case matters, public benefits, services for children, domestic violence, and alternate placement plans that might resolve the case. The lawyer should explore opportunities for substantive case meetings such as case-planning meetings or case reviews and, when appropriate, attend those meetings. The lawyer should acknowledge that the parent client may be angry that the agency is involved with the parent-client's family, and help the client develop strategies so that the client does not express that anger toward the caseworker in ways that may undermine the parent client's goals.

If the child is removed from the parent-client's home, the lawyer should advocate for frequent visitation in a family-friendly setting, consistent with the parent client's direction.

If the child is removed, the parent-client's lawyer may prepare the case by proposing early evaluations of the parents and the family unit and by making a more complete record, during the hearing, of the facts leading up to the removal of the child.

If consistent with the parent client's direction, the parent-client's lawyer should ensure that the child receives services that are needed immediately, such as medical care, psychological evaluation, and trauma counseling.

If consistent with the parent client's direction, the parent-client's lawyer should work to prevent any unnecessary interruption in the child's education and ensure that educational services for the child will be appropriate.

## **STANDARD 6 – INVESTIGATION**

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

**Action:**

The parent-client’s lawyer should review the case record of the parent client and the supplemental confidential file, and the case record of the child’s siblings when permitted by the juvenile code, Oregon Rules of Professional Conduct, and other confidentiality statutes.

**Action:**

The parent-client’s lawyer should contact lawyers for the other parties and any CASA for background information.

**Action:**

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

**Action:**

The parent-client’s lawyer should obtain necessary releases of information in order to thoroughly investigate the case.

**Action:**

The parent-client’s lawyer should review relevant photographs, video or audio recordings, and other evidence. When necessary, the lawyer should obtain protective orders to keep information confidential once obtained.

**Action:**

The parent-client’s lawyer should research and review relevant statutes and case law to identify defenses and legal arguments to support the parent-client’s case.

Action:

The parent-client's lawyer should review the internet presence or personas for parties and witnesses.

Action:

The parent-client's lawyer should interview individuals involved with the parent client and the child, such as:

1. Domestic partners;
2. Educators;
3. Friends;
4. Neighbors; or
5. Church members.

Action:

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

Action:

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

Commentary:

If possible, the parent-client's lawyer should work with a team that includes social workers and investigators who can meet with the parent client 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 lawyer cannot rely solely on what the agency caseworker reports about the parent client. Rather, the lawyer should review the agency file; meet with the parent client as soon as possible and thoroughly interview the parent client 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 client and or the parent-client's child or family, relatives who can discuss the parent client's care of the child client, community supports

such as clergy, neighbors, child care providers, the child client's teacher, or other natural supports who can clarify information relevant to the case.

**B. The parent-client's lawyer should review the child's agency case file.**

Action:

The parent-client'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 reviewing the agency file, the parent-client's lawyer should determine if any records or case notes of any caseworker 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 parent-client's lawyer is voluntarily given the contents of the agency file in paper or electronic format, the lawyer should also look at the actual file in the agency office and request disclosure of all documents relating to the case from the agency, 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 parent-client's 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 parent-client'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:

The parent-client's 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. The lawyer should obtain and examine all available discovery and other relevant information.

Commentary:

As part of the discovery phase, the parent-client's 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. The child’s lawyer should have potential witnesses, including adverse witnesses, interviewed by an investigator or other appropriately trained person. If appropriate, witnesses should be subpoenaed.**

Action:

If the parent-client’s 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.

Commentary:

It is a good practice to have interviews conducted by an investigator employed by the parent-client’s lawyer. However, 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.

**E. The parent-client’s lawyer should consult with the parent client well before each hearing, in time to use the parent client’s information for the case investigation.**

Commentary:

Often, the parent client is the best source of information for the parent-client’s 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-client confidentiality to the parent client. The lawyer may need to work hard to gain the parent client’s trust, but if a trusting relationship can be developed, the lawyer will be a better advocate for the parent client. The investigation will be more effective if guided by the parent client, as the parent client generally knows firsthand what occurred in the case.

## **STANDARD 7 – COURT PREPARATION**

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

Action:

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

Commentary:

The strategy may change throughout the case, as the parent client makes or does not make progress, but the initial theory is important to assist the parent-client’s lawyer in staying focused on the parent 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 parent client’s ultimate goals.

- B. The parent-client’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-client’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 all the lawyers or unrepresented parties.

Action:

When a case presents a complicated or new legal issue, the parent-client’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 parent-client’s case, the parent-client’s lawyer should present a memorandum of law to the court.

Commentary:

Filing motions, pleadings, and memoranda benefits the parent client. The parent-client's lawyer who actively litigates issues highlights important issues for the court and builds credibility for himself or herself. In addition to filing responsive papers and discovery requests, the lawyer should seek court orders when that would benefit the parent client; for example, 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 parent-client's lawyer should not wait to bring the issue to the court's attention. Arguments in child welfare cases are often fact-based. Nonetheless, the lawyer should ground argument in statutes, Oregon Administrative Rules (OARs), and case law. Additionally, although nonbinding, 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. The parent-client's lawyer should preserve legal issues for appellate review by making a record, even if the argument is unlikely to prevail at the 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:

The parent-client's lawyer should make motions to meet the parent 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 ORS 419B.395 and its cross-references.

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

Action:

The parent-client'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 parent 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 parent client, 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:

The parent-client's lawyer should be trained in mediation and negotiation skills and be comfortable resolving cases outside a courtroom setting when consistent with the parent client's position. With the agreement of the parent client, the lawyer should share information about services in which the parent client is engaged and provide copies of favorable reports from service providers. This information may affect settlement discussions.

Action:

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

Action:

The parent-client's lawyer should explain to the parent 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 parent client's decision whether to settle. The parent-client's lawyer must be willing to try the case and not compromise solely to avoid the hearing.

Commentary:

While the parent client may admit to facts, they cannot stipulate to jurisdiction. Jurisdiction is a legal conclusion for the judge to determine.

The facts to which the parent client admits will frame the court's inquiry at all subsequent hearings as well as what actions the parent client must take, the services provided, and the ultimate outcome. Thus, the parent-client's lawyer must take care to ensure that the factual admissions made by the parent 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-client's lawyer should ensure agreements accurately reflect the understandings of the parties. The lawyer should request a hearing or move for contempt, if appropriate, if orders benefiting the parent are not obeyed.

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

Action:

The parent-client's lawyer should discuss and practice the questions that the lawyer will ask the parent client, as well as types of questions the parent client should expect opposing counsel to ask. The lawyer should help the parent client think through the best way to present information, familiarize the parent client 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-client's lawyer should be attuned to the parent client's comfort level about the hearing, and ability to testify accurately and persuasively. The lawyer should provide the parent client with a written list of questions that the lawyer will ask, if this will help the parent client.

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

**E. The parent-client's lawyer should identify, locate, and prepare all witnesses.**

Action:

The parent-client's lawyer, in consultation with the parent client, should develop a witness list well before a hearing or trial. 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, when possible, 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 parent-client's 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 parent client.

Action:

The parent-client's lawyer should set aside time to fully prepare all witnesses in person before the hearing. The lawyer should remind the witnesses about the court date.

Commentary:

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

When appropriate, the parent-client's lawyer should consider working with other parties who share the parent client's position 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-client's lawyer should review ORS 419B.899, ORS 419B.902, and local supplemental rules for the proper process and time to issue subpoenas.

Witnesses are often nervous about testifying in court. The parent-client's lawyer should thoroughly prepare the witnesses so they feel comfortable with the process. Preparation generally includes rehearsing the specific questions and answers expected on direct and anticipating the questions and answers that might arise on cross-examination.

- F. The parent-client's lawyer should identify, secure, prepare, and qualify expert witnesses when needed. When possible, the 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 parent-client's lawyer should consider whether the opposing party is calling expert witnesses and determine whether the parent client needs to call any experts on behalf of the parent client to respond to the opponent's experts.

Action:

When opposing counsel plans to call expert witnesses, the parent-client's lawyer should seek to interview the witnesses in advance. The parent client 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-client's lawyer will know what evidence will be presented against the parent 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 parent client, prepare a defense, and call experts on behalf of the parent 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 parent client competently.

## **STANDARD 8 – HEARINGS**

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

#### **Action:**

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

The parent client’s position may overlap with the positions of the child, another parent, third-party caretakers, or the agency. Nevertheless, the parent-client’s lawyer should participate fully in every hearing and not merely defer to the other parties. The lawyer should be prepared to state and explain the parent client’s position at each hearing.

#### **Commentary:**

The parent-client’s lawyer’s participation in pretrial proceedings may improve case resolution for the parent client. Failing to participate in the proceedings may disadvantage the parent client. Therefore, the lawyer should be actively involved in this stage.

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

#### **Action:**

If the court proceeds in the absence of the parent-client’s lawyer, the lawyer should consider filing a motion to set aside.

#### **Commentary:**

If the parent-client’s lawyer has a conflict with another courtroom appearance, the lawyer should notify the court and the other parties and request a short continuance.

The lawyer should avoid having another lawyer stand in to represent the parent client in court if the other lawyer is unfamiliar with the parent client or the case.

**B. The parent-client’s lawyer should take the opportunity to make opening statements and closing arguments.**

Action:

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

Commentary:

In many child abuse and neglect proceedings, lawyers waive the opportunity to make opening statements and closing arguments. However, these opportunities can help shape the way the judge views the case and therefore can help the parent client. They 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 parent-client’s lawyer should move along when the judge is tracking the argument and elaborate on the areas that appear to need more attention.

**C. The parent-client’s lawyer should prepare and make all appropriate motions and evidentiary objections. The lawyer must be aware of the need to make a record for appeal.**

Action:

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

Commentary:

It is essential that the parent-client’s lawyer 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 agency's lack of reasonable/active efforts).

**D. The parent-client's lawyer should present and cross-examine witnesses and prepare and offer exhibits.**

Action:

The parent-client's lawyer must be able to effectively present witnesses to advance the parent 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 parent-client's lawyer should advocate for the parent client's goals, keeping in mind the case theory.

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

Action:

The parent-client's lawyer should advocate for appropriate services and request that the court state its expectations of all parties on the record.

Action:

The parent-client's lawyer must be familiar with the standard forms and ensure that they are completed correctly and findings beneficial to the parent client are included.

Action:

The parent-client's lawyer should consider preparing proposed findings of fact and conclusions of law to frame the case and ruling for the judge.

Commentary:

Framing the case for the judge may result in orders that are more favorable to the parent client, preserve appellate issues, and help the parent-client's 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-client's lawyer should review it for accuracy prior to it being submitted to the judge for signature.

## **STANDARD 9 – POST HEARING**

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

#### **Action:**

At the conclusion of a hearing, the parent-client’s trial 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, that is, it does not reflect the court’s verbal rulings, the parent-client’s trial lawyer should take whatever steps are necessary to correct it to the extent that the corrections are beneficial to the parent client.

#### **Action:**

Once the order or judgment is final, the parent-client’s trial lawyer should provide the parent client with a copy of the order or judgment and should review the order or judgment with the parent client to ensure that parent client understands it and the client’s obligations under the order. If the parent client is unhappy with the order or judgment, the lawyer should counsel the parent client about any options to appeal, or, if the order was entered by a referee, request a rehearing pursuant to ORS 419A.150, but should explain that the order is in effect unless a stay or other relief is secured.

#### **Commentary:**

The parent client may be angry about being involved in the child welfare system and a court order that is adverse to the parent client could add stress and frustration. It is essential that the parent-client’s trial lawyer take the time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the parent client. The lawyer should counsel the parent client about all options, including appeal.

### **B. The parent-client’s trial lawyer should take reasonable steps to ensure the parent client and all other parties comply with court orders and should continuously assess whether the case needs to be brought back to court.**

#### **Action:**

If the parent client is attempting to comply with the order but any other party is not meeting that party’s responsibilities, the parent-client’s trial lawyer should approach the other party and seek assistance on behalf of the parent client. If necessary, the 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 parent client.

Commentary:

The parent-client's trial lawyer should play an active role in assisting the parent client in complying with court orders, ensuring that other parties comply, and in obtaining visitation and any other social services. The lawyer should speak with the parent client regularly about progress and any difficulties the parent client is encountering with the implementation of the court order or service plan. If the agency neglects or refuses to offer appropriate services, especially those ordered by the court, the lawyer should file appropriate motions, including those for an expedited hearing, for a change in the visitation plan, to compel disclosure of information or material, or for contempt.

When the agency does not offer appropriate services, the parent-client's trial lawyer should consider making referrals to independent social service providers.

**C. The parent-client's trial lawyer should move the court to modify or set aside an order or judgment when appropriate.**

Action:

If an order or judgment adversely affects the parent client, the parent-client's trial lawyer should advise the client of the remedies, which include moving to modify or set aside the order or judgment. [ORS 419B.923](#) permits a motion to modify or set aside an order or judgment in instances of clerical error, excusable neglect, and newly discovered evidence. Although other reasons may be permitted under the "include, but are not limited to" language of the statute, the extent of the trial court's discretion is not yet completely determined.

The motion must be filed within a "reasonable time" and may be filed while an appeal is pending. The parent-client's trial lawyer should consider filing both the motion and referring the case for appeal when the time limitations make that necessary. In that instance, the motion must be served on the appellate court.

Additionally, a motion to modify or set aside an order or judgment may be made to assert a claim of inadequate assistance of counsel, which also may be made on direct appeal. When this issue may be the basis for a motion to modify or set aside, a request for a rehearing, or an appeal to the court of appeals, the parent-client's trial lawyer should be cognizant of all of the possible deadlines and immediately move the court to substitute counsel.

**D. The parent-client's trial lawyer should consider and discuss the possibility of appeal or rehearing with the parent client.**

Action:

The parent-client's trial lawyer should immediately consider and discuss with the parent client, preferably in person, the possibility of appeal when a court's ruling is contrary to the parent client's position or interests. Regardless of whether the lawyer believes an appeal is appropriate or if there are any viable issues for appeal, the lawyer should advise the parent client—at the conclusion of each hearing—that the client has a right to appeal from any adverse order or judgment 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-client's trial lawyer should advise the parent client that the client is entitled to a rehearing before a juvenile court judge. Under ORS 419A.150(4), unless a rehearing is requested within 10 days following the entry of the referee's order, the order will become final. Whether to seek a rehearing of a referee's order or to pursue a direct appeal in the appellate courts is always the parent client's decision.

Commentary:

When discussing the possibility of an appeal, the parent-client's trial lawyer should explain both the positive and negative effects of an appeal, including how the appeal could affect the parent client's goals. For instance, the appellate court could reverse the juvenile court and vindicate the parent client's position. Further, under ORS 19.360, 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. Alternatively, an appeal could delay the case for a long time.

- E. If the parent client decides to appeal, the parent-client's trial lawyer should timely and thoroughly facilitate the appointment of an appellate lawyer for the parent client.**

Action:

The parent-client's trial lawyer should take all steps necessary to facilitate appointing an appellate lawyer; for example, the parent's court-appointed trial lawyer should refer the case for appeal to the OPDS and comply with that office's referral procedures. The parent's court-appointed trial lawyer should work with the appellate lawyer and identify for 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 the appellate lawyer to prosecute the appeal. The trial lawyer should promptly comply with the court's order to return exhibits necessary for appeal.

Commentary:

Pursuant to ORS 419A.200(4), the parent-client’s trial lawyer must file the notice of appeal or, if court-appointed, the trial lawyer may discharge his or her duty to file the notice of appeal by referring the case to the Juvenile Appellate Section of the OPDS using the online referral form and complying with OPDS procedures.

- F. The parent-client’s trial lawyer should monitor the progress of an appeal taken by another party to the juvenile case and continuously evaluate whether the parent client should participate in the appeal.**

Action:

As a party to the underlying juvenile case, the parent-client’s trial lawyer should monitor the appeal by reviewing the log of filings and the filed documents through the electronic Appellate Case Management System.

Oregon Rule of Appellate Procedure (ORAP) 2.22 requires that a party eFiling documents in a dependency case must use the “notification information” function of the appellate courts’ eFiling system to notify the attorney for any person who was a party in the juvenile court pursuant to ORS 419B.875(1)(a)(A) to (C), (H), or ORS 419B.875(1)(b). Notification must be made to each attorney whose client has not been designated a party in the notice of appeal and to each attorney whose client has not filed a notice of intent to participate in the appeal under ORAP 2.25(3).

The rule explains that the notification will notify the attorney that the document has been eFiled, but will not permit the attorney to view the document unless the attorney has juvenile case permissions in the Appellate Case Management System.

To access the documents, the parent-client’s trial lawyer should obtain, complete, and submit a “Request for Access” form to the State Court Administrator.

Action:

The parent-client’s trial lawyer should regularly monitor the electronic notifications and review the filed documents, when appropriate, and evaluate whether the parent client should file a notice of intent to participate. Court-appointed counsel may do so by referring the case to the OPDS using the process explained in subsection E. above.

## **STANDARD 10 – APPEALS ISSUES FOR PARENT’S LAWYER**

- A. The parent-client’s appellate lawyer should communicate with the parent client.**

Action:

The parent-client's appellate lawyer should consult with the parent client as soon as possible to confirm that the client wishes to pursue a direct appeal and advise the parent client of the appellate process including relevant timelines.

The parent-client's appellate lawyer should not be bound by the determinations of the parent-client's trial lawyer and instead should take direction from the parent client.

Commentary:

The parent-client's trial lawyer should consider whether undertaking representation of the same parent client on direct appeal protects the parent client's interests on appeal. Representation of the parent client on appeal by the parent-client's trial lawyer potentially deprives the parent client of an independent audit of the quality of the representation by the trial lawyer and, because a claim of inadequate assistance of counsel may be available on direct appeal, could implicate Oregon RPC 1.7(a)(2).

Action:

The parent-client's appellate lawyer should explain to the parent client the difference between representation for appeal and ongoing representation in the dependency case. Because the dependency case will almost always be ongoing during the appeal, the parent-client's appellate lawyer and the parent-client's trial lawyer should consult and collaborate as necessary to advance the parent client's interests in both cases.

Action:

The parent-client's appellate lawyer and the trial lawyer should be thoughtful about their respective roles and relationship with the parent 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 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.

Action:

The parent-client's appellate lawyer should advise the parent client about the limited scope of the lawyer's representation and, should the parent client have concerns about his or her ongoing case, the appellate lawyer should refer the parent client to the client's trial lawyer. Ideally, the trial lawyer and the appellate lawyer will work collaboratively and strategically to obtain the best result for the parent 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 if the parent client does not prevail at trial.

**B. Unless the parent-client’s trial lawyer has filed the notice of appeal, the parent-client’s appellate lawyer must do so within the prescribed time limits.**

Action:

The parent-client’s appellate lawyer must comply with statutory and rule requirements in filing the notice of appeal.

When the parent-client’s trial lawyer has filed the notice of appeal before the parent’s appellate lawyer has assumed the representation, the appellate lawyer should promptly obtain and thoroughly review the notice of appeal for any jurisdictional or other defects, including whether the decisional document appealed from is an appealable judgment pursuant to ORS 419A.205.

Commentary:

Under ORS 19.270, proper notice of appeal is a jurisdictional requirement. Consequently, the notice must satisfy both statutory requirements found in ORS 19.250, ORS 19.255, and ORS 419A.200(3), and the Oregon Rules of Appellate Procedure found in ORAP 2.05, ORAP 2.10, and ORAP 2.22 in order to prosecute the appeal.

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.

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

Action:

The parent-client’s appellate lawyer should thoroughly review the judgment to ensure that it comports with the requirements of the juvenile code; for example, the requirements of a valid permanency judgment found under ORS 419B.476(5).

The parent’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 parent client. The brief should reflect relevant case law and present the best legal arguments available under Oregon and federal law to advance the parent

client's position. Novel legal arguments that might develop favorable law in support of the parent client's position should also be advanced if available.

The parent-client's appellate lawyer should send a copy of the filed brief to the parent client and to the parent-client's trial lawyer.

Commentary:

The parent-client's appellate lawyer has considerable authority over the manner in which an appeal is presented. It is that lawyer's responsibility to exercise his or her professional judgment to raise issues that, in the lawyer's judgment, will provide the best chance of success on appeal—even when the parent client disagrees with the appellate lawyer's judgment about which arguments are most likely to advance the client's position.

If the parent client insists on advancing a theory that the court-appointed appellate lawyer determines is not meritorious or uses too much of the allotted word limit so that better arguments cannot be effectively advanced, the court-appointed appellate lawyer should determine the strategy for the opening brief based on professional skill and judgment and consider counseling the parent client to advance the client's arguments in a supplemental *pro se* brief pursuant to ORAP 5.92.

ORAP 5.90(4) allows the filing of a *Balfour*-type brief with the argument section to be drafted by the parent client in a juvenile case in which an appellate lawyer has been appointed. In the event that the parent-client's appellate lawyer, after consultation with the parent client, is unable to identify any meritorious issues on appeal, the court-appointed appellate lawyer may consider filing a brief pursuant to ORAP 5.90(4). Before the parent-client's appellate lawyer embarks on this course of action, the appellate lawyer must determine whether, in his or her professional judgment, the confidentiality constraints and ethical dilemmas caused by the unique circumstances involved in this type of case can be overcome.

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

Action:

The parent-client's appellate lawyer should determine whether to request an oral argument. The appellate lawyer should inform the parent client of whether the lawyer intends to present oral argument or submit the case on the briefs. If the lawyer intends to present an oral argument, the lawyer should inform the parent client of the date, time, and place scheduled for oral argument.

Commentary:

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

Action:

If oral arguments are scheduled, the parent-client's appellate lawyer should be thoroughly prepared to present the case to the court and to answer the court's questions.

**E. Communicating the result of the appeal.**

Action:

The parent-client's appellate lawyer should communicate the result of the appeal and its implications, and provide the parent client with a copy of the appellate decision. The appellate lawyer should promptly communicate with the parent-client's trial lawyer and assist the trial lawyer with interpreting the appellate court's decision and preparing for the next trial level event.

**F. Petitioning for Review in the Oregon Supreme Court.**

Action:

If the parent client does not prevail on direct appeal in the Oregon Court of Appeals, the parent-client's appellate lawyer may petition for review in the Oregon Supreme Court. Whether to petition for review in the Oregon Supreme Court is ultimately the parent client's decision.

## 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;
- (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 of 1978 (ICWA), Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901–1963); ICWA regulations in 2016, which took effect on December 12, 2016. 81 Fed. Reg. 38,778 (June 14, 2016); and Bureau of Indian Affairs Guidelines (2016);
- (9) Individuals with Disabilities Education Act (IDEA), Pub. L. No. 91-230, 84 Stat. 191 (1970);
- (10) Interstate Compact on Placement of Children (ICPC);
- (11) The Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568;
- (12) Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. §§ 620–679); and the ASFA Regulations, 45 C.F.R. pts. 1355, 1356, 1357;
- (13) Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974);
- (14) Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (2008);
- (15) McKinney-Vento Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified as amended at 42 U.S.C. §§ 11431–11435);
- (16) Multiethnic Placement Act of 1994 (MEPA), as amended by the Interethnic 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), Pub. L. No. 106-169, 113 Stat. 1822;
- (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 and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. 99;
- (20) Health Insurance Portability and Accountability Act of 1996 (HIPPA), Pub. L. No. 104-191 § 264, 110 Stat. 1936 (codified as amended, in relevant part at 42 U.S.C. § 1320d-2);
- (21) Public Health Service Act, 42 U.S.C. § 290dd-2 and 42 C.F.R. pt. 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 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption;
- (25) The International Parental Kidnapping Crime Act of 1993 (IPKCA), Pub. L. No. 103-173, 107 Stat. 1998 (codified as amended at 18 U.S.C. § 1204).
- (26) The Hague Convention on the International Aspects of Child Abduction Act, implemented by ICARA, 42 U.S.C. § 11603 *et seq.*;
- (27) The Hague Convention on the Service of Judicial and Extrajudicial Documents Abroad
- (28) Refugee Child Welfare Act, ORS 418.925-945

## 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) Physical and mental health risks factors associated with children’s placement in foster care;
- (3) Racial and ethnic disparities in child dependency cases;
- (4) Cultural and ethnic differences as they relate to child-rearing;
- (5) Substance abuse and resources for substance abusing families;
- (6) Domestic violence, its effect on parents, children, and families and appropriate resources;
- (7) Family preservation services;
- (8) Resources for the diagnosis and treatment of sexual abuse, physical abuse, and emotional abuse;
- (9) Resources for the treatment and recognition of nonorganic failure to thrive;
- (10) Educational, mental health, and other resources for special-needs children, including infants and preschoolers;
- (11) 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;
  - c. The transracial, transcultural, and language aspects of the placement;
- (12) The importance of placing siblings together when appropriate;
- (13) Risk assessment prior to reunification;
- (14) The use and appropriateness of psychotropic drugs for children;
- (15) Government benefits available in dependency cases, such as Social Security payments including nonneedy relative grants, AFDC, and AFDC-FC, adoption assistance programs, and crime victims programs;
- (16) Transition plans and independent living programs for teens, including emancipation issues;
- (17) Accessing private insurance for services.

## APPENDIX C:

### CHECKLISTS FOR SPECIFIC HEARINGS FOR LAWYERS FOR CHILDREN:

#### A. SHELTER HEARINGS:

1. Discovery: Obtain copies of all relevant documents including, but not limited to:
  - a. Shelter report;
  - b. Police report(s); and
  - c. Prior child welfare referrals.
2. Child client interview: If the child client is present or available by phone, take time to talk with the child before the shelter hearing. Talk with the child client about:
  - a. Purpose of the hearing;
  - b. Placement preference if applicable;
  - c. Educational needs (identify home school);
  - d. Visitation; and
  - e. Child client's preferred outcome.

Ask for a recess or a continuance if necessary.

3. Assist the child client in exercising his or her right to an evidentiary hearing to require the Department of Human Services (hereinafter the "agency") to demonstrate to the court that the child client 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.
4. When appropriate, present facts and law regarding:
  - a. Jurisdictional sufficiency of the petition;
  - b. Appropriateness of venue;
  - c. Applicability of Indian Child Welfare Act (ICWA);
  - d. Applicability of Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA);
  - e. Adequacy of notice provided to parties and tribes if applicable;
  - f. Establishment of paternity;
  - g. Why continuation of the child client in the home would be contrary to his or her welfare or why it is not in the best interest or welfare of the child client to be removed;
  - h. Whether reasonable or active efforts were made to prevent removal;
  - i. Whether diligent efforts have been made to place the child client with family;
  - j. Maintaining the existing school unless it is in the best interest of the child client to change schools;
  - k. Whether reasonable and available services can prevent or eliminate the need to separate the family;

- l. Whether the placement proposed by the agency is the least disruptive and most family-like setting that meets the needs of the child client; and
  - m. The possibility of placement with appropriate noncustodial parents and relatives and corresponding diligent-efforts requirement.
- 5. If ICWA applies, consult with the child client about transferring the case to tribal court and take appropriate action.
- 6. When appropriate, request temporary orders 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 (for example, not discussing allegations with the child client, remaining clean and sober while the child client is present, etc.);
  - c. Visitation orders that are reasonable and flexible and take into consideration the child client's age and activities. Orders that specify the frequency and manner of visitation may be appropriate. *See* ORS 419B.337(3) (the juvenile court may order that the agency provide a certain number of visits weekly and that the visits be supervised or unsupervised); and OAR 413-070-0830 (parents and children have the right to visit as often as reasonably necessary; insufficient agency resources are not justification for lack of visitation);
  - d. Orders for child support;
  - e. Orders for the agency to investigate relatives and friends of the family as potential placements or to place sibling groups together;
  - f. Orders for the agency to provide appropriate treatment for the child client;
  - g. Orders permitting return of the child client prior to the jurisdictional hearing; and
  - h. Orders maintaining attendance at existing school.
- 7. Review the order with the child client or, if appropriate, with the child client's care provider if the child client has diminished capacity:
  - a. Discuss reviewability of shelter order:
    - 1) Orders by referees can be reviewed by a sitting judge;
    - 2) Right (and process) to appeal; and
    - 3) Possibility of pursuing a writ of habeas corpus.
  - b. Review the consequences of not abiding by the order.

## **B. JURISDICTION/ADJUDICATION HEARING:**

- 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. Create a draft outline of:
  - a. Opening and closing statements;
  - b. Direct and cross-examination plans for all witnesses and, if necessary, prepare the child client to testify; and
  - c. Findings of fact and conclusions of law to be requested at the conclusion of the hearing.
3. If the agency makes an amendment to the petition make sure there is sufficient notice and time to argue the amended allegation(s). Request a continuance if necessary.
4. Ensure that the child client is informed of and understands the nature, obligations, and consequences of the decision, and the need for the child client to cooperate with the trial court's orders. Explain the child client's rights and the possibilities of posttrial motions to reconsider, set aside, modify, or review the jurisdictional finding, as well as the right to appeal. Explain the consequences of violating the trial court's order and the continuing jurisdiction of the court and, if the child client has diminished capacity and it is appropriate to do so, discuss the court's order with the child client's care provider.
5. After the jurisdictional hearing or adjudication:
  - a. Carefully review the judgment and advise the child client about potential issues for appeal;
  - b. Advise the child client in writing of the timelines for filing a notice of appeal; and
  - c. If court appointed and you do not wish to represent the child on appeal, you must timely refer the case to Office of Public Defense Services (OPDS) pursuant to OPDS procedures.

### **C. DISPOSITION HEARINGS:**

1. Explain to the child client the nature of the hearing, the issues involved, and the alternatives open to the court.
2. When the court has found sufficient evidence to support jurisdiction, 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 client because the child client and his or her family do not require supervision, treatment, or placement.
3. Investigate all sources of evidence that will be presented. A child client's trial lawyer has an independent duty to investigate the child client's circumstances, including such factors as previous history, family relations, and any other information relevant to disposition.
4. Ensure that all reasonably available and mitigating factors and favorable information is presented to the court.

5. During the disposition hearing:
  - a. Advocate for the least restrictive disposition possible that can be supported and is consistent with the child client's needs and desires;
  - b. Request that the court order the agency to provide services and set concrete conditions of return of the child client to the parent;
  - c. Present evidence on whether the reasonableness or unreasonableness of the agency's efforts were active or reasonable;
  - d. Request a no reasonable/no active efforts finding if appropriate;
  - e. Request an order identifying specific services needed to ameliorate the jurisdictional bases. Services may 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. Ensure the order includes a description of actions to be taken by the parent client to correct the identified problems as well as a timetable for accomplishing the changes required;
  - g. Request specific visitation orders covering visitation between the child client and the parent, between siblings, and between the child and other significant persons;
  - h. Request that the court appoint an educational advocate (surrogate parent) for the child client;
  - i. Seek child support orders; and
  - j. Seek to ensure continued representation of the child client at all future hearings and reviews (set date for next proceeding).
6. After the disposition hearing:
  - a. Ensure that the child client is informed of and understands the nature, obligations, and consequences of the dispositional decision, and the need to cooperate with the dispositional orders;
  - b. Explain the child client's rights and possibilities of posttrial motions to reconsider, set aside, modify, or review the disposition, as well as the right to appeal; and
  - c. Explain the consequences of violating the dispositional order and continuing jurisdiction of the court.

#### **D. REVIEW HEARINGS AND CITIZEN REVIEW BOARD (CRB) REVIEWS:**

1. The child client is entitled to request reviews in the case as issues arise. Seek a review to request return of the child client when any event happens that may significantly affect the need for continued placement. Also request a review when court intervention is necessary to resolve a dispute over such matters as visitation, placement, or services.
2. 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 child client prior to the hearings and obtaining supplemental reports and information for the child client prior to the hearing;
  - c. Interviewing the caseworker to determine his or her assessment of the case, the case plan, the child client's placement and progress, and the parent's cooperation and progress;
  - d. Contacting other agencies and professionals who are providing services to the child client or parents and seeking appropriate documentation to verify the progress by the child client;
  - e. Interviewing other potential witnesses, which may include relatives, neighbors, school personnel, and foster parents; and
  - f. Subpoenaing needed witnesses and records.
3. During review hearings and CRB reviews:
  - a. Present information supporting the child client's position and whether the parties are taking the necessary steps to achieve the chosen plan in a timely fashion.
  - b. Consider submitting a written memorandum on behalf of the child client. You should specifically address:
    - 1) Whether there is a current basis for jurisdiction to continue;
    - 2) Whether there is a need for continued placement of the child client;
    - 3) Whether the agency is making reasonable or active efforts to rehabilitate and reunify the family or to achieve another permanent plan;
    - 4) Why services have not been successful to date;
    - 5) Whether the court-adopted plan for the child client remains the best plan;
    - 6) Whether the agency case plan or service agreement needs to be clarified or modified;
    - 7) The child client's position on the development of the concurrent case plan;
    - 8) The appropriateness of the child client's placement; and
    - 9) Whether previous court orders regarding visitation, services, and other case related issues should be modified.

4. After review hearings and CRB reviews, carefully review the order from the hearing with the child client and discuss the child's option to review, including appellate review of any final orders.
5. Ask the court to schedule a subsequent hearing (unless wardship terminated).

#### **E. PERMANENT PLANNING HEARINGS:**

1. Consider requesting that the court schedule a permanency hearing in furtherance of the child client's goals.
2. Conduct an independent investigation as described in section D. In addition, be prepared to address what the long-term plan for the child client should be, including:
  - a. A specific date on which the child client is to be returned home;
  - b. A date on which the child client will be placed in an alternative permanent placement;
  - c. Whether the child client 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. During the permanency hearing:
  - a. Request sufficient court time to adequately present the child client's position, including live witness testimony;
  - b. 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;
  - c. Consider submitting a written permanency memorandum in support of the child client's position; and
  - d. Request specific findings and orders that advance the child client's position, including but not limited to a specific extension of time for reunification and the specific services and progress required during that time.
4. Carefully review the court order from the permanency hearing with the child client including, if appropriate, the option to seek review of the order and appellate review of any final orders.

#### **F. TERMINATION OF PARENTAL RIGHTS HEARINGS:**

1. In preparation for a termination trial the child client's trial lawyer should:
  - a. Thoroughly review the entire record of the case, carefully analyzing court orders and CRB findings and recommendations;

- b. Completely and independently investigate the case, paying particular attention to issues unique to termination, such as the adoptability of the child client and whether termination of parental rights is in the child client's best interest, including:
    - 1) The child client's relationship with his or her parents;
    - 2) The importance of maintaining a relationship with the child client's siblings and other relatives;
    - 3) The child client's ability to bond to an adoptive resource; and
    - 4) Preserving the child client'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 client will be called as a witness, carefully prepare the child client 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 ICWA;
  - j. Be prepared to present evidence of or address the agency's failure to adequately assist the parent or child client;
  - 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 client.
2. The child client's trial lawyer should meet with the child client to discuss the termination petition and determine the child client's position on termination of parental rights.
  3. The child client's trial lawyer should discuss alternatives to trial with the child client, including voluntary relinquishments of parental rights, open adoption agreements, postadoption contact agreements, guardianship, other planned permanent-living agreements, conditional relinquishments, and continuance of the trial. If the child client wishes to pursue an alternative to trial, the child client's trial lawyer should advocate for the child client's position.
  4. In preparation for and during the termination trial, the child client's trial lawyer should be:
    - a. Prepared to submit a trial memorandum in support of the child 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.
5. After the termination-of-parental-rights trial, the child client's trial lawyer should:
- a. Carefully review the judgment and advise the child client about potential issues for appeal;
  - b. Advise the child client in writing (if developmentally appropriate) of the timelines for filing a notice of appeal; and
  - c. If the child client's trial lawyer is court appointed, the lawyer must timely refer the case to Office of Public Defense Services (OPDS) pursuant to OPDS procedures.

## APPENDIX D:

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

#### A. SHELTER HEARINGS:

1. Discovery: Obtain copies of all relevant documents including, but not limited to:
  - a. Shelter report;
  - b. Police report(s); and
  - c. Prior child welfare referrals.
2. Parent client interview: If the parent client is present or available by phone, take time to talk to the parent client before the shelter hearing. Talk with the parent client about:
  - a. Purpose of the hearing;
  - b. Risk of self-incrimination;
  - c. Placement options if applicable;
  - d. Safety service providers to prevent removal; and
  - e. Visitation.

Ask for a recess or a continuance if necessary.

3. If appropriate, assert the parent client's Fifth Amendment and other constitutional rights;
4. Assist the parent client in exercising his or her right to an evidentiary hearing to require the Department of Human Services (hereinafter the "agency") 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 and law regarding:
  - a. Jurisdictional sufficiency of the petition;
  - b. Appropriateness of venue;
  - c. Applicability of the Indian Child Welfare Act (ICWA);
  - d. Applicability of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA);
  - e. Adequacy of notice provided to parties and tribes if applicable;
  - f. Establishment of paternity;
  - g. 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;
  - h. Whether reasonable or active efforts were made to prevent removal;
  - i. Whether diligent efforts have been made to place the child with family;
  - j. Maintaining the existing school unless it is in the best interest of the child to change schools;

- k. Whether reasonable and available services can prevent or eliminate the need to separate the family;
    - l. Whether the placement proposed by the agency is the least disruptive and most family-like setting that meets the needs of the child; and
    - m. The possibility of placement with appropriate noncustodial parents and relatives and corresponding diligent-efforts requirement.
6. If ICWA applies, consult with the parent client about transfer of the case to tribal court and take appropriate action.
7. When appropriate, request temporary orders 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 (for example, not discussing allegations with the child, remaining clean and sober while the child is present, etc.);
  - c. Orders for any services for parent client agreed-on before adjudication;
  - d. Visitation orders that are reasonable and flexible and take into consideration the child's age and activities. Orders that specify the frequency and manner of visitation may be appropriate. *See* ORS 419B.337(3) (the juvenile court may order that the agency provide a certain number of visits weekly and that the visits be supervised or unsupervised); and OAR 413-070-0830 (parents and children have the right to visit as often as reasonably necessary; insufficient agency resources are not justification for lack of visitation);
  - e. Orders for child support. Be prepared to rebut the presumption—argue inability to pay and treatment costs are more valuable to the child. *See* ORS 25.245 and ORS 25.280;
  - f. Orders for the agency to investigate relatives and friends of the family as potential placements or to place sibling groups together;
  - g. Orders for the agency to provide appropriate treatment for the child;
  - h. Orders permitting return of the child prior to the jurisdictional hearing; and
  - i. Orders maintaining attendance at existing school.
8. Review the order with the parent client:
  - a. Discuss reviewability of shelter order:
    - 1) Orders by referees can be reviewed by a sitting judge;
    - 2) Right (and process) to appeal; and
    - 3) Possibility of pursuing a writ of habeas corpus.
  - b. Review the consequences of not abiding by the order.
9. Review the safety plan and the consequences for not following the order. If the court sets conditions of the child's placement, explain to the parent client, and any third party, the conditions and potential consequences of violating those conditions. Seek review of shelter-

care decisions as appropriate and advise the parent client or any third parties of changes in conditions for pretrial placement that would be likely to get the court to agree with the parent client's plan.

10. At the conclusion of the shelter hearing, after discussing items 8 and 9 (above) with the parent client, schedule an initial office appointment with the parent client. The appointment should be scheduled to be as convenient as possible for the parent client and should not interfere with the parent client's visitation (if the child has been removed) or other obligations. The timing should also allow enough time for the receipt of discovery and other information necessary for a productive discussion of the case.

When the attorney appearing at the shelter hearing will be the parent client's assigned trial lawyer, the parent client should be provided, in writing, the contact information of the parent client's trial lawyer and the date, time, and location of the office appointment.

When the attorney appearing at the shelter hearing will not be the parent client's assigned trial lawyer (as is sometimes the case with large consortia or public defender firms) the parent client should be provided, in writing, the contact information for a staff person who will be able to provide the parent client with the name of the parent's assigned trial lawyer and the date, time, and location of the office appointment. As soon as the parent client's case is assigned to his or her attorney, the staff of the parent client's trial lawyer should contact the parent client, by phone and email, to schedule the initial interview.

When feasible, the initial interview should occur within 72 hours of appointment.

#### **B. JURISDICTION/ADJUDICATION HEARING:**

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. Create a draft outline of:
  - a. Opening and closing statements;
  - b. Direct and cross-examination plans for all witnesses; and
    - 1) Prepare the parent client to testify; and
    - 2) If there is potential for criminal liability, advise the client whether to answer specific questions or assert the client's Fifth Amendment right not to answer specific questions;
  - c. Findings of fact and conclusions of law to be requested at the conclusion of the hearing.
3. If the agency makes an amendment to the petition, make sure there is sufficient notice and time to defend the amended allegation(s). Request a continuance if necessary.

4. Ensure that the parent client is informed of and understands the nature, obligations, and consequences of the decision, and the need for the parent client to cooperate with the trial court's orders. Explain the parent client's rights and the possibilities of posttrial motions to reconsider, set aside, modify, or review the jurisdictional finding, as well as the right to appeal. Explain the consequences of violating the trial court's order and the continuing jurisdiction of the court.
5. After the jurisdictional hearing or adjudication:
  - a. Carefully review the judgment and advise the parent client about potential issues for appeal;
  - b. Advise the parent client in writing of the timelines for filing a notice of appeal; and
  - c. If you are court appointed, you must timely refer the case to Office of Public Defense Services (OPDS) pursuant to OPDS procedures.
6. If the parent client fails to appear at the hearing and you have been relieved as counsel, promptly notify the parent client of the entry of the judgment, the availability of posttrial motions, and the right to appeal. If the parent client seeks to contest the judgment, immediately contact the court to request reappointment and thereafter promptly file the necessary pleadings on behalf of the parent client.

### **C. DISPOSITION HEARINGS:**

1. Explain to the parent client the nature of the hearing, the issues involved, and the alternatives open to the court.
2. When the court has found sufficient evidence to support jurisdiction, 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.
3. Investigate all sources of evidence that will be presented. A parent client's trial lawyer has an independent duty to investigate the parent client's circumstances, including such factors as previous history, family relations, economic conditions, and any other information relevant to disposition.
4. Ensure that all reasonably available and mitigating factors and favorable information is presented to the court.
5. During the disposition hearing, when appropriate,:
  - a. Advocate for the least restrictive disposition possible that can be supported and is consistent with the parent client's needs and desires;
  - b. Request that the court order the agency to provide services and set concrete conditions of return of the child to the parent client;

- c. Present evidence on whether the reasonableness or unreasonableness of the agency's efforts were active or reasonable;
  - d. Request a no reasonable/no active efforts finding if appropriate;
  - e. Request an order identifying specific services needed to ameliorate the jurisdictional bases. Services may 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. Ensure the order includes a description of actions to be taken by the parent client to correct the identified problems as well as a timetable for accomplishing the changes required;
  - g. Request specific visitation orders covering visitation between the child and the parent client, between siblings, and between the child and other significant persons;
  - h. Request that the court appoint an educational advocate (surrogate parent) for the child(ren);
  - i. Seek child support orders; and
  - j. Seek to ensure continued representation of the parent client at all future hearings and reviews (set date for next proceeding).
6. After the disposition hearing:
- a. Ensure that the parent client is informed of and understands the nature, obligations, and consequences of the dispositional decision, and the need for the parent client to cooperate with the dispositional orders;
  - b. Explain the parent client's rights and the possibilities of posttrial motions to reconsider, set aside, modify, or review the disposition, as well as the right to appeal; and
  - c. Explain the consequences of violating the dispositional order and continuing jurisdiction of the court.

**D. REVIEW HEARINGS AND CITIZEN REVIEW BOARD REVIEWS:**

- 1. The parent client is entitled to request reviews in the case as they arise. Seek a review to request return of the child when any event happens that may significantly affect the need

for continued placement. Also request a review when court intervention is necessary to resolve a dispute over such matters as visitation, placement, or services.

2. 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 parent client prior to the hearings and obtaining supplemental reports and information for the parent 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 client's cooperation and progress;
  - d. Contacting other agencies and professionals who are providing services to the child or parent(s) and seeking appropriate documentation to verify the progress by the parent client;
  - e. Interviewing other potential witnesses, which may include relatives, neighbors, school personnel, and foster parents; and
  - f. Subpoenaing needed witnesses and records.
  
3. During review hearings and CRB reviews:
  - a. Present information supporting the parent client's position and whether the parties are taking the necessary steps to achieve the chosen plan in a timely fashion.
  - b. Consider submitting a written report on behalf of the parent client. Specifically address the following:
    - 1) Whether there is a current basis for jurisdiction to continue;
    - 2) Whether there is a need for continued placement of the child;
    - 3) Whether the agency is making reasonable or active efforts to rehabilitate and reunify the family or to achieve another permanent plan;
    - 4) Why services have not been successful to date;
    - 5) Whether the court-adopted plan for the child remains the best plan;
    - 6) Whether the agency case plan or service agreement needs to be clarified or modified;
    - 7) The parent client's position on the development of the concurrent case plan;
    - 8) The appropriateness of the child's placement; and
    - 9) Whether previous court orders regarding visitation, services, and other case related issues should be modified.
  
4. After review hearings and CRB reviews, carefully review the order from the hearing with the parent client and discuss the parent client's option to review, including appellate review of any final orders.
  
5. Ask the court to schedule a subsequent hearing (unless wardship terminated).

#### **E. PERMANENT PLANNING HEARINGS:**

1. Consider requesting that the court schedule a permanency hearing in furtherance of the parent client's goals.
2. Conduct an independent investigation as described in section D.

In addition, 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. During the permanency hearing:
    - a. Request sufficient court time to adequately present the parent client's position, including live witness testimony;
    - b. 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;
    - c. Consider submitting a written permanency memorandum in support of the parent client's position; and
    - d. Request specific findings and orders that advance the parent client's position, including but not limited to a specific extension of time for reunification and the specific services and progress required during that time;
  4. Carefully review the court order from the permanency hearing with the parent client including, if appropriate, the option to seek review of the order and appellate review of any final orders.

#### **F. TERMINATION OF PARENTAL RIGHTS HEARINGS**

1. In preparation for a termination trial, the parent client's trial lawyer should:
  - a. Thoroughly review the entire record of the case, carefully analyzing court orders and CRB findings and recommendations;
  - b. Completely and independently 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 the parent client;
    - 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 parent client to testify at the termination trial;
  - h. Advise the parent client of the consequences of failing to appear at a mandatory court appearance in a termination proceeding;
  - i. Evaluate evidentiary issues and file motions *in limine* as appropriate and lay proper evidentiary foundations as needed during the trial;
  - j. 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 ICWA;
  - k. Be prepared to present evidence of or address the agency's failure to adequately assist the parent client;
  - l. Evaluate and be prepared if necessary to move to recuse or disqualify the trial judge;
  - m. 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
  - n. Assess the sufficiency of service, particularly regarding alternative service, and file objections as appropriate.
  
2. The parent client's trial lawyer should meet with the parent client to discuss the termination petition and the consequences of an involuntary judgment of termination of parental rights.
  
3. The parent client's trial lawyer should discuss alternatives to trial with the parent client, including voluntary relinquishments of parental rights, open-adoption agreements, postadoption contact agreements, guardianship, other planned permanent living agreements, conditional relinquishments, and continuance of the trial. If the parent client wishes to pursue an alternative to trial, the lawyer should advocate for the parent client's position.
  
4. The parent client's trial lawyer should discuss with the parent client the ramifications of nonappearance at a mandatory proceeding and should be prepared to appropriately advocate for the parent client if he or she fails to appear at a mandatory court proceeding.
  
5. In preparation for and during the termination trial, the parent client's trial lawyer should be:

- a. Prepared to submit a trial memorandum in support of the parent 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.
6. After the termination-of-parental-rights trial, the parent client's trial lawyer should:
- a. Carefully review the judgment and advise the parent client about potential issues for appeal;
  - b. Advise the parent client in writing of the timelines for filing a notice of appeal; and
  - c. If the parent client's trial lawyer is court appointed, the lawyer shall timely refer the case to the Office of Public Defense Services (OPDS) pursuant to OPDS procedures.