INTRODUCTION AND BACKGROUND

Chair Greenlee, Vice Chair Kenney and Members of the Law and Government Committee:

Good morning. I am William P. Fedullo, Chancellor of the Philadelphia Bar Association, which represents approximately 13,000 members of the legal profession in our city.

I congratulate the City for stepping back and taking a second look at the critically important issue of indigent representation in criminal and dependency cases where the Defender Association is unable to represent a party due to a conflict of interest.

The Sixth Amendment to the Constitution of the United States guarantees to every citizen the right to "have the assistance of counsel for his defense."

There is no qualifier in the Sixth Amendment providing for the ability to pay usual and customary fees as a condition to receiving this right. Every person charged with a crime has the same right to the assistance of counsel, without regard to the person’s ability to pay.

Having the same right requires that standards must be established to ensure that those on the lower end of the economic scale are afforded the same level of quality representation as anyone else in our society facing the same charges.

There is no question that the Defender Association of Philadelphia does a remarkable job with the resources at its disposal to provide competent representation to those who qualify for services. It is when the Defender Association is unable to represent an individual due to a conflict of interest that the quality of representation provided is called into question.

We must find a solution to the problem of inadequate representation of individuals in conflicts cases.

Our primary goal is for the people of this city to fully realize the right to have assistance of counsel guaranteed in the Sixth Amendment. In evaluating proposals, no delivery model should be summarily dismissed from consideration. Rather, each model should be carefully examined to determine whether it can achieve the goal of equal justice for all.
In each of the areas of law in which conflicts counsel representation is required – criminal, dependency and juvenile delinquency - standards have been established to ensure the appropriate delivery of legal representation to the indigent.

In criminal cases, where liberty interests are at stake, it is essential that defendants be afforded competent and diligent representation. Several years ago, the American Bar Association thoroughly studied the issue of indigent criminal representation and formulated the ABA Ten Principles of a Public Defense Delivery System. These are not aspirational goals, they are the baseline. In the words of the ABA, the Ten Principles are the “fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”

Examples of the Ten Principles are:

- Assignment of counsel as quickly as possible after the client’s arrest, detention or request for counsel.
- Defense counsel’s workload is controlled to permit the rendering of quality representation.
- Defense counsel’s ability, training and experience match the complexity of the case.
- The same attorney continuously represents the client until completion of the case.
- Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

The Philadelphia Bar Association urges the City to adopt the ABA Ten Principles of a Public Defense Delivery System as its baseline for any program instituted to deliver legal representation to those who are unable to afford counsel and who cannot obtain legal representation through the Defender Association due to conflicts of interest. A copy of the ABA Ten Principles is being provided with this testimony.

For dependency matters, the American Bar Association has developed Standards of Practice for attorneys representing children, parents and agencies in child welfare cases. These Standards of Practice have become widely accepted as the benchmark by which an effective system of indigent representation in dependency cases can be measured, and include:

- Representation consisting of appearance at, preparation for and participation in all court hearings and conferences; attendance by the attorney at Family Service Plan meetings and other service planning sessions; and fieldwork for investigations, client interviews and service provider contacts.
- Caseload limits not to exceed 110 cases per year.
- Assignment of cases on a fair and impartial basis.
- Compensation of attorneys for representation services throughout the term of appointment, at levels which reflect the numbers of sibling children involved in and the complexity of the case, and includes both in-court service and out-of-court preparation, participation in case reviews and post-dispositional hearings and involvement in appeals.
The Philadelphia Bar Association recommends that the City adopt the ABA Standards of Practice for attorneys representing children, parents and agencies in child welfare cases. I am including a copy of these Standards of Practice with my testimony today.

For juvenile delinquency matters, the Juvenile Defender Association of Pennsylvania has developed the Performance Guidelines for Quality and Effective Juvenile Delinquency Representation. These Guidelines define the best practices necessary to achieve quality, client-centered delinquency representation, and address issues such as:

- Ongoing education and training of counsel.
- Matching case severity and consequences with the experience of counsel.
- Managing caseloads.
- Adequate case preparation, investigation and pre-adjudication motions practice.
- The role of counsel in post-disposition proceedings.

The Philadelphia Bar Association urges the City to require any new program for indigent representation in conflicts cases in juvenile matters to adhere to the Performance Guidelines for Quality and Effective Juvenile Delinquency Representation. A copy of the Performance Guidelines is included with my testimony.

Each year, thousands of Philadelphians receive representation through the conflicts counsel appointment system. Thousands more are impacted by the appointment system, including the victims of crime, witnesses and family members of the accused.

We recently celebrated the sixtieth anniversary of the United States Supreme Court decision in Gideon v. Wainwright, 372 U.S. 335 (1963), which made clear the right to counsel in criminal proceedings whether or not the defendant can afford to pay. Seven years after the Gideon decision, in McMann v. Richardson, 397 U.S. 759 (1970), the Supreme Court held that “[T]he right to counsel is the right to the effective assistance of counsel.” Thus, any system adopted for the provision of legal counsel in conflicts cases must afford indigent defendants effective aid in the preparation and trial of the case.

With such fundamental rights at stake, it is critical that a thorough, transparent and inclusive examination of all available options be accomplished in order to provide the people of Philadelphia with the best possible conflicts counsel program.

The Philadelphia Bar Association stands ready to assist the City in any way possible to achieve this goal.

Thank you for the opportunity to provide this testimony.

ATTACHMENTS

- ABA Ten Principles of a Public Defense Delivery System.
• ABA Standards of Practice for Attorneys Representing Children in Abuse and Neglect Cases.
• ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases.
• Pennsylvania Performance Guidelines for Quality and Effective Juvenile Delinquency Representation.
Ten Principles of a Public Defense Delivery System

February 2002
Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.
INTRODUCTION

The ABA Ten Principles of a Public Defense Delivery System were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992), which can be viewed on-line (black letter only) and purchased (black letter with commentary) by accessing the ABA Criminal Justice Section homepage at http://www.abanet.org/crimjust/home.html.

ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defendants is grateful to everyone assisting in the development of the ABA Ten Principles of a Public Defense Delivery System. Foremost, the Standing Committee acknowledges former member James R. Neuhard, Director of the Michigan State Appellate Defender Office, who was the first to recognize the need for clear and concise guidance on how to design an effective system for providing public defense services. In 2000, Mr. Neuhard and Scott Wallace, Director of Defender Legal Services for the National Legal Aid and Defender Association, jointly produced a paper entitled “The Ten Commandments of Public Defense Delivery Systems,” which was later included in the Introduction to Volume I of the U.S. Department of Justice’s Compendium of Standards for Indigent Defense Systems. The ABA Ten Principles of a Public Defense Delivery System are based on this work of Mr. Neuhard and Mr. Wallace.

Special thanks go to the members of the Standing Committee and its Indigent Defense Advisory Group who reviewed drafts and provided comment. Further, the Standing Committee is grateful to the ABA entities that provided invaluable support for these Principles by co-sponsoring them in the House of Delegates, including: Criminal Justice Section, Government and Public Sector Lawyers Division, Steering Committee on the Unmet Legal Needs of Children, Commission on Racial and Ethnic Diversity in the Profession, Standing Committee on Pro Bono and Public Services. We would also like to thank the ABA Commission on Homelessness and Poverty and the ABA Juvenile Justice Center for their support.

L. Jonathan Ross
Chair, Standing Committee on Legal Aid and Indigent Defendants
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The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.

Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.

Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

Defense counsel’s workload is controlled to permit the rendering of quality representation. Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.
Defense counsel’s ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.21

The same attorney continuously represents the client until completion of the case. Often referred to as “vertical representation,” the same attorney should continuously represent the client from initial assignment through the trial and sentencing.22 The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.23 Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.24 Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases,25 and separately fund expert, investigative, and other litigation support services.26 No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.27 This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.28

Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.29
"Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.


3 NSC, supra note 2, Guidelines 2.10-2.13; ABA, supra note 2, Standard 5-1.3(b); Assigned Counsel, supra note 2, Standards 3.2.1, 2; Contracting, supra note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, Juvenile Justice Standards Relating to Monitoring (1979) [hereinafter "ABA Monitoring"], Standard 3.2.

Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).

ABA, supra note 2, Standard 5-4.1

"Sufficiently high" is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

7 NAC, supra note 2, Standard 13.5; ABA, supra note 2, Standard 5-1.2; ABA Counsel for Private Parties, supra note 2, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

ABA, supra note 2, Standard 5-1.2(a) and (b); NSC, supra note 2, Guideline 2.3; ABA, supra note 2, Standard 5-2.1.

9 NSC, supra note 2, Guideline 2.3; ABA, supra note 2, Standard 5-2.1.

10 ABA, supra note 2, Standard 5-2.1 and commentary; Assigned Counsel, supra note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

11 NSC, supra note 2, Guideline 2.4; Model Act, supra note 2, § 10; ABA, supra note 2, Standard 5-1.2(c); Gideon v. Wainwright, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

12 For screening approaches, see NSC, supra note 2, Guideline 1.6 and ABA, supra note 2, Standard 5-7.3.

13 NAC, supra note 2, Standard 13.3; ABA, supra note 2, Standard 5-6.1; Model Act, supra note 2, § 3; NSC, supra note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, supra note 2, Standard 2.4(A).

14 NSC, supra note 2, Guideline 1.3.

16 NSC, supra note 2, Guideline 5.10; ABA Defense Function, supra note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, supra note 15, Guideline 2.2.


18 NSC, supra note 2, Guideline 5.1, 5.3; ABA, supra note 2, Standards 5-5.3; ABA Defense Function, supra note 15, Standard 4-1.3(e); NAC, supra note 2, Standard 13.12; Contracting, supra note 2, Guidelines III-6, III-12; Assigned Counsel, supra note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, supra note 2, Standard 2.2(B)(iv).

19 Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should “reflect” (NSC Guideline 5.1) or “under no circumstances exceed” (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (Judicial Conference of the United States, 1998). See also ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter “Death Penalty”].

20 ABA, supra note 2, Standard 5-5.3; NSC, supra note 2, Guideline 5.1; Standards and Evaluation Design for Appellate Defender Offices (NLADA 1980) [hereinafter “Appellate”], Standard 1-F.

21 Performance Guidelines, supra note 15, Guidelines 1.2, 1.3(a); Death Penalty, supra note 19, Guideline 5.1.

22 NSC, supra note 2, Guidelines 5.11, 5.12; ABA, supra note 2, Standard 5-6.2; NAC, supra note 2, Standard 13.1; Assigned Counsel, supra note 2, Standard 2.6; Contracting, supra note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, supra note 2, Standard 2.4(B)(i).

23 NSC, supra note 2, Guideline 3.4; ABA, supra note 2, Standards 5-4.1, 5-4.3; Contracting, supra note 2, Guideline III-10; Assigned Counsel, supra note 2, Standard 4.7.1; Appellate, supra note 20 (Performance); ABA Counsel for Private Parties, supra note 2, Standard 2.1(B)(iv). See NSC, supra note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). Cf. NAC, supra note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

24 ABA, supra note 2, Standard 5-2.4; Assigned Counsel, supra note 2, Standard 4.7.3.

25 NSC, supra note 2, Guideline 2.6; ABA, supra note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, supra note 2, Guidelines III-6, III-12, and passim.

26 ABA, supra note 2, Standard 5-3.3(b)(x); Contracting, supra note 2, Guidelines III-8, III-9.

27 ABA Defense Function, supra note 15, Standard 4-1.2(d).

28 NAC, supra note 2, Standards 13.15, 13.16; NSC, supra note 2, Guidelines 2.4(4), 5-6.5-8; ABA, supra note 2, Standards 5-1.5; Model Act, supra note 2, § 10(e); Contracting, supra note 2, Guideline III-17; Assigned Counsel, supra note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA Defender Training and Development Standards (1997); ABA Counsel for Private Parties, supra note 2, Standard 2.1(A).

29 NSC, supra note 2, Guidelines 5.4, 5.5; Contracting, supra note 2, Guidelines III-16; Assigned Counsel, supra note 2, Standard 4.4; ABA Counsel for Private Parties, supra note 2, Standards 2.1 (A), 2.2; ABA Monitoring, supra note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.
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PREFACE

All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues. These Abuse and Neglect Standards are meant to apply when a lawyer is appointed for a child in any legal action based on: (a) a petition filed for protection of the child; (b) a request to a court to change legal custody, visitation, or guardianship based on allegations of child abuse or neglect based on sufficient cause; or (c) an action to terminate parental rights.

These Standards apply only to lawyers and take the position that although a lawyer may accept appointment in the dual capacity of a "lawyer/guardian ad litem," the lawyer's primary duty must still be focused on the protection of the legal rights of the child client. The lawyer/guardian ad litem should therefore perform all the functions of a "child's attorney," except as otherwise noted.

These Standards build upon the ABA-approved JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1979) which include important directions for lawyers representing children in juvenile court matters generally, but do not contain sufficient guidance to aid lawyers representing children in abuse and neglect cases. These Abuse and Neglect Standards are also intended to help implement a series of ABA-approved policy resolutions (in Appendix) on the importance of legal representation and the improvement of lawyer practice in child protection cases.

In support of having lawyers play an active role in child abuse and neglect cases, in August 1995 the ABA endorsed a set of RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES produced by the National Council of Juvenile and Family Court Judges. The RESOURCE GUIDELINES stress the importance of quality representation provided by competent and diligent lawyers by supporting: 1) the approach of vigorous representation of child clients; and 2) the actions that courts should take to help assure such representation.

These Standards contain two parts. Part I addresses the specific roles and responsibilities of a lawyer appointed to represent a child in an abuse and neglect case. Part II provides a set of standards for judicial administrators and trial judges to assure high quality legal representation.

PART I– STANDARDS FOR THE CHILD'S ATTORNEY

A. DEFINITIONS

A-1. The Child's Attorney. The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.
Commentary

These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.

A-2. Lawyer Appointed as Guardian Ad Litem. A lawyer appointed as "guardian ad litem" for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences.

Commentary

In some jurisdictions the lawyer may be appointed as guardian ad litem. These Standards, however, express a clear preference for the appointment as the "child's attorney." These Standards address the lawyer's obligations to the child as client.

A lawyer appointed as guardian ad litem is almost inevitably expected to perform legal functions on behalf of the child. Where the local law permits, the lawyer is expected to act in the dual role of guardian ad litem and lawyer of record. The chief distinguishing factor between the roles is the manner and method to be followed in determining the legal position to be advocated. While a guardian ad litem should take the child's point of view into account, the child's preferences are not binding, irrespective of the child's age and the ability or willingness of the child to express preferences. Moreover, in many states, a guardian ad litem may be required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a "lawyer."

These Standards do not apply to nonlawyers when such persons are appointed as guardians ad litem or as "court appointed special advocates" (CASA). The nonlawyer guardian ad litem cannot and should not be expected to perform any legal functions on behalf of a child.

A-3. Developmentally Appropriate. "Developmentally appropriate" means that the child's attorney should ensure the child's ability to provide client-based directions by structuring all communications to account for the individual child's age, level of education, cultural context, and degree of language acquisition.

Commentary

The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning and consequences of action. See DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). A child client may not understand the legal terminology and for a variety of reasons may choose a particular course of action without fully appreciating the implications. With a child the potential for not understanding may be even greater. Therefore, the child's attorney has additional obligations based on the child's age, level of education, and degree of language acquisition. There is also the possibility that because of a particular child's developmental limitations, the lawyer may not completely understand the child's responses. Therefore, the child's attorney must learn how to ask developmentally appropriate questions and how to interpret the child's responses. See ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE (ABA Center on Children and the Law 1994). The child's attorney may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

B. GENERAL AUTHORITY AND DUTIES
B-1. Basic Obligations. The child's attorney should:

1. Obtain copies of all pleadings and relevant notices;
2. Participate in depositions, negotiations, discovery, pretrial conferences, and hearings;
3. Inform other parties and their representatives that he or she is representing the child and expects reasonable notification prior to case conferences, changes of placement, and other changes of circumstances affecting the child and the child’s family;
4. Attempt to reduce case delays and ensure that the court recognizes the need to speedily promote permanency for the child;
5. Counsel the child concerning the subject matter of the litigation, the child’s rights, the court system, the proceedings, the lawyer’s role, and what to expect in the legal process;
6. Develop a theory and strategy of the case to implement at hearings, including factual and legal issues; and
7. Identify appropriate family and professional resources for the child.

Commentary

The child's attorney should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child. (The same is true for the guardian ad litem, although the position to be advocated may be different). In furtherance of that advocacy, the child's attorney must be adequately prepared prior to hearings. The lawyer's presence at and active participation in all hearings is absolutely critical. See, RESOURCE GUIDELINES, at 23.

Although the child's position may overlap with the position of one or both parents, third-party caretakers, or a state agency, the child's attorney should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position.

While subsection (4) recognizes that delays are usually harmful, there may be some circumstances when delay may be beneficial. Section (7) contemplates that the child's attorney will identify counseling, educational and health services, substance abuse programs for the child and other family members, housing and other forms of material assistance for which the child may qualify under law. The lawyer can also identify family members, friends, neighbors, or teachers with whom the child feels it is important to maintain contact; mentoring programs, such as Big Brother/Big Sister; recreational opportunities that develop social skills and self-esteem; educational support programs; and volunteer opportunities which can enhance a child's self-esteem.

B-2. Conflict Situations. (1) If a lawyer appointed as guardian ad litem determines that there is a conflict caused by performing both roles of guardian ad litem and child's attorney, the lawyer should continue to perform as the child's attorney and withdraw as guardian ad litem. The lawyer should request appointment of a guardian ad litem without revealing the basis for the request.

(2) If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children.

Commentary

The primary conflict that arises between the two roles is when the child's expressed preferences differ from what the lawyer deems to be in the child's best interests. As a practical matter, when the lawyer has established a trusting relationship with the child, most conflicts can be avoided. While the lawyer should be careful not to apply undue pressure to a child, the lawyer’s advice and guidance can often persuade the child to change an imprudent position or to identify alternative choices if the child's first choice is denied by the court.

The lawyer-client role involves a confidential relationship with privileged communications, while a
guardian ad litem-client role may not be confidential. Compare Alaska Bar Assoc. Ethics Op. #854 (1985) (lawyer-client privilege does not apply when the lawyer is appointed to be child's guardian ad litem) with Bentley v. Bentley, 448 N.Y.S.2d 559 (App. Div. 1982) (communication between minor children and guardian ad litem in divorce custody case is entitled to lawyer-client privilege). Because the child has a right to confidentiality and advocacy of his or her position, the child's attorney can never abandon this role. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as guardian ad litem. When the roles cannot be reconciled, another person must assume the guardian ad litem role. See Arizona State Bar Committee on Rules of Professional Conduct, Opinion No. 86-13 (1986).

B-3. Client Under Disability. The child's attorney should determine whether the child is "under a disability" pursuant to the Model Rules of Professional Conduct or the Model Code of Professional Responsibility with respect to each issue in which the child is called upon to direct the representation.

Commentary
These Standards do not accept the idea that children of certain ages are "impaired," "disabled," "incompetent," or lack capacity to determine their position in litigation. Further, these Standards reject the concept that any disability must be globally determined.
Rather, disability is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another. This Standard relies on empirical knowledge about competencies with respect to both adults and children. See, e.g., ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 217 (1989).

B-4. Client Preferences. The child's attorney should elicit the child's preferences in a developmentally appropriate manner, advise the child, and provide guidance. The child's attorney should represent the child's expressed preferences and follow the child's direction throughout the course of litigation.

Commentary
The lawyer has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determination of the particular position at issue. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, the best position for the child to take, and the reasons underlying such recommendation. A child, however, may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships. Therefore, the lawyer needs to understand what the child knows and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child when deciding the best time to express his or her assessment of the case.

Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.
The lawyer for the child has dual fiduciary duties to the child which must be balanced. On one hand, the lawyer has a duty to ensure that the child client is given the information necessary to make an informed decision, including advice and guidance. On the other hand, the lawyer has a duty not to overbear the will of the child. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by these Abuse and Neglect Standards or the Code of Professional Responsibility.

While the child is entitled to determine the overall objectives to be pursued, the child's attorney, as any adult's lawyer, may make certain decisions with respect to the manner of achieving those objectives, particularly with respect to procedural matters. These Abuse and Neglect Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client. Further, the Standards do not require the child's attorney to discuss with the child issues for which it is not feasible to obtain the child's direction because of the child's developmental limitations, as with an infant or preverbal child.

(1) To the extent that a child cannot express a preference, the child's attorney shall make a good faith effort to determine the child's wishes and advocate accordingly or request appointment of a guardian ad litem.

Commentary
There are circumstances in which a child is unable to express a position, as in the case of a preverbal child, or may not be capable of understanding the legal or factual issues involved. Under such circumstances, the child's attorney should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision-making of the child's attorney and a person acting as guardian ad litem.

(2) To the extent that a child does not or will not express a preference about particular issues, the child's attorney should determine and advocate the child's legal interests.

Commentary
The child's failure to express a position is distinguishable from a directive that the lawyer not take a position with respect to certain issues. The child may have no opinion with respect to a particular issue, or may delegate the decision-making authority. For example, the child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the other parties. The lawyer should clarify with the child whether the child wants the lawyer to take a position or remain silent with respect to that issue or wants the preference expressed only if the parent or other party is out of the courtroom. The lawyer is then bound by the child's directive. The position taken by the lawyer should not contradict or undermine other issues about which the child has expressed a preference.

(3) If the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child’s expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem which would compromise the child's position.

Commentary
One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of the parents, or because of threats. The child may choose to deal with a known situation rather than risk the unknown world of a
In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function. If the lawyer has taken the time to establish rapport with the child and gain that child's trust, it is likely that the lawyer will be able to persuade the child to abandon a dangerous position or at least identify an alternate course.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a guardian ad litem, who will be charged with advocating the child's best interests without being bound by the child's direction. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the guardian ad litem may never learn of the disclosed danger.

Confidentiality is abrogated for various professionals by mandatory child abuse reporting laws. Some states abrogate lawyer-client privilege by mandating reports. States which do not abrogate the privilege may permit reports notwithstanding professional privileges. The policy considerations underlying abrogation apply to lawyers where there is a substantial danger of serious injury or death. Under such circumstances, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules.

The lawyer may never counsel a client or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d), Model Rules of Professional Conduct, DR 7-102(A)(7), Model Code of Professional Responsibility. Further, existing ethical rules requires the lawyer to disclose confidential information to the extent necessary to prevent the client from committing a criminal act likely to result in death or substantial bodily harm, see ER 1.6(b), Model Rules of Professional Conduct, and permits the lawyer to reveal the intention of the client to commit a crime. See ER 1.6(c), Model Rules of Professional Conduct, DR 4-101(C)(3), Model Code of Professional Responsibility. While child abuse, including sexual abuse, are crimes, the child is presumably the victim, rather than the perpetrator of those crimes. Therefore, disclosure of confidences is designed to protect the client, rather than to protect a third party from the client. Where the child is in grave danger of serious injury or death, the child's safety must be the paramount concern.

The lawyer is not bound to pursue the client's objectives through means not permitted by law and ethical rules. See DR-7-101(A)(1), Model Code of Professional Responsibility. Further, lawyers may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

B-5. Child's Interests. The determination of the child’s legal interests should be based on objective criteria as set forth in the law that are related to the purposes of the proceedings. The criteria should address the child’s specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive or detrimental alternatives available.

Commentary
A lawyer who is required to determine the child's interests is functioning in a nontraditional role by determining the position to be advocated independently of the client. The lawyer should base the position, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. The child's various needs and interests may be in conflict and must be weighed against each other. Even nonverbal children can communicate their needs and interests through their behaviors and developmental levels. See generally JAMES GARBARINO & FRANCES M. STOTT, WHAT CHILDREN CAN TELL US: ELICITING, INTERPRETING, AND EVALUATING CRITICAL INFORMATION FROM CHILDREN (1992). The lawyer may seek the advice and consultation of experts and other knowledgeable people in both determining and weighing such needs and interests.
A child's legal interests may include basic physical and emotional needs, such as safety, shelter, food, and clothing. Such needs should be assessed in light of the child's vulnerability, dependence upon others, available external resources, and the degree of risk. A child needs family affiliation and stability of placement. The child's developmental level, including his or her sense of time, is relevant to an assessment of need. For example, a very young child may be less able to tolerate separation from a primary caretaker than an older child, and if separation is necessary, more frequent visitation than is ordinarily provided may be necessary.

In general, a child prefers to live with known people, to continue normal activities, and to avoid moving. To that end, the child's attorney should determine whether relatives, friends, neighbors, or other people known to the child are appropriate and available as placement resources. The lawyer must determine the child's feelings about the proposed caretaker, however, because familiarity does not automatically confer positive regard. Further, the lawyer may need to balance competing stability interests, such as living with a relative in another town versus living in a foster home in the same neighborhood. The individual child's needs will influence this balancing task.

In general, a child needs decisions about the custodial environment to be made quickly. Therefore, if the child must be removed from the home, it is generally in the child's best interests to have rehabilitative or reunification services offered to the family quickly. On the other hand, if it appears that reunification will be unlikely, it is generally in the child's best interests to move quickly toward an alternative permanent plan. Delay and indecision are rarely in a child's best interests.

In addition to the general needs and interests of children, individual children have particular needs, and the lawyer must determine the child client's individual needs. There are few rules which apply across the board to all children under all circumstances.

C. ACTIONS TO BE TAKEN

C-1. Meet With Child. Establishing and maintaining a relationship with a child is the foundation of representation. Therefore, irrespective of the child's age, the child's attorney should visit with the child prior to court hearings and when apprised of emergencies or significant events impacting on the child.

Commentary

Meeting with the child is important before court hearings and case reviews. In addition, changes in placement, school suspensions, in-patient hospitalizations, and other similar changes warrant meeting again with the child. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next. This also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to more creative solutions in the child's interest. A lawyer can learn a great deal from meeting with child clients, including a preverbal child. See, e.g., JAMES GARBARINO, ET AL., WHAT CHILDREN CAN TELL US: ELICITING, INTERPRETING, AND EVALUATING CRITICAL INFORMATION FROM CHILDREN (1992).

C-2. Investigate. To support the client's position, the child's attorney should conduct thorough, continuing, and independent investigations and discovery which may include, but should not be limited to:

(1) Reviewing the child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case;

Commentary

Thorough, independent investigation of cases, at every stage of the proceedings, is a key aspect of providing competent representation to children. See, RESOURCE GUIDELINES, AT 23. The lawyer may need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those records which
pertain to the other parties. In some jurisdictions the statute or the order appointing the lawyer for the child includes provision for obtaining certain records.

(2) Reviewing the court files of the child and siblings, case-related records of the social service agency and other service providers;

Commentary
Another key aspect of representing children is the review of all documents submitted to the court as well as relevant agency case files and law enforcement reports. See, RESOURCE GUIDELINES, at 23. Other relevant files that should be reviewed include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted and may reveal alternate potential placements and services.

(3) Contacting lawyers for other parties and nonlawyer guardians ad litem or court-appointed special advocates (CASA) for background information;

Commentary
The other parties' lawyers may have information not included in any of the available records. Further, they can provide information on their respective clients' perspectives. The CASA is typically charged with performing an independent factual investigation, getting to know the child, and speaking up to the court on the child's "best interests." Volunteer CASAs may have more time to perform their functions than the child's attorney and can often provide a great deal of information to assist the child's attorney. Where there appears to be role conflict or confusion over the involvement of both a child’s attorney and CASA in the same case, there should be joint efforts to clarify and define mutual responsibilities. See, RESOURCE GUIDELINES, at 24.

(4) Contacting and meeting with the parents/legal guardians/caretakers of the child, with permission of their lawyer;

Commentary
Such contact generally should include visiting the home, which will give the lawyer additional information about the child's custodial circumstances.

(5) Obtaining necessary authorizations for the release of information;

Commentary
If the relevant statute or order appointing the lawyer for the child does not provide explicit authorization for the lawyer's obtaining necessary records, the lawyer should attempt to obtain authorizations for release of information from the agency and from the parents, with their lawyer's consent. Even if it is not required, an older child should be asked to sign authorizations for release of his or her own records, because such a request demonstrates the lawyer's respect for the client's authority over information.

(6) Interviewing individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

Commentary
In some jurisdictions the child's attorney is permitted free access to agency case workers. In others, contact with the case worker must be arranged through the agency's lawyer.

(7) Reviewing relevant photographs, video or audio tapes and other evidence; and
Commentary

It is essential that the lawyer review the evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of the evidence.

(8) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed.

Commentary

While some courts will not authorize compensation for the child's attorney to attend such collateral meetings, such attendance is often very important. The child's attorney can present the child's perspective at such meetings, as well as gather information necessary to proper representation. In some cases the child's attorney can be pivotal in achieving a negotiated settlement of all or some issues. The child's attorney may not need to attend collateral meetings if another person involved in the case, such as a social worker who works the lawyer, can get the information or present the child's perspective.

C-3. File Pleadings. The child's attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to:

(1) A mental or physical examination of a party or the child;
(2) A parenting, custody or visitation evaluation;
(3) An increase, decrease, or termination of contact or visitation;
(4) Restraining or enjoining a change of placement;
(5) Contempt for non-compliance with a court order;
(6) Termination of the parent-child relationship;
(7) Child support;
(8) A protective order concerning the child's privileged communications or tangible or intangible property;
(9) Request services for child or family; and
(10) Dismissal of petitions or motions.

Commentary

Filing and arguing necessary motions is an essential part of the role of a child’s attorney. See, RESOURCE GUIDELINES, at 23. Unless the lawyer is serving in a role which explicitly precludes the filing of pleadings, the lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of the other parties. The filing of such pleadings can ensure that appropriate issues are properly before the court and can expedite the court's consideration of issues important to the child's interests. In some jurisdictions, guardians ad litem are not permitted to file pleadings, in which case it should be clear to the lawyer that he or she is not the "child's attorney" as defined in these Standards.

C-4. Request Services. Consistent with the child's wishes, the child's attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to:

(1) Family preservation-related prevention or reunification services;
(2) Sibling and family visitation;
(3) Child support;
(4) Domestic violence prevention, intervention, and treatment;
(5) Medical and mental health care;
(6) Drug and alcohol treatment;
(7) Parenting education;
(8) Semi-independent and independent living services;
(9) Long-term foster care;
(10) Termination of parental rights action;
(11) Adoption services;
(12) Education;
(13) Recreational or social services; and
(14) Housing.

Commentary
The lawyer should request appropriate services even if there is no hearing scheduled. Such requests may be made to the agency or treatment providers, or if such informal methods are unsuccessful, the lawyer should file a motion to bring the matter before the court. In some cases the child's attorney should file collateral actions, such as petitions for termination of parental rights, if such an action would advance the child's interest and is legally permitted and justified. Different resources are available in different localities.

C-5. Child With Special Needs. Consistent with the child's wishes, the child's attorney should assure that a child with special needs receives appropriate services to address the 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) Therapeutic foster or group home care; and

Commentary
There are many services available from extra-judicial, as well as judicial, sources for children with special needs. The child's attorney should be familiar with these other services and how to assure their availability for the client. See generally, THOMAS A. JACOBS, CHILDREN & THE LAW: RIGHTS & OBLIGATIONS (1995); LEGAL RIGHTS OF CHILDREN (2d ed. Donald T. Kramer, ed., 1994).

C-6. Negotiate Settlements. The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child's attorney should use suitable mediation resources.

Commentary
Particularly in contentious cases, the child's attorney may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child. If a parent is legally represented, it is unethical for the child's attorney to negotiate with a parent directly without the consent of the parent's lawyer. Because the court is likely to resolve at least some parts of the dispute in question based on the best interests of the child, the child's attorney is in a pivotal position in negotiation.

Settlement frequently obtains at least short term relief for all parties involved and is often the best resolution of a case. The child's attorney, however, should not become merely a facilitator to the parties' reaching a negotiated settlement. As developmentally appropriate, the child's attorney should consult the child prior to any settlement becoming binding.
D. HEARINGS

D-1. Court Appearances. The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

D-2. Client Explanation. The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.

D-3. Motions and Objections. The child's attorney should make appropriate motions, including motions in limine and evidentiary objections, to advance the child's position at trial or during other hearings. If necessary, the child's attorney should file briefs in support of evidentiary issues. Further, during all hearings, the child's attorney should preserve legal issues for appeal, as appropriate.

D-4. Presentation of Evidence. The child's attorney should present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary.

Commentary

The child's position may overlap with the positions of one or both parents, third-party caretakers, or a child protection agency. Nevertheless, the child's attorney should be prepared to participate fully in every hearing and not merely defer to the other parties. Any identity of position should be based on the merits of the position (consistent with Standard B-6), and not a mere endorsement of another party's position.

D-5. Child at Hearing. In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.

Commentary

A child has the right to meaningful participation in the case, which generally includes the child's presence at significant court hearings. Further, the child's presence underscores for the judge that the child is a real party in interest in the case. It may be necessary to obtain a court order or writ of habeas corpus ad testificandum to secure the child's attendance at the hearing.

A decision to exclude the child from the hearing should be made based on a particularized determination that the child does not want to attend, is too young to sit through the hearing, would be severely traumatized by such attendance, or for other good reason would be better served by nonattendance. There may be other extraordinary reasons for the child's non-attendance. The lawyer should consult the child, therapist, caretaker, or any other knowledgeable person in determining the effect on the child of being present at the hearing. In some jurisdictions the court requires an affirmative waiver of the child's presence if the child will not attend. Even a child who is too young to sit through the hearing may benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making the decisions. The lawyer should provide the court with any required notice that the child will be present. Concerns about the child being exposed to certain parts of the evidence may be addressed by the child's temporary exclusion from the court room during the taking of that evidence, rather than by excluding the child from the entire hearing.

The lawyer should ensure that the state/ custodian meets its obligation to transport the child to and from the hearing. Similarly, the lawyer should ensure the presence of someone to accompany the child any time the child is temporarily absent from the hearing.

D-6. Whether Child Should Testify. The child's attorney should decide whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and
withstand possible cross-examination. Ultimately, the child's attorney is bound by the child's direction concerning testifying.

Commentary

There are no blanket rules regarding a child's testimony. While testifying is undoubtedly traumatic for many children, it is therapeutic and empowering for others. Therefore, the decision about the child's testifying should be made individually, based on the circumstances of the individual child and the individual case. The child's therapist, if any, should be consulted both with respect to the decision itself and assistance with preparation. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so. See ANN M. HARALAMBIE, THE CHILD'S LAWYER: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES ch. 4 (1993). If the child should not wish to testify or would be harmed by being forced to testify, the lawyer should seek a stipulation of the parties not to call the child as a witness or seek a protective order from the court. If the child is compelled to testify, the lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by local law, such as having the testimony taken informally, in chambers, without presence of the parents. See JOHN E.B. MYERS, 2 EVIDENCE IN CHILD ABUSE AND NEGLECT CASES ch. 8 (1992). The child should know whether the in-chambers testimony will be shared with others, such as parents who might be excluded from chambers, before agreeing to this forum. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes which will not be the child's fault.

D-7. Child Witness. The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

Commentary

The lawyer's preparation of the child to testify should include attention to the child's developmental needs and abilities as well as to accommodations which should be made by the court and other lawyers. The lawyer should seek any necessary assistance from the court, including location of the testimony (in chambers, at a small table etc.), determination of who will be present, and restrictions on the manner and phrasing of questions posed to the child.

The accuracy of children's testimony is enhanced when they feel comfortable. See, generally, Karen Saywitz, Children in Court: Principles of Child Development for Judicial Application, in A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE 15 (Josephine Bulkley & Claire Sandt, eds., 1994). Courts have permitted support persons to be present in the courtroom, sometimes even with the child sitting on the person's lap to testify. Because child abuse and neglect cases are often closed to the public, special permission may be necessary to enable such persons to be present during hearings. Further, where the rule sequestering witnesses has been invoked, the order of witnesses may need to be changed or an exemption granted where the support person also will be a witness. The child should be asked whether he or she would like someone to be present, and if so, whom the child prefers. Typical support persons include parents, relatives, therapists, Court Appointed Special Advocates (CASA), social workers, victim-witness advocates, and members of the clergy. For some, presence of the child's attorney provides sufficient support.

D-8. Questioning the Child. The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

Commentary

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory, and suggestibility. See generally, Karen Saywitz, supra D -7; CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY (Gail S. Goodman & Bette L. Bottoms, eds. 1993); ANN HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES 24.09 v24.22 (2nd ed. 1993); MYERS,
The information a child gives in interviews and during testimony is often misleading because the adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. See WALKER, SUPRA, A-3 Commentary. The child's attorney must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

D-9. Challenges to Child's Testimony/Statements. The child's competency to testify, or the reliability of the child’s testimony or out-of-court statements, may be called into question. The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

Commentary

Many jurisdictions have abolished presumptive ages of competency. See HARALAMBIE, SUPRA D-8 AT 24.17. The jurisdictions which have rejected presumptive ages for testimonial competency have applied more flexible, case-by-case analyses. See Louis I. Parley, Representing Children in Custody Litigation, 11 J. AM. ACAD. MATRIM. LAW. 45, 48 (Winter 1993). Competency to testify involves the abilities to perceive and relate.

If necessary, the child's attorney should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases. See generally, Karen Saywitz, supra D-8 at 15; CHILD VICTIMS, SUPRA D-8; Haralambie, supra D-8; J. MYERS, SUPRA D-8; Matthews & Saywitz, supra D-8.

D-10. Jury Selection. In those states in which a jury trial is possible, the child's attorney should participate in jury selection and drafting jury instructions.

D-11. Conclusion of Hearing. If appropriate, the child's attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The child's attorney should ensure that a written order is entered.

Commentary

One of the values of having a trained child's attorney is such a lawyer can often present creative alternative solutions to the court. Further, the child's attorney is able to argue the child's interests from the child's perspective, keeping the case focused on the child's needs and the effect of various dispositions on the child.

D-12. Expanded Scope of Representation. The child's attorney may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. For example:

(1) Child support;
(2) Delinquency or status offender matters;
(3) SSI and other public benefits;
(4) Custody;
(5) Guardianship;
(6) Paternity;
(7) Personal injury;
(8) School/education issues, especially for a child with disabilities;
(9) Mental health proceedings;
(10) Termination of parental rights; and
Adoption.

Commentary

The child's interests may be served through proceedings not connected with the case in which the child's attorney is participating. In such cases the lawyer may be able to secure assistance for the child by filing or participating in other actions. See, e.g., In re Appeal in Pima County Juvenile Action No. S-113432, 872 P.2d 1240 (Ariz. Ct. App. 1994). With an older child or a child with involved parents, the child's attorney may not need court authority to pursue other services. For instance, federal law allows the parent to control special education. A Unified Child and Family Court Model would allow for consistency of representation between related court proceedings, such as mental health or juvenile justice.

D-13. Obligations after Disposition. The child's attorney should seek to ensure continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.

Commentary

Representing a child should reflect the passage of time and the changing needs of the child. The bulk of the child's attorney's work often comes after the initial hearing, including ongoing permanency planning issues, six month reviews, case plan reviews, issues of termination, and so forth. The average length of stay in foster care is over five years in some jurisdictions. Often a child's case workers, therapists, other service providers or even placements change while the case is still pending. Different judges may hear various phases of the case. The child's attorney may be the only source of continuity for the child. Such continuity not only provides the child with a stable point of contact, but also may represent the institutional memory of case facts and procedural history for the agency and court. The child's attorney should stay in touch with the child, third party caretakers, case workers, and service providers throughout the term of appointment to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

Generally it is preferable for the lawyer to remain involved so long as the case is pending to enable the child's interest to be addressed from the child's perspective at all stages. Like the JUVENILE JUSTICE STANDARDS, these ABUSE AND NEGLECT STANDARDS require ongoing appointment and active representation as long as the court retains jurisdiction over the child. To the extent that these are separate proceedings in some jurisdictions, the child's attorney should seek reappointment. Where reappointment is not feasible, the child's attorney should provide records and information about the case and cooperate with the successor to ensure continuity of representation.

E. POST HEARING

E-1. Review of Court's Order. The child's attorney should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.

E-2. Communicate Order to Child. The child's attorney should discuss the order and its consequences with the child.

Commentary

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children may assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out. For example, an order may permit the agency to return the child to the parent if certain goals are accomplished.

E-3. Implementation. The child's attorney should monitor the implementation of the court's orders and communicate
to the responsible agency and, if necessary, the court, any non-compliance.

Commentary

The lawyer should ensure that services are provided and that the court's orders are implemented in a complete and timely fashion. In order to address problems with implementation, the lawyer should stay in touch with the child, case worker, third party caretakers, and service providers between review hearings. The lawyer should consider filing any necessary motions, including those for civil or criminal contempt, to compel implementation. See, RESOURCE GUIDELINES, at 23.

F. APPEAL

F-1. Decision to Appeal. The child's attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If after such consultation, the child wishes to appeal the order, and the appeal has merit, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.

Commentary

The lawyer should explain to the child not only the legal possibility of an appeal, but also the ramifications of filing an appeal, including the potential for delaying implementation of services or placement options. The lawyer should also explain whether the trial court's orders will be stayed pending appeal and what the agency and trial court may do pending a final decision.

F-2. Withdrawal. If the child's attorney determines that an appeal would be frivolous or that he or she lacks the necessary experience or expertise to handle the appeal, the lawyer should notify the court and seek to be discharged or replaced.

F-3. Participation in Appeal. The child's attorney should participate in an appeal filed by another party unless discharged.

Commentary

The child's attorney should take a position in any appeal filed by the parent, agency, or other party. In some jurisdictions, the lawyer's appointment does not include representation on appeal. If the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel to represent the child's position in the appeal.

F-4. Conclusion of Appeal. When the decision is received, the child's attorney should explain the outcome of the case to the child.

Commentary

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appellate decision. In addition, the lawyer should explain whether there are further appellate remedies and what more, if anything, will be done in the trial court following the decision.

F-5. Cessation of Representation. The child's attorney should discuss the end of the legal representation and determine what contacts, if any, the child's attorney and the child will continue to have.

Commentary

When the representation ends, the child's lawyer should explain in a developmentally appropriate manner why the representation is ending and how the child can obtain assistance in the future should it become necessary. It is important for there to be closure between the child and the lawyer.
PART II—ENHANCING THE JUDICIAL ROLE IN CHILD REPRESENTATION

PREFACE

Enhancing the legal representation provided by court-appointed lawyers for children has long been a special concern of the American Bar Association [see, e.g., JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1979); ABA Policy Resolutions on Representation of Children (Appendix). Yet, no matter how carefully a bar association, legislature, or court defines the duties of lawyers representing children, practice will only improve if judicial administrators and trial judges play a stronger role in the selection, training, oversight, and prompt payment of court-appointed lawyers in child abuse/neglect and child custody/visitation cases.

The importance of the court's role in helping assure competent representation of children is noted in the JUVENILE JUSTICE STANDARDS RELATING TO COURT ORGANIZATION AND ADMINISTRATION (1980) which state in the Commentary to 3.4D that effective representation of parties is "essential" and that the presiding judge of a court "might need to use his or her position to achieve" it. In its RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995), the National Council of Juvenile and Family Court Judges stated, "Juvenile and family courts should take active steps to ensure that the parties in child abuse and neglect cases have access to competent representation. . . ." In jurisdictions which engage nonlawyers to represent a child's interests, the court should ensure they have access to legal representation.

These Abuse and Neglect Standards, like the RESOURCE GUIDELINES, recognize that the courts have a great ability to influence positively the quality of counsel through setting judicial prerequisites for lawyer appointments including requirements for experience and training, imposing sanctions for violation of standards (such as terminating a lawyer's appointment to represent a specific child, denying further appointments, or even fines or referrals to the state bar committee for professional responsibility). The following Standards are intended to assist the judiciary in using its authority to accomplish the goal of quality representation for all children before the court in abuse/neglect related proceedings.

G. THE COURT'S ROLE IN STRUCTURING CHILD REPRESENTATION

G-1. Assuring Independence of the Child's Attorney. The child's attorney should be independent from the court, court services, the parties, and the state.

Commentary
To help assure that the child's attorney is not compromised in his or her independent action, these Standards propose that the child's lawyer be independent from other participants in the litigation. "Independence" does not mean that a lawyer may not receive payment from a court, a government entity (e.g., program funding from social services or justice agencies), or even from a parent, relative, or other adult so long as the lawyer retains the full authority for independent action. For ethical conflict reasons, however, lawyers should never accept compensation as retained counsel for the child from a parent accused of abusing or neglecting the child. The child's attorney should not prejudge the case. The concept of independence includes being free from prejudice and other limitations to uncompromised representation.

JUVENILE JUSTICE STANDARD 2.1(d) states that plans for providing counsel for children "must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship." The Commentary strongly asserts there is "no justification for . . . judicial preference" to compromise a lawyer's relationship with the child client and notes the "willingness of some judges to direct lawyers' performance and thereby compromise their independence."

G-2. Establishing Uniform Representation Rules. The administrative office for the state trial, family, or juvenile court system should cause to be published and disseminated to all relevant courts a set of uniform,
written rules and procedures for court-appointed lawyers for minor children.

Commentary
Although uniform rules of court to govern the processing of various types of child-related judicial proceedings have become common, it is still rare for those rules to address comprehensively the manner and scope of representation for children. Many lawyers representing children are unclear as to the court's expectations. Courts in different communities, or even judges within the same court, may have differing views regarding the manner of child representation. These Standards promote statewide uniformity by calling for written publication and distribution of state rules and procedures for the child's attorney.

G-3. Enhancing Lawyer Relationships with Other Court Connected Personnel. Courts that operate or utilize Court Appointed Special Advocate (CASA) and other nonlawyer guardians ad litem, and courts that administer nonjudicial foster care review bodies, should assure that these programs and the individuals performing those roles are trained to understand the role of the child's attorney. There needs to be effective coordination of their efforts with the activities of the child's attorney, and they need to involve the child's attorney in their work. The court should require that reports from agencies be prepared and presented to the parties in a timely fashion.

Commentary
Many courts now regularly involve nonlawyer advocates for children in various capacities. Some courts also operate programs that, outside of the courtroom, review the status of children in foster care or other out-of-home placements. It is critical that these activities are appropriately linked to the work of the child's attorney, and that the court through training, policies, and protocols helps assure that those performing the nonlegal tasks (1) understand the importance and elements of the role of the child's attorney, and (2) work cooperatively with such lawyers. The court should keep abreast of all the different representatives involved with the child, the attorney, social worker for government or private agency, CASA volunteer, guardian ad litem, school mediator, counselors, etc.

H. THE COURT’S ROLE IN APPOINTING THE CHILD’S ATTORNEY

H-1. Timing of Appointments. The child's attorney should be appointed immediately after the earliest of:

(1) The involuntary removal of the child for placement due to allegations of neglect, abuse or abandonment;
(2) The filing of a petition alleging child abuse and neglect, for review of foster care placement, or for termination of parental rights; or
(3) Allegations of child maltreatment, based upon sufficient cause, are made by a party in the context of proceedings that were not originally initiated by a petition alleging child maltreatment.

Commentary
These ABUSE AND NEGLECT STANDARDS take the position that courts must assure the appointment of a lawyer for a child as soon as practical (ideally, on the day the court first has jurisdiction over the case, and hopefully, no later than the next business day). The three situations are described separately because:

(1) A court may authorize, or otherwise learn of, a child's removal from home prior to the time a formal petition is instituted. Lawyer representation of (and, ideally, contact with) the child prior to the initial court hearing following removal (which in some cases may be several days) is important to protect the child's interests;

(2) Once a petition has been filed by a government agency (or, where authorized, by a hospital or other agency with child protection responsibilities), for any reason related to a child's need for protection, the child should have prompt access to a lawyer; and
(3) There are cases (such as custody, visitation, and guardianship disputes and family-related abductions of children) where allegations, with sufficient cause, of serious physical abuse, sexual molestation, or severe neglect of a child are presented to the court not by a government agency (i.e., child protective services) but by a parent, guardian, or other relative. The need of a child for competent, independent representation by a lawyer is just as great in situation (3) as with cases in areas (1) and (2).

H-2. Entry of Compensation Orders. At the time the court appoints a child's attorney, it should enter a written order addressing compensation and expense costs for that lawyer, unless these are otherwise formally provided for by agreement or contract with the court, or through another government agency.

Commentary

Compensation and expense reimbursement of individual lawyers should be addressed in a specific written court order is based on a need for all lawyers representing maltreated children to have a uniform understanding of how they will be paid. Commentary to Section 2.1(h) of the JUVENILE JUSTICE STANDARDS observes that it is common for court-appointed lawyers to be confused about the availability of reimbursement of expenses for case-related work.

H-3. Immediate Provision of Access. Unless otherwise provided for, the court should upon appointment of a child's attorney, enter an order authorizing that lawyer access between the child and the lawyer and to all privileged information regarding the child, without the necessity of a further release. The authorization should include, but not be limited to: social services, psychiatric, psychological treatment, drug and alcohol treatment, medical, evaluation, law enforcement, and school records.

Commentary

Because many service providers do not understand or recognize the nature of the role of the lawyer for the child or that person's importance in the court proceeding, these Standards call for the routine use of a written court order that clarifies the lawyers right to contact with their child client and perusal of child-related records. Parents, other caretakers, or government social service agencies should not unreasonably interfere with a lawyer's ability to have face-to-face contact with the child client nor to obtain relevant information about the child's social services, education, mental health, etc. Such interference disrupts the lawyer's ability to control the representation and undermines his or her independence as the child's legal representative.

H-4. Lawyer Eligibility for and Method of Appointment. Where the court makes individual appointment of counsel, unless impractical, before making the appointment, the court should determine that the lawyer has been trained in representation of children and skilled in litigation (or is working under the supervision of an lawyer who is skilled in litigation). Whenever possible, the trial judge should ensure that the child's attorney has had sufficient training in child advocacy and is familiar with these Standards. The trial judge should also ensure that (unless there is specific reason to appoint a specific lawyer because of their special qualifications related to the case, or where a lawyer's current caseload would prevent them from adequately handling the case) individual lawyers are appointed from the ranks of eligible members of the bar under a fair, systematic, and sequential appointment plan.

Commentary

The JUVENILE JUSTICE STANDARDS 2.2(c) provides that where counsel is assigned by the court, this lawyer should be drawn from "an adequate pool of competent attorneys." In general, such competency can only be gained through relevant continuing legal education and practice-related experience. Those Standards also promote the use of a rational court appointment process drawing from the ranks of qualified lawyers. The Abuse and Neglect Standards reject the concept of ad hoc appointments of counsel that are made without regard to prior training or practice.
H-5. Permitting Child to Retain a Lawyer. The court should permit the child to be represented by a retained private lawyer if it determines that this lawyer is the child's independent choice, and such counsel should be substituted for the appointed lawyer. A person with a legitimate interest in the child's welfare may retain private counsel for the child and/or pay for such representation, and that person should be permitted to serve as the child's attorney, subject to approval of the court. Such approval should not be given if the child opposes the lawyer's representation or if the court determines that there will be a conflict of interest. The court should make it clear that the person paying for the retained lawyer does not have the right to direct the representation of the child or to receive privileged information about the case from the lawyer.

Commentary
Although such representation is rare, there are situations where a child, or someone acting on a child's behalf, seeks out legal representation and wishes that this lawyer, rather than one appointed by the court under the normal appointment process, be recognized as the sole legal representative of the child. Sometimes, judges have refused to accept the formal appearances filed by such retained lawyers. These Standards propose to permit, under carefully scrutinized conditions, the substitution of a court-appointed lawyer with the retained counsel for a child.

I. THE COURT'S ROLE IN LAWYER TRAINING

I-1. Judicial Involvement in Lawyer Training. Trial judges who are regularly involved in child-related matters should participate in training for the child's attorney conducted by the courts, the bar, or any other group.

Commentary
JUVENILE JUSTICE STANDARDS 2.1 indicates that it is the responsibility of the courts (among others) to ensure that competent counsel are available to represent children before the courts. That Standard further suggests that lawyers should "be encouraged" to qualify themselves for participation in child-related cases "through formal training." The Abuse and Neglect Standards go further by suggesting that judges should personally take part in educational programs, whether or not the court conducts them. The National Council of Juvenile and Family Court Judges has suggested that courts can play an important role in training lawyers in child abuse and neglect cases, and that judges and judicial officers can volunteer to provide training and publications for continuing legal education seminars. See, RESOURCE GUIDELINES, at 22.

I-2. Content of Lawyer Training. The appropriate state administrative office of the trial, family, or juvenile courts should provide educational programs, live or on tape, on the role of a child's attorney. At a minimum, the requisite training should include:

1. Information about relevant federal and state laws and agency regulations;
2. Information about relevant court decisions and court rules;
3. Overview of the court process and key personnel in child-related litigation;
4. Description of applicable guidelines and standards for representation;
5. Focus on child development, needs, and abilities;
6. Information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in his or her home;
7. Information concerning family dynamics and dysfunction including substance abuse, and the use of kinship care;
8. Information on accessible child welfare, family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services; the structure of agencies providing such services as well as provisions and constraints related to agency payment for services; and
9. Provision of written material (e.g., representation manuals, checklists, sample forms), including
Commentary

The ABUSE AND NEGLECT STANDARDS take the position that it is not enough that judges mandate the training of lawyers, or that judges participate in such training. Rather, they call upon the courts to play a key role in training by actually sponsoring (e.g., funding) training opportunities. The pivotal nature of the judiciary's role in educating lawyers means that courts may, on appropriate occasions, stop the hearing of cases on days when training is held so that both lawyers and judges may freely attend without docket conflicts. The required elements of training are based on a review of well-regarded lawyer training offered throughout the country, RESOURCE GUIDELINES, and many existing manuals that help guide lawyers in representing children.

I-3. Continuing Training for Lawyers. The court system should also assure that there are periodic opportunities for lawyers who have taken the "basic" training to receive continuing and "new developments" training.

Commentary

Many courts and judicial organizations recognize that rapid changes occur because of new federal and state legislation, appellate court decisions, systemic reforms, and responses to professional literature. Continuing education opportunities are critical to maintain a high level of performance. These Standards call for courts to afford these "advanced" or "periodic" training to lawyers who represent children in abuse and neglect related cases.

I-4. Provision of Mentorship Opportunities. Courts should provide individual court-appointed lawyers who are new to child representation the opportunity to practice under the guidance of a senior lawyer mentor.

Commentary

In addition to training, particularly for lawyers who work as sole practitioners or in firms that do not specialize in child representation, courts can provide a useful mechanism to help educate new lawyers for children by pairing them with more experienced advocates. One specific thing courts can do is to provide lawyers new to representing children with the opportunity to be assisted by more experienced lawyers in their jurisdiction. Some courts actually require lawyers to "second chair" cases before taking an appointment to a child abuse or neglect case. See, RESOURCE GUIDELINES, at 22.

J. THE COURT'S ROLE IN LAWYER COMPENSATION

J-1. Assuring Adequate Compensation. A child's attorney should receive adequate and timely compensation throughout the term of appointment that reflects the complexity of the case and includes both in court and out-of-court preparation, participation in case reviews and post-dispositional hearings, and involvement in appeals. To the extent that the court arranges for child representation through contract or agreement with a program in which lawyers represent children, the court should assure that the rate of payment for these legal services is commensurate with the fees paid to equivalently experienced individual court-appointed lawyers who have similar qualifications and responsibilities.

Commentary

JUVENILE JUSTICE STANDARDS 2.1(b) recognize that lawyers for children should be entitled to reasonable compensation for both time and services performed "according to prevailing professional standards," which takes into account the "skill required to perform...properly," and which considers the need for the lawyer to perform both counseling and resource identification/evaluation activities. The RESOURCE GUIDELINES, at 22, state that it is "necessary to provide reasonable compensation” for improved lawyer representation of children and that where necessary judges should “urge state legislatures and local governing bodies to provide sufficient funding” for quality legal representation.
Because some courts currently compensate lawyers only for time spent in court at the adjudicative or initial disposition stage of cases, these Standards clarify that compensation is to be provided for out-of-court preparation time, as well as for the lawyer's involvement in case reviews and appeals. "Out-of-court preparation" may include, for example, a lawyer's participation in social services or school case conferences relating to the client.

These Standards also call for the level of compensation where lawyers are working under contract with the court to provide child representation to be comparable with what experienced individual counsel would receive from the court. Although courts may, and are encouraged to, seek high quality child representation through enlistment of special children's law offices, law firms, and other programs, the motive should not be a significantly different (i.e., lower) level of financial compensation for the lawyers who provide the representation.

J-2. Supporting Associated Costs. The child's attorney should have access to (or be provided with reimbursement for) experts, investigative services, paralegals, research costs, and other services, such as copying medical records, long distance phone calls, service of process, and transcripts of hearings as requested.

Commentary
The ABUSE AND NEGLECT STANDARDS expand upon JUVENILE JUSTICE STANDARDS 2.1(c) which recognizes that a child's attorney should have access to "investigatory, expert and other nonlegal services" as a fundamental part of providing competent representation.

J-3. Reviewing Payment Requests. The trial judge should review requests for compensation for reasonableness based upon the complexity of the case and the hours expended.

Commentary
These Standards implicitly reject the practice of judges arbitrarily "cutting down" the size of lawyer requests for compensation and would limit a judge's ability to reduce the amount of a per/case payment request from a child's attorney unless the request is deemed unreasonable based upon two factors: case complexity and time spent.

J-4. Keeping Compensation Levels Uniform. Each state should set a uniform level of compensation for lawyers appointed by the courts to represent children. Any per/hour level of compensation should be the same for all representation of children in all types of child abuse and neglect-related proceedings.

Commentary
These Standards implicitly reject the concept (and practice) of different courts within a state paying different levels of compensation for lawyers representing children. They call for a uniform approach, established on a statewide basis, towards the setting of payment guidelines.

K. THE COURT'S ROLE IN RECORD ACCESS BY LAWYERS

K-1. Authorizing Lawyer Access. The court should enter an order in child abuse and neglect cases authorizing the child's attorney access to all privileged information regarding the child, without the necessity for a further release.

Commentary
This Standard requires uniform judicial assistance to remove a common barrier to effective representation, i.e., administrative denial of access to significant records concerning the child. The language supports the universal issuance of broadly-worded court orders that grant a child's attorney full access to information (from individuals) or records (from agencies) concerning the child.
K-2. Providing Broad Scope Orders. The authorization order granting the child's attorney access to records should include social services, psychiatric, psychological treatment, drug and alcohol treatment, medical, evaluation, law enforcement, school, and other records relevant to the case.

Commentary
This Standard further elaborates upon the universal application that the court's access order should be given, by listing examples of the most common agency records that should be covered by the court order.

L. THE COURT'S ROLE IN ASSURING REASONABLE LAWYER CASELOADS

L-1. Controlling Lawyer Caseloads. Trial court judges should control the size of court-appointed caseloads of individual lawyers representing children, the caseloads of government agency-funded lawyers for children, or court contracts/agreements with lawyers for such representation. Courts should take steps to assure that lawyers appointed to represent children, or lawyers otherwise providing such representation, do not have such a large open number of cases that they are unable to abide by Part I of these Standards.

Commentary
THE ABUSE AND NEGLECT STANDARDS go further than JUVENILE JUSTICE STANDARD 2.2(b) which recognize the "responsibility of every defender office to ensure that its personnel can offer prompt, full, and effective counseling and representation to each (child) client" and that it "should not accept more assignments than its staff can adequately discharge" by specifically calling upon the courts to help keep lawyer caseloads from getting out of control. The Commentary to 2.2.(b) indicates that: Caseloads must not be exceeded where to do so would "compel lawyers to forego the extensive fact investigation required in both contested and uncontested cases, or to be less than scrupulously careful in preparation for trial, or to forego legal research necessary to develop a theory of representation." We would add: "...or to monitor the implementation of court orders and agency case plans in order to help assure permanency for the child."

L-2. Taking Supportive Caseload Actions. If judges or court administrators become aware that individual lawyers are close to, or exceeding, the levels suggested in these Standards, they should take one or more of the following steps:

(1) Expand, with the aid of the bar and children's advocacy groups, the size of the list from which appointments are made;
(2) Alert relevant government or private agency administrators that their lawyers have an excessive caseload problem;
(3) Recruit law firms or special child advocacy law programs to engage in child representation;
(4) Review any court contracts/agreements for child representation and amend them accordingly, so that additional lawyers can be compensated for case representation time; and
(5) Alert state judicial, executive, and legislative branch leaders that excessive caseloads jeopardize the ability of lawyers to competently represent children pursuant to state-approved guidelines, and seek funds for increasing the number of lawyers available to represent children.

Commentary
This Standard provides courts with a range of possible actions when individual lawyer caseloads appear to be inappropriately high.
APPENDIX

Previous American Bar Association Policies Related to Legal Representation of Abused and Neglected Children

GUARDIANS AD LITEM
FEBRUARY 1992

BE IT RESOLVED, that the American Bar Association urges:
   (1) Every state and territory to meet the full intent of the Federal Child Abuse Prevention and Treatment Act, whereby every child in the United States who is the subject of a civil child protection related judicial proceedings will be represented at all stages of these proceedings by a fully-trained, monitored, and evaluated guardian ad litem in addition to appointed legal counsel.
   (2) That state, territory and local bar associations and law schools become involved in setting standards of practice for such guardians ad litem, clarify the ethical responsibilities of these individuals and establish minimum ethical performance requirements for their work, and provide comprehensive multidisciplinary training for all who serve as such guardians ad litem.
   (3) That in every state and territory, where judges are given discretion to appoint a guardian ad litem in private child custody and visitation related proceedings, the bench and bar jointly develop guidelines to aid judges in determining when such an appointment is necessary to protect the best interests of the child.

COURT-APPOINTED SPECIAL ADVOCATES
AUGUST 1989

BE IT RESOLVED, that the American Bar Association endorses the concept of utilizing carefully selected, well trained lay volunteers, Court Appointed Special Advocates, in addition to providing attorney representation, in dependency proceedings to assist the court in determining what is in the best interests of abused and neglected children.
BE IT FURTHER RESOLVED, that the American Bar Association encourages its members to support the development of CASA programs in their communities.

COUNSEL FOR CHILDREN ENHANCEMENT
FEBRUARY 1987

BE IT RESOLVED, that the American Bar Association requests State and local bar associations to determine the extent to which statutory law and court rules in their States guarantee the right to counsel for children in juvenile court proceedings; and
BE IT FURTHER RESOLVED, that State and local bar associations are urged to actively participate and support amendments to the statutory law and court rules in their State to bring them in to compliance with the Institute of Judicial Administration/American Bar Association Standards Relating to Counsel for Private Parties; and
BE IT FURTHER RESOLVED, that State and local bar associations are requested to ascertain the extent to which, irrespective of the language in their State statutory laws and court rules, counsel is in fact provided for children in juvenile court proceedings and the extent to which the quality of representation is consistent with the standards and policies of the American Bar Association; and
BE IT FURTHER RESOLVED, that State and local bar associations are urged to actively support programs of training and education to ensure that lawyers practicing in juvenile court are aware of the American Bar Association's standards relating to representation of children and provide advocacy which meets those standards.
BE IT RESOLVED, that the American Bar Association urges the members of the legal profession, as well as state and local bar associations, to respond to the needs of children by directing attention to issues affecting children including, but not limited to: ... (7) establishment of guardian ad litem programs.

BAR AND ATTORNEY INVOLVEMENT IN CHILD PROTECTION CASES
AUGUST 1981

BE IT RESOLVED, that the American Bar Association encourages individual attorneys and state and local bar organizations to work more actively to improve the handling of cases involving abused and neglected children as well as children in foster care. Specifically, attorneys should form appropriate committees and groups within the bar to ... work to assure quality legal representation for children....

JUVENILE JUSTICE STANDARDS
FEBRUARY 1979

BE IT RESOLVED, that the American Bar Association adopt (the volume of the) Standards for Juvenile Justice (entitled) Counsel for Private Parties...
American Bar Association

Standards of Practice for Attorneys Representing
Parents in Abuse and Neglect Cases

Introduction

These standards promote quality representation and uniformity of practice throughout the country for parents’ attorneys in child abuse and neglect cases. The standards were written with the help of a committee of practicing parents’ attorneys and child welfare professionals from different jurisdictions in the country. With their help, the standards were written with the difficulties of day-to-day practice in mind, but also with the goal of raising the quality of representation. While local adjustments may be necessary to apply these standards in practice, jurisdictions should strive to meet their fundamental principles and spirit.

The standards are divided into the following categories:

1. Summary of the Standards
2. Basic Obligations of Parents’ Attorneys
3. Obligations of Attorney Manager
4. The Role of the Court

The standards include “black letter” requirements written in bold. Following the black letter standards are “actions.” These actions further discuss how to fulfill the standard; implementing each standard requires the accompanying action. After the action is “commentary” or a discussion of why the standard is necessary and how it should be applied. When a standard does not need further explanation, no action or commentary appears. Several standards relate to specific sections of the Model Rules of Professional Conduct, and the Model Rules are referenced in these standards. The terms “parent” and “client” are used interchangeably throughout the document. These standards apply to all attorneys who represent parents in child abuse and neglect cases, whether they work for an agency or privately.

As was done in the Standards of Practice for Attorneys Representing Child Welfare Agencies, ABA 2004, a group of standards for attorney managers is included in these standards. These standards primarily apply to parents’ attorneys who work for an agency or law firm — an institutional model of representation. Solo practitioners, or attorneys who individually receive appointments from the court, may wish to review this part of the standards, but may find some do not apply. However, some standards in this section, such as those about training and caseload, are relevant for all parents’ attorneys.

As was done in the Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, ABA 1996, a section of the standards concerns the Role of the Court in implementing these Standards. The ABA and the National Council of Juvenile and Family Court
Judges have policies concerning the importance of the court in ensuring that all parties in abuse and neglect cases have competent representation.

Representing a parent in an abuse and neglect case is a difficult and emotional job. There are many responsibilities. These standards are intended to help the attorney prioritize duties and manage the practice in a way that will benefit each parent on the attorney’s caseload.
SUMMARY: ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases

Basic Obligations: The parent’s attorney shall:

General:

1. Adhere to all relevant jurisdiction-specific training and mentoring requirements before accepting a court appointment to represent a parent in an abuse or neglect case.

2. Acquire sufficient working knowledge of all relevant federal and state laws, regulations, policies, and rules.

3. Understand and protect the parent’s rights to information and decision making while the child is in foster care.

4. Actively represent a parent in the pre-petition phase of a case, if permitted within the jurisdiction.

5. Avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the client.

6. Cooperate and communicate regularly with other professionals in the case.

Relationship with the Client:

7. Advocate for the client’s goals and empower the client to direct the representation and make informed decisions based on thorough counsel.

8. Act in accordance with the duty of loyalty owed to the client.

9. Adhere to all laws and ethical obligations concerning confidentiality.

10. Provide the client with contact information in writing and establish a message system that allows regular attorney-client contact.

11. Meet and communicate regularly with the client well before court proceedings. Counsel the client about all legal matters related to the case, including specific allegations against the client, the service plan, the client’s rights in the
pending proceeding, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with service plans.

12. Work with the client to develop a case timeline and tickler system.

13. Provide the client 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.

14. Be alert to and avoid potential conflicts of interest that would interfere with the competent representation of the client.

15. Act in a culturally competent manner and with regard to the socioeconomic position of the parent throughout all aspects of representation.

16. Take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.

17. Be aware of the unique issues an incarcerated parent faces and provide competent representation to the incarcerated client.

18. Be aware of the client’s mental health status and be prepared to assess whether the parent can assist with the case.

**Investigation:**

19. Conduct a thorough and independent investigation at every stage of the proceeding.

20. Interview the client well before each hearing, in time to use client information for the case investigation.

**Informal Discovery:**


22. Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the caseworker and providers.

**Formal Discovery:**

23. When needed, use formal discovery methods to obtain information.

**Court Preparation:**
24. Develop a case theory and strategy to follow at hearings and negotiations.

25. Timely file all pleadings, motions, and briefs. Research applicable legal issues and advance legal arguments when appropriate.

26. Engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.

27. Aggressively advocate for regular visitation in a family-friendly setting.

28. With the client’s permission, and when appropriate, engage in settlement negotiations and mediation to resolve the case.

29. Thoroughly prepare the client to testify at the hearing.

30. Identify, locate and prepare all witnesses.

31. Identify, secure, prepare and qualify expert witness when needed. When permissible, interview opposing counsel’s experts.

**Hearings:**

32. Attend and prepare for all hearings, including pretrial conferences.

33. Prepare and make all appropriate motions and evidentiary objections.

34. Present and cross-examine witnesses, prepare and present exhibits.

35. In jurisdictions in which a jury trial is possible, actively participate in jury selection and drafting jury instructions.

36. Request closed proceedings (or a cleared courtroom) in appropriate cases.

37. Request the opportunity to make opening and closing arguments.

38. Prepare proposed findings of fact, conclusions of law and orders when they will be used in the court’s decision or may otherwise benefit the client.

**Post Hearings/Appeals:**

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

40. Take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.

41. Consider and discuss the possibility of appeal with the client.
42. If the client decides to appeal, timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the jurisdiction’s Rules of Appellate Procedure.

43. Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending.

44. Communicate the results of the appeal and its implications to the client.

**Obligations of Attorney Managers:**

Attorney Managers are urged to:

1. Clarify attorney roles and expectations.

2. Determine and set reasonable caseloads for attorneys.

3. Advocate for competitive salaries for staff attorneys.

4. Develop a system for the continuity of representation.

5. Provide attorneys with training and education opportunities regarding the special issues that arise in the client population.

6. Establish a regular supervision schedule.

7. Create a brief and forms bank.

8. Ensure the office has quality technical and support staff as well as adequate equipment, library materials, and computer programs to support its operations.

9. Develop and follow a recruiting and hiring practice focused on hiring highly qualified candidates.

10. Develop and implement an attorney evaluation process.

11. Work actively with other stakeholders to improve the child welfare system, including court procedures.

**Role of the Court**

The Court is urged to:

1. Recognize the importance of the parent attorney’s role.

2. Establish uniform standards of representation for parents’ attorneys.
3. Ensure the attorneys who are appointed to represent parents in abuse and neglect cases are qualified, well-trained, and held accountable for practice that complies with these standards.

4. Ensure appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been dismissed from the court’s jurisdiction.

5. Ensure parents’ attorneys receive fair compensation.

6. Ensure timely payment of fees and costs for attorneys.

7. Provide interpreters, investigators and other specialists needed by the attorneys to competently represent clients. Ensure attorneys are reimbursed for supporting costs, such as use of experts, investigation services, interpreters, etc.

8. Ensure that attorneys who are receiving appointments carry a reasonable caseload that would allow them to provide competent representation for each of their clients.

9. Ensure all parties, including the parent’s attorney, receive copies of court orders and other documentation.

10. Provide contact information between clients and attorneys.

11. Ensure child welfare cases are heard promptly with a view towards timely decision making and thorough review of issues.
Basic Obligations: The parent’s attorney shall:

General

1. **Adhere to all relevant jurisdiction-specific training and mentoring requirements before accepting a court appointment to represent a parent in an abuse or neglect case.**

   **Action:** The parent’s attorney must participate in all required training and mentoring before accepting an appointment.

   **Commentary:** As in all areas of law, it is essential that attorneys learn the substantive law as well as local practice. A parent’s fundamental liberty interest in the care and custody of his or her child is at stake, and the attorney must be adequately trained to protect this interest. Because the stakes are so high, the standards drafting committee recommends all parents’ attorneys receive a minimum of 20 hours of relevant training before receiving an appointment and a minimum of 15 hours of related training each year. Training should directly relate to the attorney’s child welfare practice. This is further detailed in Attorney Managers Standard 5 below. In addition, the parent’s attorney should actively participate in ongoing training opportunities. Even if the attorney’s jurisdiction does not require training or mentoring, the attorney should seek it. Each state should make comprehensive training available to parents’ attorneys throughout the state. Training may include relevant online or video training.

2. **Acquire sufficient working knowledge of all relevant federal and state laws, regulations, policies, and rules.**

   **Action:** Parents’ attorneys may come to the practice with competency in the various aspects of child abuse and neglect practice, or they need to be trained on them. It is essential for the parent’s attorney to read and understand all state laws, policies and procedures regarding child abuse and neglect. In addition, the parent’s attorney must be familiar with the following laws to recognize when they are relevant to a case and should be prepared to research them when they are applicable:

   - Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357
   - Child Abuse Prevention Treatment Act (CAPTA), P.L.108-36
   - State Indian Child Welfare Act laws

Interstate Compact on Placement of Children (ICPC)
Foster Care Independence Act of 1999 (FCIA), P.L. 106-169
Individuals with Disabilities Education Act (IDEA), P.L. 91-230
Family Education Rights Privacy Act (FERPA), 20 U.S.C. § 1232g
Public Health Act, 42 U.S.C. Sec. 290dd-2 and 42 C.F.R. Part 2
Immigration laws relating to child welfare and child custody
State laws and rules of evidence
State laws and rules of civil procedure
State laws and rules of criminal procedure
State laws concerning privilege and confidentiality, public benefits, education, and disabilities
State laws and rules of professional responsibility or other relevant ethics standards
State laws regarding domestic violence
State domestic relations laws

Commentary: Although the burden of proof is on the child welfare agency, in practice the parent and the parent’s attorney generally must demonstrate that the parent can adequately care for the child. The parent’s attorney must consider all obstacles to this goal, such as criminal charges against the parent, immigration issues, substance abuse or mental health issues, confidentiality concerns, permanency timelines, and the child’s individual service issues. To perform these functions, the parent’s attorney must know enough about all relevant laws to vigorously advocate for the parent’s interests. Additionally, the attorney must be able to use procedural, evidentiary and confidentiality laws and rules to protect the parent’s rights throughout court proceedings.

3. Understand and protect the parent’s rights to information and decision making while the child is in foster care.

Action: The parent’s attorney must explain to the parent what decision-making authority remains with the parent and what lies with the child welfare agency while the child is in foster care. The parent’s attorney should seek updates and reports from any service provider working with the child/family or help the client obtain information about the child’s safety, health, education and well-being when the client desires. Where decision-making rights remain, the parent’s attorney should assist the parent in exercising his or her rights to continue to make decisions regarding the child’s medical, mental health and educational services. If necessary, the parent’s attorney should intervene with the child welfare agency, provider agencies, medical providers and the school to ensure the parent
has decision-making opportunities. This may include seeking court orders when the
parent has been left out of important decisions about the child’s life.

Commentary: Unless and until parental rights are terminated, the parent has parental
obligations and rights while a child is in foster care. Advocacy may be necessary to
ensure the parent is allowed to remain involved with key aspects of the child’s life. Not
only should the parent’s rights be protected, but continuing to exercise as much parental
responsibility as possible is often an effective strategy to speed family reunification.
Often, though, a parent does not understand that he or she has the right to help make
decisions for, or obtain information about, the child. Therefore, it is the parent’s
attorney’s responsibility to counsel the client and help the parent understand his or her
rights and responsibilities and try to assist the parent in carrying them out.

4. Actively represent a parent in the prepetition phase of a case, if permitted
within the jurisdiction.

Action: The goal of representing a parent 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. The parent’s attorney should counsel the
client about the client’s rights in the investigation stage as well as the realistic pros and
cons of cooperating with the child welfare agency (i.e., the parent’s admissions could be
used against the client later, but cooperating with services could eliminate a petition
filing). The parent’s attorney should acknowledge that the parent may be justifiably angry
that the agency is involved with the client’s family, and help the client develop strategies
so the client does not express that anger toward the caseworker in ways that may
undermine the client’s goals. The attorney should discuss available services and help the
client enroll in those in which the client wishes to participate. The attorney should
explore conference opportunities with the agency. If it would benefit the client, the
attorney should attend any conferences. There are times that an attorney’s presence in a
conference can shut down discussion, and the attorney should weigh that issue when
deciding whether to attend. The attorney should prepare the client for issues that might
arise at the conference, such as services and available kinship resources, and discuss with
the client the option of bringing a support person to a conference.

Commentary: A few jurisdictions permit parents’ attorneys to begin their representation
before the child welfare agency files a petition with the court. When the agency becomes
involved with the families, it can refer parents to attorneys so that parents will have the
benefit of counsel throughout the life of the case. During the prepetition phase, the
parent’s attorney has the opportunity to work with the parent and help the parent fully
understand the issues and the parent’s chances of retaining custody of the child. The
parent’s attorney 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 attorney
should work intensively with the parent to explore all appropriate services.

5. Avoid continuances (or reduce empty adjournments) and work to reduce
delays in court proceedings unless there is a strategic benefit for the client.
Action: The parent’s attorney should not request continuances unless there is an emergency or it benefits the client’s case. If continuances are necessary, the parent’s attorney should request the continuance in writing, as far as possible in advance of the hearing, and should request the shortest delay possible, consistent with the client’s interests. The attorney must notify all counsel of the request. The parent’s attorney should object to repeated or prolonged continuance requests by other parties if the continuance would harm the client.

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

6. Cooperate and communicate regularly with other professionals in the case.4

Action: The parent’s attorney should communicate with attorneys for the other parties, court appointed special advocates (CASAs) or guardians ad litem (GALs). Similarly, the parent’s attorney should communicate with the caseworker, foster parents and service providers to learn about the client’s progress and their views of the case, as appropriate. The parent’s attorney should have open lines of communication with the attorney(s) representing the client in related matters such as any criminal, protection from abuse, private custody or administrative proceedings to ensure that probation orders, protection from abuse orders, private custody orders and administrative determinations do not conflict with the client’s goals in the abuse and neglect case.

Commentary: The parent’s attorney must have all relevant information to try a case effectively. This requires open and ongoing communication with the other attorneys and service providers working with the client and family. Rules of professional ethics govern contact with represented and unrepresented parties. In some states, for instance, attorneys may not speak with child welfare caseworkers without the permission of agency counsel. The parent’s attorney must be aware of local rules on this issue and seek permission to speak with represented parties when that would further the client’s interests.

Relationship with the Client5

7. Advocate for the client’s goals and empower the client to direct the representation and make informed decisions based on thorough counsel.6

Action: Attorneys representing parents must understand the client’s goals and pursue them vigorously. The attorney should explain that the attorney’s job is to represent the client’s interests and regularly inquire as to the client’s goals, including ultimate case
goals and interim goals. The attorney should explain all legal aspects of the case and provide comprehensive counsel on the advantages and disadvantages of different options. At the same time, the attorney should be careful not to usurp the client’s authority to decide the case goals.

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

8. **Act in accordance with the duty of loyalty owed to the client.**

**Action:** Attorneys representing parents should show respect and professionalism towards their clients. Parents’ attorneys should support their clients and be sensitive to the client’s individual needs. Attorneys should remember that they may be the client’s only advocate in the system and should act accordingly.

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

9. **Adhere to all laws and ethical obligations concerning confidentiality.**

**Action:** Attorneys representing parents must understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client. The attorney must fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. Consistent with the client's interests and goals, the attorney must seek to protect from disclosure confidential information concerning the client.

**Commentary:** Confidential information contained in a parent's substance abuse treatment records, domestic violence treatment records, mental health records and medical records is often at issue in abuse and neglect cases. Improper disclosure of confidential information early in the proceeding may have a negative impact on the manner in which
the client is perceived by the other parties and the court. For this reason, it is crucial for the attorney to advise the client promptly as to the advantages and disadvantages of releasing confidential information, and for the attorney to take whatever steps necessary to protect the client's privileges or rights to confidentiality.

10. Provide the client with contact information in writing and establish a message system that allows regular attorney-client contact.\(^8\)

**Action:** The parent’s attorney should ensure the parent understands how to contact the attorney and that the attorney wants to hear from the client on an ongoing basis. The attorney should explain that even when the attorney is unavailable, the parent should leave a message. The attorney must respond to client messages in a reasonable time period. The attorney and client should establish a reliable communication system that meets the client’s needs. For example, it may involve telephone contact, email or communication through a third party when the client agrees to it. Interpreters should be used when the attorney and client are not fluent in the same language.

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

11. Meet and communicate regularly with the client well before court proceedings. Counsel the client about all legal matters related to the case, including specific allegations against the client, the service plan, the client’s rights in the pending proceeding, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with service plans.\(^9\)

**Action:** The parent’s attorney should spend time with the client to prepare the case and address questions and concerns. The attorney should clearly explain the allegations made against the parent, what is likely to happen before, during and after each hearing, and what steps the parent can take to increase the likelihood of reuniting with the child. The attorney should explain any settlement options and determine whether the client wants the attorney to pursue such options. The attorney should explain courtroom procedures. The attorney should write to the client to ensure the client understands what happened in court and what is expected of the client.
The attorney should ensure a formal interpreter is involved when the attorney and client are not fluent in the same language. The attorney should advocate for the use of an interpreter when other professionals in the case who are not fluent in the same language as the client are interviewing the client as well.

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

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

The parent’s attorney and the client should identify barriers to the client engaging in services, such as employment, transportation, and financial issues. The attorney should work with the client, caseworker and service provider to resolve the barriers.

The attorney should be aware of any special issues the parents may have related to participating in the proposed case plan, such as an inability to read or language differences, and advocate with the child welfare agency and court for appropriate accommodations.

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

### 12. Work with the client to develop a case timeline and tickler system.

**Action:** At the beginning of a case, the parent’s attorney and client should develop timelines that reflect projected deadlines and important dates and a tickler/calendar system to remember the dates. The timeline should specify what actions the attorney and parent will need to take and dates by which they will be completed. The attorney and the client should know when important dates will occur and should be focused on accomplishing the objectives in the case plan in a timely way. The attorney should provide the client with a timeline/calendar, outlining known and prospective court dates, service appointments, deadlines and critical points of attorney-client contact. The attorney should record federal and state law deadlines in the system (e.g., the 15 of 22 month point that would necessitate a termination of parental rights (TPR), if exceptions do not apply).
Commentary: Having a consistent calendaring system can help an attorney manage a busy caseload. Clients should receive a hard copy calendar to keep track of appointments and important dates. This helps parents stay focused on accomplishing the service plan goals and meeting court-imposed deadlines.

13. Provide the client 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.10

Action: The parent’s attorney should provide all written documents to the client or ensure that they are provided in a timely manner and ensure the client understands them. If the client has difficulty reading, the attorney should read the documents to the client. In all cases, the attorney should be available to discuss and explain the documents to the client.

Commentary: The parent’s attorney should ensure the client is informed about what is happening in the case. Part of doing so is providing the client with written documents and reports relevant to the case. If the client has this information, the client will be better able to assist the attorney with the case and fulfill his or her parental obligations. The attorney must be aware of any allegations of domestic violence in the case and not share confidential information about an alleged or potential victim’s location.

14. Be alert to and avoid potential conflicts of interest that would interfere with the competent representation of the client.11

Action: The parent’s attorney must not represent both parents if their interests differ. The attorney should generally avoid representing both parents when there is even a potential for conflicts of interests. In situations involving allegations of domestic violence the attorney should never represent both parents.

Commentary: In most cases, attorneys should avoid representing both parents in an abuse or neglect case. In the rare case in which an attorney, after careful consideration of potential conflicts, may represent both parents, it should only be with their informed consent. 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 attorney might be required to withdraw from representing one or both parents. This could be difficult for the clients and delay the case. Other examples of potential conflicts of interest that the attorney should avoid include representing multiple fathers in the same case or representing parties in a separate case who have interests in the current case.

In analyzing whether a conflict of interest exists, the attorney must consider “whether pursuing one client’s objectives will prevent the lawyer from pursuing another client’s objectives, and whether confidentiality may be compromised.”12

15. Act in a culturally competent manner and with regard to the socioeconomic position of the parent throughout all aspects of representation.
**Action:** The parent’s attorney should learn about and understand the client’s background, determine how that has an impact on the client’s case, and always show the parent respect. The attorney must understand how cultural and socioeconomic differences impact interaction with clients, and must interpret the client’s words and actions accordingly.

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

16. **Take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.**

**Action:** Upon accepting an appointment, the parent’s attorney should communicate to the client the importance of staying in contact with the attorney. While the attorney must communicate regularly with the client, and be informed of the client’s wishes before a hearing, the client also must keep in contact with the attorney. At the beginning of the representation, the attorney should tell the client how to contact the attorney, and discuss the importance of the client keeping the attorney informed of changes in address, phone numbers, and the client’s current whereabouts.

The parent’s attorney should attempt to locate and communicate with missing parents to formulate what positions the attorney should take at hearings, and to understand what information the client wishes the attorney to share with the child welfare agency and the court. If, after diligent steps, the attorney is unable to communicate with the client, the attorney should assess whether the client’s interests are better served by advocating for the client’s last clearly articulated position, or declining to participate in further court proceedings, and should act accordingly. After a prolonged period without contact with the client, the attorney should consider withdrawing from representation.

**Commentary:**

*Diligent Steps to Locate:* To represent a client adequately, the attorney must know what the client wishes. It is, therefore, important for parents’ attorneys to take diligent steps to locate missing clients. Diligent steps can include speaking with the client’s family, the caseworker, the foster care provider and other service providers. It should include contacting the State Department of Corrections, Social Security Administration, and
Child Support Office, and sending letters by regular and certified mail to the client’s last known address. The attorney should also visit the client’s last known address and asking anyone who lives there for information about the client’s whereabouts. Additionally, the attorney should leave business cards with contact information with anyone who might have contact with the client as long as this does not compromise confidentiality.

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

17. **Be aware of the unique issues an incarcerated parent faces and provide competent representation to the incarcerated client.**

**Action:**

*Adoption and Safe Families Act (ASFA) Issues:* The parent’s attorney must be particularly diligent when representing an incarcerated parent. The attorney must be aware of the reasons for the incarceration. If the parent is incarcerated as a result of an act against the child or another child in the family, the child welfare agency may request an order from the court that reasonable efforts toward reunification are not necessary and attempt to fast-track the case toward other permanency goals. If this is the case, the attorney must be prepared to argue against such a motion, if the client opposes it. Even if no motion is made to waive the reasonable efforts requirement, in some jurisdictions the agency may not have the same obligations to assist parents who are incarcerated. Attorneys should counsel the client as to any effects incarceration has on the agency’s obligations and know the jurisdiction’s statutory and case law concerning incarceration as a basis for TPR. The attorney should help the client identify potential kinship placements, relatives who can provide care for the child while the parent is incarcerated. States vary in whether and how they weigh factors such as the reason for incarceration, length of incarceration and the child’s age at the time of incarceration when considering TPR. Attorneys must understand the implications of ASFA for an incarcerated parent who has difficulty visiting and planning for the child.

*Services:* Obtaining services such as substance abuse treatment, parenting skills, or job training while in jail or prison is often difficult. The parent’s attorney may need to advocate for reasonable efforts to be made for the client, and assist the parent and the agency caseworker in accessing services. The attorney must assist the client with these services. Without services, it is unlikely the parent will be reunified with the child upon discharge from prison.
If the attorney practices in a jurisdiction that has a specialized unit for parents and children, and especially when the client is incarcerated for an offense that is unrelated to the child, the attorney should advocate for such a placement. The attorney must learn about available resources, contact the placements and attempt to get the support of the agency and child’s attorney.

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

If the client cannot meet the attorney before court hearings, the attorney must find alternative ways to communicate. This may include visiting the client in prison or engaging in more extensive phone or mail contact than with other clients. The attorney should be aware of the challenges to having a confidential conversation with the client, and attempt to resolve that issue.

The parent’s attorney should also communicate with the parent’s criminal defense attorney. There may be issues related to self-incrimination as well as concerns about delaying the abuse and neglect case to strengthen the criminal case or vice versa.

**Appearance in Court:** The client’s appearance in court frequently raises issues that require the attorney’s attention in advance. The attorney should find out from the client if the client wants to be present in court. In some prisons, inmates lose privileges if they are away from the prison, and the client may prefer to stay at the prison. If the client wants to be present in court, the attorney should work with the court to obtain a writ of habeas corpus/bring-down order/order to produce or other documentation necessary for the client to be transported from the prison. The attorney should explain to any client hesitant to appear, that the case will proceed without the parent’s presence and raise any potential consequences of that choice. If the client does not want to be present, or if having the client present is not possible, the attorney should be educated about what means are available to have the client participate, such as by telephone or video conference. The attorney should make the necessary arrangements for the client. Note that it may be particularly difficult to get a parent transported from an out-of-state prison or a federal prison.

18. **Be aware of the client’s mental health status and be prepared to assess whether the parent can assist with the case.**

**Action:** Attorneys representing parents must be able to determine whether a client’s mental status (including mental illness and mental retardation) interferes with the client’s ability to make decisions about the case. The attorney should be familiar with any mental health diagnosis and treatment that a client has had in the past or is presently undergoing (including any medications for such conditions). The attorney should get consent from the client to review mental health records and to speak with former and current mental
health providers. The attorney should explain to the client that the information is necessary to understand the client’s capacity to work with the attorney. If the client’s situation seems severe, the attorney should also explain that the attorney may seek the assistance of a clinical social worker or some other mental health expert to evaluate the client’s ability to assist the attorney because if the client does not have that capacity, the attorney may have to ask that a guardian ad litem be appointed to the client. Since this action may have an adverse effect on the client’s legal claims, the attorney should ask for a GAL only when absolutely necessary.

Commentary: Many parents charged with abuse and neglect have serious or long-standing mental health challenges. However, not all of those conditions or diagnoses preclude the client from participating in the defense. Whether the client can assist counsel is a different issue from whether the client is able to parent the children, though the condition may be related to ability to parent. While the attorney is not expected to be a mental health expert, the attorney should be familiar with mental health conditions and should review such records carefully. The fact that a client suffers a disability does not diminish the lawyer’s obligation to treat the client with attention and respect. If the client seems unable to assist the attorney in case preparation, the attorney should seek an assessment of the client’s capacity from a mental health expert. If the expert and attorney conclude that the client is not capable of assisting in the case, the attorney should inform the client that the attorney will seek appointment of a guardian ad litem from the court. The attorney should be careful to explain that the attorney will still represent the client in the child protective case. The attorney must explain to the client that appointment of a GAL will limit the client’s decision-making power. The GAL will stand in the client’s shoes for that purpose.

Investigation

19. Conduct a thorough and independent investigation at every stage of the proceeding.

Action: The parent’s attorney must take all necessary steps to prepare each case. A thorough investigation is an essential element of preparation. The parent’s attorney can not rely solely on what the agency caseworker reports about the parent. Rather, the attorney should contact service providers who work with the client, relatives who can discuss the parent’s care of the child, the child’s teacher or other people who can clarify information relevant to the case. If necessary, the attorney should petition the court for funds to hire an investigator.

Commentary: In some jurisdictions, parents’ attorneys work with social workers or investigators who can meet with clients and assist in investigating the underlying issues that arise as cases proceed. The drafting committee recommends such a model of representation. However, if the attorney is not working with such a team, the attorney is still responsible for gaining all pertinent case information.

20. Interview the client well before each hearing, in time to use client information for the case investigation.
**Action:** The parent’s attorney should meet with the parent regularly throughout the case. The meetings should occur well before the hearing, not at the courthouse just minutes before the case is called before the judge. The attorney should ask the client questions to obtain information to prepare the case, and strive to create a comfortable environment so the client can ask the attorney questions. The attorney should use these meetings to prepare for court as well as to counsel the client concerning issues that arise during the course of the case. Information obtained from the client should be used to propel the investigation.

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

**Informal Discovery**

21. **Review the child welfare agency case file.**

**Action:** The parent’s attorney should ask for and review the agency case file as early during the course of representation as possible. The file contains useful documents that the attorney may not yet have, and will instruct the attorney on the agency’s case theory. If the agency case file is inaccurate, the attorney should seek to correct it. The attorney must read the case file periodically because information is continually being added by the agency.

**Commentary:** While an independent investigation is essential, it is also important that the parent’s attorney understands what information the agency is relying on to further its case. The case file should contain a history about the family that the client may not have shared, and important reports and information about both the child and parent that will be necessary for the parent’s attorney to understand for hearings as well as settlement conferences. Unless the attorney also has the information the agency has, the parent’s attorney will walk into court at a disadvantage.

22. **Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the caseworker and providers.**

**Action:** As part of the discovery phase, the parent’s attorney should gather all relevant documentation regarding the case that might shed light on the allegations, the service plan and the client’s strengths as a parent. The attorney should not limit the scope as information about past or present criminal, protection from abuse, private custody or
administrative proceedings involving the client can have an impact on the abuse and neglect case. The attorney should also review the following kinds of documents:

- social service records
- court records
- medical records
- school records
- evaluations of all types

The attorney should be sure to obtain reports and records from service providers.

Discovery is not limited to information regarding the client, but may include records of others such as the other parent, stepparent, child, relative and non-relative caregivers.

Commentary: In preparing the client’s case, the attorney must try to learn as much about the parent and the family as possible. Various records may contradict or supplement the agency’s account of events. Gathering documentation to verify the client’s reports about what occurred before the child came into care and progress the parent is making during the case is necessary to provide concrete evidence for the court. Documentation may also alert the attorney to issues the client is having that the client did not share with counsel. The attorney may be able to intercede and assist the client with service providers, agency caseworkers and others.

**Formal Discovery**

23. When needed, use formal discovery methods to obtain information.

**Action:** The parent’s attorney should know what information is needed to prepare for the case and understand the best methods of obtaining that information. The attorney should become familiar with the pretrial requests and actions used in the jurisdiction and use whatever tools are available to obtain necessary information. The parent’s attorney should consider the following types of formal discovery: depositions, interrogatories (including expert interrogatories), requests for production of documents, requests for admissions, and motions for mental or physical examination of a party. The attorney should file timely motions for discovery and renew these motions as needed to obtain the most recent records.

The attorney should, consistent with the client's interests and goals, and where appropriate, take all necessary steps to preserve and protect the client's rights by opposing discovery requests of other parties.

**Court Preparation**

24. Develop a case theory and strategy to follow at hearings and negotiations.
Action: Once the parent’s attorney has completed the initial investigation and discovery, including interviews with the client, the attorney should develop a strategy for representation. The strategy may change throughout the case, as the client makes or does not make progress, but the initial theory is important to assist the attorney in staying focused on the client’s wishes and on what is achievable. The theory of the case should inform the attorney’s preparation for hearings and arguments to the court throughout the case. It should also help the attorney decide what evidence to develop for hearings and the steps to take to move the case toward the client’s ultimate goals (e.g., requesting increased visitation when a parent becomes engaged in services).

25. Timely file all pleadings, motions, and briefs. Research applicable legal issues and advance legal arguments when appropriate.

Action: The attorney must file petitions, motions, discovery requests, and responses and answers to pleadings filed by other parties that are appropriate for the case. These pleadings must be thorough, accurate and timely.

When a case presents a complicated or new legal issue, the parent’s attorney should conduct the appropriate research before appearing in court. The attorney must have a solid understanding of the relevant law, and be able to present it to the judge in a compelling and convincing way. The attorney should be prepared to distinguish case law that appears to be unfavorable. If the judge asks for memoranda of law, the attorney will already have done the research and will be able to use it to argue the case well. If it would advance the client’s case, the parent’s attorney should present an unsolicited memorandum of law to the court.

Commentary: Actively filing motions, pleadings and briefs benefits the client. This practice puts important issues before the court and builds credibility for the attorney. In addition to filing responsive papers and discovery requests, the attorney should proactively seek court orders that benefit the client, e.g., filing a motion to enforce court orders to ensure the child welfare agency is meeting its reasonable efforts obligations. When an issue arises, it is often appropriate to attempt to resolve it informally with other parties. When out-of-court advocacy is not successful, the attorney should not wait to bring the issue to the court’s attention if that would serve the client’s goals.

Arguments in child welfare cases are often fact-based. Nonetheless, attorneys should ground their arguments in statutory, regulatory and common law. These sources of law exist in each jurisdiction, as well as in federal law. Additionally, law from other jurisdictions can be used to sway a court in the client’s favor. An attorney who has a firm grasp of the law, and who is willing to do legal research on an individual case, may have more credibility before the court. At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Attorneys should be mindful to preserve issues for appellate review by making a record even if the argument is unlikely to prevail at the trial level.
26. Engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.

**Action:** The parent’s attorney must advocate for the client both in and out of court. The parent’s attorney should know about the social, mental health, substance abuse treatment and other services that are available to parents and families in the jurisdiction in which the attorney practices so the attorney can advocate effectively for the client to receive these services. The attorney should ask the client if the client wishes to engage in services. If so, the attorney must determine whether the client has access to the necessary services to overcome the issues that led to the case.

The attorney should actively engage in case planning, including attending major case meetings, to ensure the client asks for and receives the needed services. The attorney should also ensure the client does not agree to undesired services that are beyond the scope of the case. A major case meeting is one in which the attorney or client believes the attorney will be needed to provide advice or one in which a major decision on legal steps, such as a change in the child’s permanency goal, will be made. The attorney should be available to accompany the client to important meetings with service providers as needed.

The services in which the client is involved must be tailored to the client’s needs, and not merely hurdles over which the client must jump (e.g., if the client is taking parenting classes, the classes must be relevant to the underlying issue in the case).

Whenever possible, the parent’s attorney should engage or involve a social worker as part of the parent’s “team” to help determine an appropriate case plan, evaluate social services suggested for the client, and act as a liaison and advocate for the client with the service providers.

When necessary, the parent’s attorney should seek court orders to force the child welfare agency to provide services or visitation to the client. The attorney may need to ask the court to enforce previously entered orders that the agency did not comply with in a reasonable period. The attorney should consider whether the child’s representative (lawyer, GAL or CASA) might be an ally on service and visitation issues. If so, the attorney should solicit the child’s representative’s assistance and work together in making requests to the agency and the court.

**Commentary:** For a parent to succeed in a child welfare case the parent must receive and cooperate with social services. It is therefore necessary that the parent’s attorney does whatever possible to obtain appropriate services for the client, and then counsel the client about participating in such 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
Funds for public transportation so the client can attend services

27. Aggressively advocate for regular visitation in a family-friendly setting.

**Action:** The parent’s attorney should advocate for an effective visiting plan and counsel the parent on the importance of regular contact with the child. Preservation of parent-child bonds through regular visitation is essential to any reunification effort. Courts and child welfare agencies may need to be pushed to develop visiting plans that best fit the needs of the individual family. Factors to consider in visiting plans include:
- Frequency
- Length
- Location
- Supervision
- Types of activities
- Visit coaching – having someone at the visit who could model effective parenting skills

**Commentary:** Consistent, high quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the parent’s attorney seek a visitation order that will allow the best possible visitation. Effort should be made to have visits be unsupervised or at the lowest possible level of supervision. Families are often more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than caseworkers. Attorneys 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.

28. With the client’s permission, and when appropriate, engage in settlement negotiations and mediation to resolve the case.

**Action:** The parent’s attorney should, when appropriate, participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the client’s goals. Parents’ attorneys should be trained in mediation and negotiation skills and be comfortable resolving cases outside a courtroom setting when consistent with the client’s position. When authorized to do so by the client, the parent’s attorney should share information about services in which the parent is engaged and provide copies of favorable reports from service providers. This information may impact settlement discussions. The attorney must communicate all settlement offers to the client and discuss their advantages and disadvantages. It is the client’s decision whether to settle. The attorney must be willing to try the case and not compromise solely to avoid the hearing. The attorney should use mediation resources when available.
Commentary: Negotiation and mediation often result in a detailed agreement among parties about actions the participants must take. Generally, when agreements have been thoroughly discussed and negotiated, all parties, including the parents, feel as if they had a say in the decision and are, therefore, 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 settlements generally happen more quickly than full hearings and therefore move a case along swiftly. The attorney should discuss all aspects of proposed settlements with the parent, including all legal effects of admissions or agreements. The attorney should advise the client about the chances of prevailing if the matter proceeds to trial and any potential negative impact associated with contesting the allegations. The final decision regarding settlement must be the client’s.

A written, enforceable agreement should result from any settlement, so all parties are clear about their rights and obligations. The parent’s attorney should ensure agreements accurately reflect the understandings of the parties. The parent’s attorney should schedule a hearing if promises made to the parent are not kept.

29. Thoroughly prepare the client to testify at the hearing.

Action: When having the client testify will benefit the case or when the client wishes to testify, the parent’s attorney should thoroughly prepare the client. The attorney should discuss and practice the questions that the attorney will ask the client, as well as the types of questions the client should expect opposing counsel to ask. The parent’s attorney should help the parent think through the best way to present information, familiarize the parent with the court setting, and offer guidance on logistical issues such as how to get to court on time and appropriate court attire.

Commentary: Testifying in court can be intimidating. For a parent whose family is the focus of the proceeding, the court experience is even scarier. The parent’s attorney should be attuned to the client’s comfort level about the hearing, and ability to testify in the case. The attorney should spend time explaining the process and the testimony itself to the client. The attorney should provide the client with a written list of questions that the attorney will ask, if this will help the client.

30. Identify, locate and prepare all witnesses.

Action: The parent’s attorney, in consultation with the parent, should develop a witness list well before a hearing. The attorney should not assume the agency will call a witness, even if the witness is named on the agency’s witness list. The attorney should, when possible, contact the potential witnesses to determine if they can provide helpful testimony.

When appropriate, witnesses should be informed that a subpoena is on its way. The attorney should also ensure the subpoena is served. The attorney should subpoena potential agency witnesses (e.g., a previous caseworker) who have favorable information about the client.
The attorney should set aside time to fully prepare all witnesses in person before the hearing. The attorney should remind the witnesses about the court date.

Commentary: Preparation is the key to successfully resolving a case, either in negotiation or trial. The attorney should plan as early as possible for the case and make arrangements accordingly. Witnesses may have direct knowledge of the allegations against the parent. They may be service providers working with the parent, or individuals from the community who could testify generally about the family’s strengths.

When appropriate, the parent’s attorney should consider working with other parties who share the parent’s position (such as the child’s representative) when creating a witness list, issuing subpoenas, and preparing witnesses. Doctors, nurses, teachers, therapists, and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing.

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

31. Identify, secure, prepare and qualify expert witness when needed. When permissible, interview opposing counsel’s experts.

Action: Often a case requires multiple experts in different roles, such as experts in 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 attorney should consider whether the opposing party is calling expert witnesses and determine whether the parent needs to call any experts.

When expert testimony is required, the attorney should identify the qualified experts and seek necessary funds to retain them in a timely manner. The attorney should subpoena the witnesses, giving them as much advanced notice of the court date as possible. As is true for all witnesses, the attorney should spend as much time as possible preparing the expert witnesses for the hearing. The attorney should be competent in qualifying expert witnesses.

When opposing counsel plans to call expert witnesses, the parent’s attorney should file expert interrogatories, depose the witnesses or interview the witnesses in advance, depending on the jurisdiction’s rules on attorney work product. The attorney should do whatever is necessary to learn what the opposing expert witnesses will say about the client during the hearing.

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

**Hearings**

**32. Attend and prepare for all hearings, including pretrial conferences.**

**Action:** The parent’s attorney must prepare for, and attend all hearings and participate in all telephone and other conferences with the court.

**Commentary:** For the parent to have a fair chance during the hearing, the attorney must be prepared and present in court. Participating in pretrial proceedings may improve case resolution for the parent. Counsel’s failure to participate in the proceedings in which all other parties are represented may disadvantage the parent. Therefore, the parent’s attorney should be actively involved in this stage. Other than in extraordinary circumstances, attorneys must appear for all court appearances on time. In many jurisdictions, if an attorney arrives to court late, or not at all, the case will receive a long continuance. This does not serve the client and does not instill confidence in the attorney. If an attorney has a conflict with another courtroom appearance, the attorney should notify the court and other parties and request a short continuance. The parent’s attorney should not have another attorney stand in to represent the client in a substantive hearing, especially if the other attorney is unfamiliar with the client or case.

**33. Prepare and make all appropriate motions and evidentiary objections.**

**Action:** The parent’s attorney should make appropriate motions and evidentiary objections to advance the client’s position during the hearing. If necessary, the attorney should file briefs in support of the client’s position on motions and evidentiary issues. The parent’s attorney should always be aware of preserving legal issues for appeal.

**Commentary:** It is essential that parents’ attorneys understand the applicable rules of evidence and all court rules and procedures. The attorney must be willing and able to make appropriate motions, objections, and arguments (e.g., objecting to the qualification of expert witnesses or raising the issue of the child welfare agency’s lack of reasonable efforts).

**34. Present and cross-examine witnesses, prepare and present exhibits.**

**Action:** The parent’s attorney must be able to present witnesses effectively to advance the client’s position. Witnesses must be prepared in advance and the attorney should know what evidence will be presented through the witnesses. The attorney must also be skilled at cross-examining opposing parties’ witnesses. The attorney must know how to offer documents, photos and physical objects into evidence.
At each hearing the attorney should keep the case theory in mind, advocate for the child to return home and for appropriate services, if that is the client’s position, and request that the court state its expectations of all parties.

Commentary: Becoming a strong courtroom attorney takes practice and attention to detail. The attorney must be sure to learn the rules about presenting witnesses, impeaching testimony, and entering evidence. The attorney should seek out training in trial skills and observe more experienced trial attorneys to learn from them. Even if the parent’s attorney is more seasoned, effective direct and cross-examination require careful preparation. The attorney must know the relevant records well enough to be able to impeach adverse witnesses and bring out in both direct and cross examinations any information that would support the parent’s position. Seasoned attorneys may wish to consult with other experienced attorneys about complex cases. Presenting and cross-examining witnesses are skills with which the parent’s attorney must be comfortable.

35. In jurisdictions in which a jury trial is possible, actively participate in jury selection and drafting jury instructions.

Commentary: Several jurisdictions around the country afford parties in child welfare cases the right to a jury trial at the adjudicatory or termination of parental rights stages. Parents’ attorneys in those jurisdictions should be skilled at choosing an appropriate jury, drafting jury instructions that are favorable to the client’s position, and trying the case before jurors who may not be familiar with child abuse and neglect issues.

36. Request closed proceedings (or a cleared courtroom) in appropriate cases.

Action: The parent’s attorney should be aware of who is in the courtroom during a hearing, and should request the courtroom be cleared of individuals not related to the case when appropriate. The attorney should be attuned to the client’s comfort level with people outside of the case hearing about the client’s family. The attorney should also be aware of whether the case is one in which there is media attention. Confidential information should not be discussed in front of the media or others without the express permission of the client.

Commentary: In many courts, even if they have a “closed court” policy, attorneys, caseworkers, and witnesses on other cases listed that day may be waiting in the courtroom. These individuals may make the client uncomfortable, and the parent’s attorney should request that the judge remove them from the courtroom. Even in an “open court” jurisdiction, there may be cases, or portions of cases, that outsiders should not be permitted to hear. The parent’s attorney must be attuned to this issue, and make appropriate requests of the judge.

37. Request the opportunity to make opening and closing arguments.
**Action:** When permitted by the judge, the parent’s attorney should make opening and closing arguments to best present the parent’s attorney’s theory of the.

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

**38.** Prepare proposed findings of fact, conclusions of law and orders when they will be used in the court’s decision or may otherwise benefit the client.

**Action:** Proposed findings of fact, conclusions of law, and orders should be prepared before a hearing. When the judge is prepared to enter a ruling, the judge can use the proposed findings or amend them as needed.

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

**Post Hearings/Appeals**

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

**Action:** After the hearing, the parent’s attorney should review the written order to ensure it reflects the court’s verbal order. If the order is incorrect, the attorney should take whatever steps are necessary to correct it. Once the order is final, the parent’s attorney should provide the client with a copy of the order and should review the order with the client to ensure the client understands it. If the client is unhappy with the order, the attorney should counsel the client about any options to appeal or request rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured. The attorney should counsel the client on the potential consequences of failing to comply with a court order.

**Commentary:** The parent may be angry about being involved in the child welfare system, and a court order that is not in the parent’s favor could add stress and frustration. It is essential that the parent’s attorney take time, either immediately after the hearing or at a meeting soon after the court date, to discuss the hearing and the outcome with the client. The attorney should counsel the client about all options, including appeal (see below).
Regardless of whether an appeal is appropriate, the attorney should counsel the parent about potential consequences of not complying with the order.

40. **Take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.**

**Action:** The parent’s attorney should answer the parent’s questions about obligations under the order and periodically check with the client to determine the client’s progress in implementing the order. If the client is attempting to comply with the order but other parties, such as the child welfare agency, are not meeting their responsibilities, the parent’s attorney should approach the other party and seek assistance on behalf of the client. If necessary, the attorney should bring the case back to court to review the order and the other party’s noncompliance or take other steps to ensure that appropriate social services are available to the client.

**Commentary:** The parent’s attorney should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The attorney should speak with the client regularly about progress and any difficulties the client is encountering while trying to comply with the court order or service plan. When the child welfare agency does not offer appropriate services, the attorney should consider making referrals to social service providers and, when possible, retaining a social worker to assist the client. The drafting committee of these standards recommends such an interdisciplinary model of practice.

41. **Consider and discuss the possibility of appeal with the client.**

**Action:** The parent’s attorney should consider and discuss with the client the possibility of appeal when a court’s ruling is contrary to the client’s position or interests. The attorney should counsel the client on the likelihood of success on appeal and potential consequences of an appeal. In most jurisdictions, the decision whether to appeal is the client’s as long as a non-frivolous legal basis for appeal exists. Depending on rules in the attorney’s jurisdiction, the attorney should also consider filing an extraordinary writ or motions for other post-hearing relief.

**Commentary:** When discussing the possibility of an appeal, the attorney should explain both the positive and negative effects of an appeal, including how the appeal could affect the parent’s goals. For instance, an appeal could delay the case for a long time. This could negatively impact both the parent and the child.

42. **If the client decides to appeal, timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the jurisdiction’s Rules of Appellate Procedure.**

**Action:** The parent’s attorney should carefully review his or her obligations under the state’s Rules of Appellate Procedure. The attorney should timely file all paperwork, including a notice of appeal and requests for stays of the trial court order, transcript, and
case file. If another party has filed an appeal, the parent’s attorney should explain the appeals process to the parent and ensure that responsive papers are filed timely.

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

In jurisdictions in which a different attorney from the trial attorney handles the appeal, the trial attorney should take all steps necessary to facilitate appointing appellate counsel and work with the new attorney to identify appropriate issues for appeal. The attorney who handled the trial may have insight beyond what a new attorney could obtain by reading the trial transcript.

If appellate counsel differs from the trial attorney, the appellate attorney should meet with the client as soon as possible. At the initial meeting, appellate counsel should determine the client's position and goals in the appeal. Appellate counsel should not be bound by the determinations of the client's position and goals made by trial counsel and should independently determine his or her client's position and goals on appeal.

If oral arguments are scheduled, the attorney should be prepared, organized, and direct. Appellate counsel should inform the client of the date, time and place scheduled for oral argument of the appeal upon receiving notice from the appellate court. Oral argument of the appeal on behalf of the client should not be waived, absent the express approval of the client, unless doing so would benefit the client. For example, in some jurisdictions appellate counsel may file a reply brief instead of oral argument. The attorney should weigh the pros and cons of each option.

Commentary: Appellate skills differ from the skills most trial attorneys use daily. The parent’s attorney may wish to seek training on appellate practice and guidance from an experienced appellate advocate when drafting the brief and preparing for argument. An appeal can have a significant impact on the trial judge who heard the case and trial courts throughout the state, as well as the individual client and family.

43. Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending.

Action: If the state court allows, the attorney in a child welfare matter should always consider requesting an expedited appeal. In this request, the attorney should provide information about why the case should be expedited, such as any special characteristics about the child and why delay would harm the relationship between the parent and child.

44. Communicate the results of the appeal and its implications to the client.
**Action**: The parent’s attorney should communicate the result of the appeal and its implications, and provide the client with a copy of the appellate decision. If, as a result of the appeal, the attorney needs to file any motions with the trial court, the attorney should do so.

**Obligations of Attorney Managers**

Attorney Managers are urged to:

1. Clarify attorney roles and expectations.

**Action**: The attorney manager must ensure that staff attorneys understand their role in representing clients and the expectations of the attorney manager concerning all staff duties. In addition to in-office obligations staff attorneys may attend meetings, conferences, and trainings. The attorney may need to attend child welfare agency or service provider meetings with clients. The manager should articulate these duties at the beginning of and consistently during the attorney’s employment. The manager should emphasize the attorney’s duties toward the client, and obligations to comply with practice standards.

**Commentary**: All employees want to know what is expected of them; one can only do a high quality job when the person knows the parameters and expectations of the position. Therefore, the attorney manager must consistently inform staff of those expectations. Otherwise, the staff attorney is set up to fail. The work of representing parents is too important, and too difficult, to be handled by people who do not understand their role and lack clear expectations. These attorneys need the full support of supervisors and attorney managers to perform their highest quality work.

2. Determine and set reasonable caseloads for attorneys.

**Action**: An attorney manager should determine reasonable caseloads for parents’ attorneys and monitor them to ensure the maximum is not exceeded. Consider a caseload/workload study, review written materials about such studies, or look into caseload sizes in similar counties to accurately determine ideal attorney caseloads. When assessing the appropriate number of cases, remember to account for all attorney obligations, case difficulty, time required to prepare a case thoroughly, support staff assistance, travel time, experience level of attorneys, and available time (excluding vacation, holidays, sick leave, training and other non-case-related activity). If the attorney manager carries a caseload, the number of cases should reflect the time the individual spends on management duties.

**Commentary**: High caseload is considered a major barrier to quality representation and a source of high attorney turnover. It is essential to decide what a reasonable caseload is in your jurisdiction. How attorneys define cases and attorney obligations vary from place-to-place, but having a manageable caseload is crucial. The standards drafting committee recommended a caseload of no more than 50-100 cases depending on what the attorney can handle competently and fulfill these standards. The type of practice the attorney has,
e.g., whether the attorney is part of a multidisciplinary representation team also has an impact on the appropriate caseload size. It is part of the attorney manager’s job to advocate for adequate funding and to alert individuals in positions of authority when attorneys are regularly asked to take caseloads that exceed local standards.

3. Advocate for competitive salaries for staff attorneys.

**Action:** Attorney managers should advocate for attorney salaries that are competitive with other government and court appointed attorneys in the jurisdiction. To recruit and retain experienced attorneys, salaries must compare favorably with similarly situated attorneys.

**Commentary:** While resources are scarce, parents’ attorneys deserve to be paid a competitive wage. They will likely not stay in their position nor be motivated to work hard without a reasonable salary. High attorney turnover may decrease when attorneys are paid well. Parents’ rights to effective assistance of counsel may be compromised if parents’ attorneys are not adequately compensated.

4. Develop a system for the continuity of representation.

**Action:** The attorney manager should develop a case assignment system that fosters ownership and involvement in the case by the parent’s attorney. The office can have a one-attorney: one-case (vertical representation) policy in which an attorney follows the case from initial filing through permanency and handles all aspects of the case. Alternatively, the cases may be assigned to a group of attorneys who handle all aspects of a case as a team and are all assigned to one judge. If a team approach is adopted, it is critical to establish mechanisms to aid communication about cases and promote accountability.

The attorney manager should also hire social workers, paralegals and/or parent advocates (parents familiar with the child welfare system because they were involved in the system and successfully reunited with their child), who should be “teamed” with the attorneys. These individuals can assist the attorney or attorney team with helping clients access services and information between hearings, and help the attorney organize and monitor the case.

**Commentary:** Parents’ attorneys can provide the best representation for the client when they know a case and are invested in its outcome. Continuity of representation is critical for attorneys and parents to develop the trust that is essential to high quality representation. Additionally, having attorneys who are assigned to particular cases decreases delays because the attorney does not need to learn the case each time it is scheduled for court, but rather has extensive knowledge of the case history. The attorney also has the opportunity to monitor action on the case between court hearings. This system also makes it easier for the attorney manager to track how cases are handled. Whatever system is adopted, the manager must be clear about which attorney has
responsibility for the case preparation, monitoring, and advocacy required throughout the case.

5. Provide attorneys with training and education opportunities regarding the special issues that arise in the client population.

Action: The attorney manager must ensure that each attorney has opportunities to participate in training and education programs. When a new attorney is hired, the attorney manager should assess that attorney’s level of experience and readiness to handle cases. The attorney manager should develop an internal training program that pairs the new attorney with an experienced “attorney mentor.” The new attorney should be required to: 1) observe each type of court proceeding (and mediation if available in the jurisdiction), 2) second-chair each type of proceeding, 3) try each type of case with the mentor second-chairing, and 4) try each type of proceeding on his or her own, with the mentor available to assist, before the attorney can begin handling cases alone.

Additionally, each attorney should attend at least 20 hours of relevant training before beginning, and at least 15 hours of relevant training every year after. Training should include general legal topics such as evidence and trial skills, and child welfare-specific topics that are related to the client population the office is representing, such as:

- Relevant state, federal and case law, procedures and rules
- Available community resources
- State and federal benefit programs affecting parties in the child welfare system (e.g., SSI, SSA, Medicaid, UCCJEA)
- Federal Indian Law including the Indian Child Welfare Act and state law related to Native Americans
- Understanding mental illness
- Substance abuse issues (including assessment, treatment alternatives, confidentiality, impact of different drugs)
- Legal permanency options
- Reasonable efforts
- Termination of parental rights law
- Child development
- Legal ethics related to parent representation
- Negotiation strategies and techniques
- Protection orders/how domestic violence impacts parties in the child welfare system
- Appellate advocacy
- Immigration law in child welfare cases
- Education law in child welfare cases
- Basic principles of attachment theory
- Sexual abuse
- Dynamics of physical abuse and neglect
- Shaken Baby Syndrome
Commentary: Parents’ attorneys should be encouraged to learn as much as possible and participate in conferences and trainings to expand their understanding of child welfare developments. While parents’ attorneys often lack extra time to attend conferences, the knowledge they gain will be invaluable. The philosophy of the office should stress the need for ongoing learning and professional growth. The attorney manager should require the attorneys to attend an achievable number of hours of training that will match the training needs of the attorneys. The court and Court Improvement Program may be able to defray costs of attorney training or may sponsor multidisciplinary training that parents’ attorneys should be encouraged to attend. Similarly, state and local bar associations, area law schools or local Child Law Institutes may offer education opportunities. Attorneys should have access to professional publications to stay current on the law and promising practices in child welfare. Child welfare attorneys benefit from the ability to strategize and share information and experiences with each other. Managers should foster opportunities for attorneys to support each other, discuss cases, and brainstorm regarding systemic issues and solutions.

6. Establish a regular supervision schedule.

Action: Attorney managers should ensure that staff attorneys meet regularly (at least once every two weeks) with supervising attorneys to discuss individual cases as well as any issues the attorney is encountering with the court, child welfare agency, service providers or others. The supervising attorney should help the staff attorney work through any difficulties the attorney is encountering in managing a caseload. Supervising attorneys should regularly observe the staff attorneys in court and be prepared to offer constructive criticism as needed. The supervising attorney should create an atmosphere in which the staff attorney is comfortable asking for help and sharing ideas.

Commentary: Parents’ attorneys function best when they can learn, feel supported, and manage their cases with the understanding that their supervisors will assist as needed. By creating this office environment, the attorney manager invests in training high quality attorneys and results in long-term retention. Strong supervision helps attorneys avoid the burnout that could accompany the stressful work of representing parents in child welfare cases.

7. Create a brief and forms bank.

Action: Develop standard briefs, memoranda of law and forms that attorneys can use, so they do not “reinvent the wheel” for each new project. For example, there could be sample discovery request forms, motions, notices of appeal, and petitions. Similarly, memoranda of law and appellate briefs follow patterns that the attorneys could use,
although these should always be tailored to the specific case. These forms and briefs should be available on the computer and in hard copy and should be centrally maintained. They should also be well indexed for accessibility and updated as needed.

8. Ensure the office has quality technical and support staff as well as adequate equipment, library materials, and computer programs to support its operations.

Action: The attorney manager should advocate for high quality technical and staff support. The office should employ qualified legal assistants or paralegals and administrative assistants to help the attorneys. The attorney manager should create detailed job descriptions for these staff members to ensure they are providing necessary assistance. For instance, a qualified legal assistant can help: research, draft petitions, schedule and prepare witnesses and more.

The attorney manager should ensure attorneys have access to working equipment, a user-friendly library conducive to research, and computer programs for word processing, conducting research (Westlaw or Lexis/Nexis), caseload and calendar management, Internet access, and other supports that make the attorney’s job easier and enhances client representation.

Commentary: By employing qualified staff, the attorneys will be free to perform tasks essential to quality representation. The attorneys must at least have access to a good quality computer, voice mail, fax machine, and copier to get the work done efficiently and with as little stress as possible.

9. Develop and follow a recruiting and hiring practice focused on hiring highly qualified candidates.

Action: The attorney manager should hire the best attorneys possible. The attorney manager should form a hiring committee made up of managing and line attorneys and possibly a client or former client of the office. Desired qualities of a new attorney should be determined, focusing on educational and professional achievements; experience and commitment to representing parents and to the child welfare field; interpersonal skills; diversity and the needs of the office; writing and verbal skills; second language skills; and ability to handle pressure. Widely advertising the position will draw a wider candidate pool. The hiring committee should set clear criteria for screening candidates before interviews and should conduct thorough interviews and post-interview discussions to choose the candidate with the best skills and strongest commitment. Reference checks should be completed before extending an offer.

Commentary: Hiring high quality attorneys raises the level of representation and the level of services parents in the jurisdiction receive. The parent attorney’s job is complicated and stressful. There are many tasks to complete in a short time. It is often difficult to connect with, build trust and represent the parent. New attorneys must be aware of these challenges and be willing and able to overcome them. Efforts should be made to recruit staff who reflect the racial, ethnic, and cultural backgrounds of the clients. It is
particularly important to have staff who can communicate with the clients in their first languages, whenever possible.

10. Develop and implement an attorney evaluation process.

**Action:** The attorney manager should develop an evaluation system that focuses on consistency, constructive criticism, and improvement. Some factors to evaluate include: communicating with the client, preparation and trial skills, working with clients and other professionals, complying with practice standards, and ability to work within a team. During the evaluation process, the attorney manager should consider:

- observing the attorney in court;
- reviewing the attorney’s files;
- talking with colleagues and clients, when appropriate, about the attorney’s performance;
- having the attorney fill out a self-evaluation; and;
- meeting in person with the attorney.

Where areas of concern are noted, the evaluation process should identify and document specific steps to address areas needing improvement.

**Commentary:** A solid attorney evaluation process helps attorneys know what they should be working on, management’s priorities, their strengths and areas for improvement. A positive process supports attorneys in their positions, empowers them to improve and reduces burnout.

11. Work actively with other stakeholders to improve the child welfare system, including court procedures.

**Action:** The attorney manager should participate, or designate someone from the staff to participate, in multidisciplinary committees within the jurisdiction that are focused on improving the local child welfare system. Examples of such committees include: addressing issues of disproportional representation of minorities in foster care, improving services for incarcerated parents, allowing parents pre-petition representation, drafting court rules and procedures, drafting protocols about outreach to missing parents and relatives, removing permanency barriers and delays, and accessing community-based services for parents and children. Similarly, the attorney manager should participate in, and strongly encourage staff participation in, multidisciplinary training.

**Commentary:** Working on systemic change with all stakeholders in the jurisdiction is one way to serve the parents the office represents as well as their children. Active participation of parents’ attorneys ensures that projects and procedures are equitably developed, protect parents’ interests, and the attorneys are more likely to work on them over the long term. Collaboration can, and generally does, benefit all stakeholders.

**Role of the Court:**

The court is urged to:
1. Recognize the importance of the parent attorney’s role.

Commentary: The judge sets the tone in the courtroom. Therefore, it is very important that the judge respects all parties, including the parents and parents’ counsel. Representing parents is difficult and emotional work, but essential to ensuring justice is delivered in child abuse and neglect cases. When competent attorneys advocate for parent clients, the judge’s job becomes easier. The judge is assured that the parties are presenting all relevant evidence, and the judge can make a well-reasoned decision that protects the parents’ rights. Also, by respecting and understanding the parent attorney’s role, the judge sets an example for others.

2. Establish uniform standards of representation for parents’ attorneys.

Commentary: By establishing uniform representation rules or standards, the judge can put the parents’ attorneys in the jurisdiction on notice that a certain level of representation will be required for the attorney to continue to receive appointments. The rules or standards should be jurisdiction specific, but should include the elements of these standards.

3. Ensure the attorneys who are appointed to represent parents in abuse and neglect cases are qualified, well-trained, and held accountable for practice that complies with these standards.

Commentary: Once the standards are established, the court must hold all parents’ attorneys accountable to them. A system should be developed that would delineate when an attorney would be removed from a case for failure to comply with the standards, and what actions, or inactions, would result in the attorney’s removal from the appointment list (or a court recommendation to an attorney manager that an attorney be disciplined within the parent attorney office). The court should encourage attorneys to participate in educational opportunities, and the judge should not appoint attorneys who have failed to meet the minimum annual training requirements set out in the rules or standards.

4. Ensure appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been dismissed from the court’s jurisdiction.

Commentary: The parent is disadvantaged in a child abuse and neglect case if not represented by a competent attorney throughout the life of the case. The attorney can explain the case to the parent, counsel the parent on how best to achieve the parent’s goals with respect to the child, and assist the parent access necessary services. In most child welfare cases, the parent cannot afford an attorney and requires the court to appoint one. The court should make every effort to obtain an attorney for that parent as early in the case as feasible – preferably before the case comes to court for the first time or at the first hearing. In jurisdictions in which parents only obtain counsel for the termination of
parental rights hearing, the parent has little chance of prevailing. A family that may have been reunified if the parent had appropriate legal support is separated forever.

5. Ensure parents’ attorneys receive fair compensation.

Commentary: While resources are scarce, parents’ attorneys deserve a competitive wage. They should receive the same wage as other government and court-appointed attorneys for other parties in the child abuse and neglect case. Parents’ rights to effective assistance of counsel may be compromised if parents’ attorneys are not adequately compensated. In most jurisdictions, the court sets the attorneys’ fees and individual judges can recommend to court administration that parents’ attorneys should be well compensated.

6. Ensure timely payment of fees and costs for attorneys.

Commentary: Often judges must sign fee petitions and approve payment of costs for attorneys. The judges should do so promptly so parents’ attorneys can focus on representing clients, not worrying about being paid.

7. Provide interpreters, investigators and other specialists needed by the attorneys to competently represent clients. Ensure attorneys are reimbursed for supporting costs, such as use of experts, investigation services, interpreters, etc.

Commentary: Attorneys can not provide competent representation for parents without using certain specialists. For instance, if the client speaks a language different from the attorney, the attorney must have access to interpreters for attorney/client meetings. Interpreter costs should not be deducted from the attorney’s compensation. A parent should be permitted to use an expert of the parent’s choosing in some contested cases. If the expert charges a fee, the court should reimburse that fee separate and apart from what the court is paying the attorney.

8. Ensure that attorneys who are receiving appointments carry a reasonable caseload that would allow them to provide competent representation for each of their clients.

Commentary: The maximum allowable caseload should be included in local standards of practice for parents’ attorneys. This committee recommends no more than 50-100 cases for full time attorneys, depending on the type of practice the attorney has and whether the attorney is able to provide each client with representation that follows these standards. Once this number has been established, the court should not appoint an attorney to cases once the attorney has reached the maximum level. Attorneys can only do high quality work for a limited number of clients, and each client deserves the attorney’s full attention. Of course, the caseload decision is closely tied to adequate compensation. If paid appropriately, the attorney will have less incentive to overextend and accept a large number of cases.
9. Ensure all parties, including the parent’s attorney, receive copies of court orders and other documentation.

**Commentary:** The court should have a system to ensure all parties receive necessary documentation in a timely manner. If the parent and parent attorney do not have the final court order, they do not know what is expected of them and of the other parties. If the child welfare agency, for example, is ordered to provide the parent with a certain service within two weeks, the parent’s attorney must know that. After two weeks, if the service has not been provided, the attorney will want to follow up with the court. In some jurisdictions, copies of court orders are handed to each party before they leave the courtroom. This is an ideal situation, and if it is not feasible, the court should determine what other distribution method will work.

10. Provide contact information between clients and attorneys.

**Commentary:** Often parties in child welfare cases are difficult to locate or contact. Some parents lack telephones. The court can help promote contact between the attorney and parent by providing contact information to both individuals.

11. Ensure child welfare cases are heard promptly with a view towards timely decision making and thorough review of issues.

**Commentary:** Judges should attempt to schedule hearings and make decisions quickly. Allotted court time should be long enough for the judge to thoroughly review the case and conduct a meaningful hearing.

When possible, judges should schedule hearings for times-certain to avoid delaying attorneys unnecessarily in court. When attorneys are asked to wait through the rest of the morning calendar for one brief review hearing, limited dollars are spent to keep the attorney waiting in hallways, rather than completing an independent investigation, or researching alternative placement or treatment options.

Judges should avoid delays in decision making. Delays in decision making can impact visitation, reunification and even emotional closure when needed. If a parent does not know what the judge expects, the parent may lack direction or motivation to engage in services.

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Their input was essential to this project, and their willingness to assist was extraordinary.

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1 Model Rules of Professional Conduct 1.1 (Competence).
The National Association of Counsel for Children is accredited by the American Bar Association to certify attorneys as specialists in Child Welfare Law. The Certification Program is open to attorneys who represent children, parents, or agencies in child welfare proceedings.

Model Rule 1.3 (Diligence).

Model Rule 1.4 (Communication).

Model Rule 2.1 (Advisor).

Model Rule 1.2 (Scope of Representation and Allocation of Authority).

Model Rule 1.6 (Confidentiality of Information).

Model Rule 1.4 Communication

Id.

Id.

Model Rules 1.7 (Conflict of Interest: Current Client); 1.8 (Conflict of Interest: Current Clients: Specific Rules); 1.9 (Duties to Former Clients).


Model Rule 1.3 (Diligence).

Model Rules 1.1 (Competence); 1.3 (Diligence).

Model Rule 1.4 (Communication).

Model Rules 1.1 (Competence); 1.3 (Competence).

Id.

Id.

Model Rule 3.1 (Meritorious Claims and Contentions).

Model Rule 5.1 (Responsibility of Partners, Managers and Supervisory Lawyers).

Model Rule 1.1 (Competence).

The Court Improvement Program (CIP) is a federal grant to each state’s (as well as the District of Columbia and Puerto Rico) supreme court. The funds must be used to improve child abuse and neglect courts. States vary in how they allocate the dollars, but funds are often used for training, benchbooks, pilot projects, model courts and information technology systems for the courts.
Performance Guidelines
For Quality and Effective Juvenile Delinquency Representation
PERFORMANCE GUIDELINES FOR QUALITY AND EFFECTIVE
JUVENILE DELINQUENCY REPRESENTATION

PREFACE

The Juvenile Defenders Association of Pennsylvania (“JDAP”) is a statewide membership organization that is dedicated to supporting zealous and quality legal representation for children in Pennsylvania’s delinquency courts. Through its education and training programs and its policy advocacy, JDAP is building a strong network of juvenile public defenders, contract, and assigned counsel who specialize in the representation of children and who consistently provide their clients with competent, effective legal services.

In consultation with juvenile defenders from across the Commonwealth and national experts, JDAP has developed *Performance Guidelines for Quality and Effective Juvenile Delinquency Representation (Guidelines)*. JDAP’s goal is to provide juvenile defenders, contract counsel, and assigned counsel, as well as the leadership of public defender offices with a clear set of guidelines that define evidence-based best practice standards for attorneys practicing in delinquency court. The Guidelines recognize and incorporate Pennsylvania’s Rules of Professional Conduct, Rules of Juvenile Court Procedure, and the Juvenile Act. They also reflect national standards established by the American Bar Association, the National Legal Aid and Defender Association and its American Council of Chief Defenders, and the National Juvenile Defender Center.

The Guidelines serve as a training and development tool for new attorneys who receive delinquency representation assignments. They also reaffirm for experienced counsel the considerations necessary to deliver quality legal representation. The Guidelines outline the representation steps that “may”, “should” or “must” be undertaken to provide competent, effective delinquency representation. They also emphasize the continuing duty of representation through the adjudicatory, disposition, post-disposition, and appellate phases of the juvenile court process.

Juvenile defenders, contract, and assigned counsel have an ethical obligation and professional responsibility to zealously defend their clients’ rights throughout the representation process. This may involve confronting difficult courtroom and non-courtroom situations. However, the lives of child clients demand that attorneys have the skills, knowledge and determination to fully advocate for the fairness, integrity and justice that our clients deserve.

The *Performance Guidelines for Quality and Effective Juvenile Delinquency Representation* provide support for the development of specialized, quality juvenile delinquency representation. JDAP will use the Guidelines to provide training and education programs. In addition, the Guidelines Subcommittee is responsible for updating the Guidelines whenever new case law, statutes, rules, or practice experience demands changes and adjustments.
PERFORMANCE GUIDELINES FOR QUALITY AND EFFECTIVE
JUVENILE DELINQUENCY REPRESENTATION

ACKNOWLEDGEMENTS

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Performance Guidelines for Quality and Effective Juvenile Delinquency Representation

PERFORMANCE GUIDELINES INDEX

Introduction to Performance Guidelines

Section 1: The Representation of Children in Delinquency Court is a Specialized and Complicated Legal Practice Area page 1

Section 2: Support for Well Resourced, Specialized Juvenile Delinquency Representation by Public Defender Offices and by Contract and Assigned Counsel Defender Systems is Critical for an Effective Juvenile Justice System page 1

Section 3: Performance Guidelines Establish Best Practices and Define Accountability for Quality and Client Centered Juvenile Delinquency Defense Advocacy page 2

Guideline One: The Special Role and Responsibilities of Delinquency Counsel for Children

Section 1: Defining Who is the Client and Issues of Attorney Client Confidentiality page 2

Section 2: Attorney Client Communications page 2

Section 3: The Decision Making Process: Attorney & Client Responsibilities page 3

Guideline Two: The Education, Training and Experience of Delinquency Counsel for Children

Section 1: Developing, Educating and Continuing to Train Quality Juvenile Delinquency Defense Counsel page 3

Section 2: Matching Case Severity and Consequences with Defense Counsel’s Legal Representation Experience and Managing Caseloads and Workloads page 4

Guideline Three: Detention Hearings and Pre-Adjudication Advocacy

Section 1: Initial Client Interview and Advocacy Preparation for the Detention Hearing page 5
Section 2: Effective Juvenile Defense Counsel Advocacy at Juvenile Detention Hearings page 5

Section 3: Case Preparation, Investigation and Pre-Adjudication Motions Practice page 6

Guideline Four: Effective Negotiation Practice for Juvenile Delinquency Adjudication and Disposition

Section 1: Advocacy Efforts Fostering Positive Plea Negotiation Outcomes page 7

Section 2: Attorney Client Communication Responsibilities during Negotiation and Prior to Entering an Admission page 8

Section 3: The Courtroom Admission Process and Advocacy for Best Dispositional Outcome page 9

Guideline Five: Effective Advocacy for the Adjudicatory Hearing where Children are Charged with Delinquent Conduct

Section 1: Counsel's Duties and Responsibilities in Timely Preparation for a Full Adjudicatory Hearing page 9

Section 2: Juvenile Defense Counsel's Obligation to Develop a Persuasive Theory for the Case page 10

Section 3: Full Litigation of the Client's Case and Protecting the Record for Appeal page 10

Guideline Six: Effective Advocacy for the Disposition of Adjudicated Children

Section 1: Juvenile Defense Counsel's Responsibilities in Preparing for the Disposition Hearing and Final Dispositional Decision page 10

Section 2: Counsel's Role in Preparing the Child's Dispositional Report and in Commenting upon Any Other Dispositional Report Submitted to the Judge page 11

Section 3: Juvenile Defense Counsel's Dispositional Hearing Advocacy and Post-Disposition Responsibilities page 12
Guideline Seven: Special Cases Involving Juveniles: Representation and Defense Counsel Responsibilities

Section 1: Juvenile Sex Cases, SORNA and Act 21

Section 2: Dual Jurisdiction Cases: Juveniles in both the Delinquency and Dependency Court Systems

Guideline Eight: Continuing Post-Disposition Representation Responsibilities

Section 1: Juvenile Defense Counsel’s Continuing Representation Responsibilities at Review Hearings after Disposition

Section 2: Counsel’s Advocacy Role for Juveniles Placed in Specialty Drug and Treatment Courts

Section 3: Counsel Responsibilities to File Expungement Petitions

Guideline Nine: The Role of Juvenile Defense Counsel in Transfer and Direct File Proceedings

Section 1: Qualifications and Experience of Defense Counsel Representing Juveniles in Transfer and Direct File Proceedings

Section 2: Effective Client Centered Case Preparation in Transfer and Direct File Cases

Section 3: Providing Quality Legal Representation for Juveniles in Transfer and Direct File Proceedings

Guideline Ten: Perfecting an Appeal from the Delinquency Adjudication and Disposition

Section 1: Making and Maintaining a Record for Appeal

Section 2: Client’s Right to Appeal & Continuing Representation

Section 3: Counsel’s Responsibilities upon Withdrawal as Appellate Counsel of Record
INTRODUCTION

Section 1: The Representation of Children in Delinquency Court is a Specialized and Complicated Practice Area

A. Delinquency cases are complex matters that raise legal, child and family-centered issues and engage overlapping court, school, supervision, service and treatment systems. Delinquency cases have direct and collateral consequences that significantly impact the lives of children and their families. Recent advances in brain research also confirm that children and adolescents are different from adults. They do not have the same cognitive, emotional, decision-making or behavioral capacities as adults. Special care must be taken to ensure that the child’s developmental immaturity is considered among the other relevant issues of the case.

B. Quality legal representation for children and adolescents in the juvenile justice system is as important as representation for adults in the criminal justice system. It requires the assignment of well-qualified, experienced attorneys who understand and appreciate the complexity and significance of delinquency representation. Juvenile defense counsel must also recognize that their primary responsibility is to zealously defend their child clients against the charges leveled against them and to protect their due process rights.

Section 2: Support for Well-Resourced, Specialized Juvenile Delinquency Representation by Public Defender Offices and by Contract and Assigned Counsel is Critical for an Effective Juvenile Justice System

A. Every child and adolescent deserves access to well-resourced juvenile defense counsel, whether that attorney is assigned by a public defender office, contract, or judicial appointment. Juvenile defense attorneys should be well-trained lawyers who specialize in delinquency representation. They should have adequate time for each case and have well-developed skills to communicate and build a positive attorney-client relationship.

B. Specialized delinquency counsel should have access to services that are necessary to protect the child’s constitutional right to effective assistance of counsel including experts, mental health professionals, social workers, alternative disposition advocates, education specialists, investigators, paralegals and other legal representation support persons.
Section 3: Performance Guidelines Establish Best Practices and Define Accountability for Quality and Client-Centered Juvenile Defense Advocacy

A. The Performance Guidelines for Quality and Effective Juvenile Delinquency Representation provide defense counsel, public defender office leaders, judicial leaders and other system stakeholders with guidelines that identify the practices necessary to achieve quality, client-centered delinquency representation and, therefore, a more effective juvenile justice system.

B. The Performance Guidelines serve as a supervision and training tool, outlining the responsibilities an attorney has to the children charged with delinquent conduct in the juvenile justice system.

GUIDELINE ONE: The Special Role and Responsibilities of Juvenile Defense Counsel

Section 1: Defining Who is the Client and Issues of Attorney-Client Confidentiality

A. When appointed or assigned to represent children and adolescents in delinquency matters, defense counsel has an ethical and professional obligation to the child client, not to that child's parent, guardian or custodian. The lawyer must explain in clear terms to the juvenile and his parent(s) the meaning of privileged communications and the attorney’s prohibition from revealing information shared between the attorney and the young client.6

B. Unless disclosure is authorized by operation of law or by the Rules of Professional Conduct, the attorney shall not reveal information relating to representation of a client where the child is the source of information.

C. The child may orally or in writing authorize the attorney’s disclosure of information as is necessary to carry out the representation. After consultation with the attorney, the child may permit disclosure to his/her parent(s) or other family member(s) who are in a position to support the child throughout the delinquency process and to encourage open, trusting communication between the child and the attorney.

Section 2: Attorney Client Communications

A. The attorney has an affirmative ethical obligation to keep the child or adolescent client informed of matters related to representation and to promptly respond to the client’s requests for information.

B. The attorney must consult with the child regarding how the client’s case objectives are to be accomplished and fully explain these matters to the child so he can understand and make informed decisions.7

C. When authorized by the child, defense counsel may also consult with and seek the assistance of the child's parent or designated family member(s) regarding the case objectives, circumstances impacting the outcome of the case and other pertinent decision-making issues.8
Section 3: The Decision-Making Process: Attorney & Client Responsibilities

A. After informed consultation with defense counsel and any parent, guardian or family member authorized to participate in the process, the child has the responsibility to determine whether to admit or deny the allegations, whether to enter into a consent decree if offered and whether to testify at the adjudicatory or dispositional hearings.⁹

B. Although the allocation of decision making authority may be more challenging than in an adult case due to the diminished capacity and/or the experience of the child, defense counsel shall abide by the child's decisions in a juvenile case. Counsel must represent the child's decisions and present them to the court. The attorney may not substitute personal judgment, or that of the parent or family member, for the child's decisions.

C. Where the child's age or other factors prevent the child from actually making a reasoned, informed decision, defense counsel may have no alternative but to request the appointment of a guardian ad litem, or to agree to such an appointment by the court. Counsel must advocate to limit the role of the guardian to the specific purposes for which the appointment is necessary.

GUIDELINE TWO: The Education, Training and Experience of Juvenile Defense Counsel for Children

Section 1: Developing, Educating and Continuing to Train Quality Juvenile Defense Counsel

A. Attorneys representing children must attend regular training programs to recognize and effectively address not only the legal aspects of the adjudicatory process, but also the dispositional needs of their clients.¹⁰ Counsel must be familiar with Pennsylvania statutes relating to delinquency proceedings, as well as the Pennsylvania Rules of Juvenile Court Procedure, Pennsylvania Rules of Evidence, Pennsylvania Rules of Appellate Procedure, relevant case law and the local rules of court governing delinquency proceedings.¹¹

B. Counsel must annually attend Continuing Legal Education courses¹² and should register for programs relevant to the representation of children in the delinquency court system. If defense counsel is new to delinquency legal representation, counsel must also seek the advice and assistance of an experienced delinquency practitioner who can provide direct training.¹³

C. Counsel must participate in on-going training, including training in the following critical representational areas:¹⁴

1. Detention Advocacy
2. Litigation and Trial Skills
3. Disposition Planning/Options
4. Post-Disposition Practice
5. Educational Rights

6. Appellate Advocacy and Procedure

7. Direct and Collateral Consequences of Juvenile Adjudications of Delinquency

D. Counsel should also obtain specialized training that directly relates to delivering quality and effective legal representation including:

1. Child and Adolescent Development
2. Child Competency and Capacity
3. Racial, Ethnic and Cultural Understanding, as well as Lesbian, Gay, Bisexual and Transgender (LGBT) Issues
4. Communicating with Children and Building Attorney-Client Relationships
5. Special Ethical Issues/Considerations Related to Representing Children
6. Zero Tolerance, School Suspension and Expulsion Policies
7. Gender Specific Issues and Programming

E. Counsel’s training should also include education on areas requiring assistance from specialists including:

1. Administrative Appeals
2. Child Welfare and Entitlements
3. Special Education within School Systems
4. Immigration Law Consequences
5. Dependency and Neglect Court Process
6. Drug Addiction and Substance Abuse
7. Mental and Physical Health Treatment

Section 2: Matching Case Severity and Consequences with Juvenile Defense Counsel’s Legal Representation Experience and Managing Caseloads and Workloads

A. Delinquency case representation assignments, whether made by a public defender office or through court appointment, should match the case’s complexity, the seriousness of the allegations, and the potential consequences of an adjudication of delinquency with the
experience level of the assigned attorney. The most serious, complex cases should be assigned to
the most experienced and qualified attorneys.\(^{18}\)

B. Defense counsel should not carry a caseload that interferes with the rendering of competent
legal services, endangers the juvenile's interest in the speedy disposition of charges or risks a
breach of ethical or professional obligations. If any one of these circumstances exists, counsel
should bring these issues to the attention of a supervisor for assessment and appropriate
remedial interventions.\(^{19}\)

GUIDELINE THREE: *Detention Hearings and Pre-Adjudication Advocacy*

Section 1: Initial Client Interview and Advocacy Preparation Prior to the Detention
Hearing\(^{20}\)

A. Prior to representing a client at the detention hearing, counsel must make every effort to
conduct a personal interview with the client as soon as practicable and sufficiently in advance
of any court hearing. To prepare for this interview, counsel should review the charging
documents, law enforcement reports, paperwork submitted by the probation department and
any other relevant documentation.

B. Counsel should interview the client in a setting that is conducive to maintaining the
confidentiality of communications between the attorney and the client. If the available setting is
problematic, counsel should seek ways to remedy the situation.

C. When the client and counsel do not speak the same language, counsel must seek the
assistance of a qualified interpreter. Counsel should be alert to any other issues that might
hinder his ability to communicate with the client and should address the issues throughout the
representation process.

D. Counsel should become familiar with the client’s life history, family background, school
experience, mental and physical health conditions, prior treatment interventions and any other
circumstances that may impact case preparation.

E. Counsel should work cooperatively with the parent(s) or guardian to assess potential
alternatives available for the possible release of a detained juvenile without jeopardizing the
juvenile’s legal interests.

Section 2: Effective Juvenile Defense at Juvenile Detention Hearings\(^{21}\)

A. Counsel must be familiar with the court’s detention hearing procedures and the detention
alternatives, including community-based resources, that the judge or master may consider.

B. Counsel must determine whether the paperwork contains any substantive legal defects and
should argue these issues at the detention hearing.

C. Counsel should prepare and present an argument for release of the child. The least restrictive
conditions must be considered at the detention hearing, and counsel should address the
juvenile’s risk of flight, as well as his potential dangerousness to himself and others. Counsel should decide whether to call witnesses in support of the client’s release, in particular, witnesses that might describe the potential living arrangements of the client.

D. Counsel should know the current conditions at the local juvenile detention center and should raise any deficiencies before the court. Counsel should consider issues such as overcrowding, violence, harsh treatment and limited or non-existent access to special education, mental health treatment, and adequate medical care.

E. If the judge or master releases the juvenile back into the community, counsel must ensure that the client and his parent(s) or guardian fully understand the conditions of release and any reporting requirements. The juvenile should also have counsel’s business address and phone number so that he can maintain contact with counsel. Counsel must also have the current contact information for the client.

F. If the judge or master orders the juvenile to remain in detention, counsel should be certain that medical, mental health, and education issues are affirmatively addressed in the detention order. Counsel should continuously seek opportunities to obtain the client’s release.

Section 3: Case Preparation, Investigation and Pre-Adjudication Motions Practice

A. Counsel should examine all charging documents, pleadings and discovery, including any exculpatory or impeachment information. Counsel should know the discovery process under the county prosecutor’s control and be prepared to file motions with the court seeking to obtain any discovery materials not appropriately provided to counsel.

B. Counsel should also request that the prosecutor reveal the names and addresses of all witnesses that will be called at either the adjudicatory or dispositional hearings, including their prior written or electronic statements or reports and any criminal records. Counsel should also request the names of any co-defendants, their statements and any authorization necessary to view and/or obtain physical evidence, 911 tapes, search warrants, arrest warrants or any other materials held in law enforcement files or with custodians of physical evidence.

C. The juvenile’s delinquency record and any prior statements must be obtained. Defense counsel may need signed client and/or parent release forms or court orders to retrieve records from the court, child welfare services, schools, hospitals, doctors, substance abuse treatment programs, psychological/psychiatric experts, other defense attorneys and other entities that have interacted in the past with the client and/or the family.

D. Defense counsel has an obligation to investigate the facts, the scene of the incident, and circumstances surrounding the juvenile’s case allegations, even where the law enforcement reports seem to establish clear culpability and the client has made an admission of guilt. Counsel may, however, consider these factors in determining the scope, relevancy and length of the investigation.

E. Where defense counsel does not have funds to employ a necessary expert or an investigator, counsel should file a timely motion with the court requesting these services and funds.
F. Counsel should conduct in-depth interviews with the client as necessary.

G. After reviewing all of the juvenile’s interview(s), prosecution discovery reports and statements, defense discovery, investigation, expert reports, and the relevant procedural and evidentiary rules and case law, counsel should decide whether pre-adjudication motions needs to be filed to protect the client's legal rights and interests. Counsel shall timely file all appropriate pre-adjudication motions, which may include:

1. Challenges to the constitutionality of the implicated statute(s)

2. Defects in the charging process or the charging document

3. Severance of charges or defendants

4. Discovery issues

5. Suppression of physical evidence, identification, and/or statements

6. Speedy adjudication issues

7. Evidentiary issues

H. Defense counsel should neither request a continuance nor agree to one without first fully consulting with the client. Any defense request for a continuance, whether by an oral motion or a written filing, should document all the relevant reasons for the continuance. Counsel should ensure the argument for a continuance is on the record before the juvenile court in case the motions by the defense or the prosecution become an issue for appeal.

GUIDELINE FOUR: Effective Negotiation Practice for Juvenile Adjudication and Disposition

Section 1: Advocacy Efforts Fostering Positive Plea Negotiation Outcomes

A. While continuing to actively investigate, prepare and research the client’s case and with the informed consent of the client, counsel may explore the possibility and desirability of reaching a negotiated adjudication and/or disposition settlement of the charges. Any agreements made through plea negotiations should be in writing and signed by all necessary parties. With the client’s consent, counsel should also consider diversion and other informal and formal disposition agreements with the intended purpose of avoiding an adjudication of delinquency.

B. In evaluating various strategies, counsel must consider:

1. Concessions that the client might offer the prosecution, such as:
   • Declining to assert or litigate particular pretrial motions;
   • Not forcing the case to a full, contested adjudicatory hearing;
• Providing law enforcement and/or the prosecution with assistance in a pending investigation or prosecution;
• Agreeing to pay restitution; or
• Participating in a community services or rehabilitation and treatment program

2. Any benefits to the client from a negotiated settlement, such as:
• Release from custody;
• Dismissal of one or more of the charges or a reduction in the gradation of a charge;
• Agreement for a recommended disposition or that the prosecutor will remain silent at disposition;
• Agreement that the client will not be subject to further investigation or prosecution for uncharged alleged delinquent conduct; or
• Special prosecution recommendations for place/manner of confinement and/or release on probation

Section 2: Attorney-Client Communication Responsibilities during Negotiation and Prior to Entering an Admission

A. Throughout the negotiation process, counsel must keep the client fully informed. Counsel should clearly explain the possible outcomes of a contested adjudicatory hearing and that hearing’s ultimate impact upon final disposition, which may include commitment, probation and other direct and collateral consequences.

B. Prior to the entry of an admission, counsel should meet with the client in a confidential setting and clearly and thoroughly explain the following:

1. The decision to enter an admission on charges is the client’s, to be made in consultation with counsel, and, as authorized, with a parent(s) or guardian.

2. The constitutional and other legal rights that will be waived by entering an admission and the completion of an admission colloquy.

3. The conditions and limits of the plea agreement with the prosecutor and the maximum punishments, sanctions and other direct and collateral consequences the client faces as a result of entering the admission.

4. The nature of an admission hearing before the juvenile court judge and the expectations of the client in the proceedings, including answering questions from the judge and providing a statement concerning the offense.

5. Each of the elements of the offense(s) included in the admission.
Section 3: The Courtroom Admission Process and Advocacy for Best Dispositional Outcome

A. After the client enters the admission, counsel must be prepared to address all the issues required to fulfill the agreement, including the release of the client from detention prior to a final disposition hearing.

B. In an appropriate setting outside the courtroom, counsel should respond to questions and explain the courtroom process and final outcome to the client and authorized parent(s) or guardian. Counsel should ensure the client and the guardian understand what has happened and the steps that must be taken to comply with the judge’s order.

C. Counsel should anticipate the dispositional hearing issues and should be prepared to examine the probation and prosecution witnesses and reports, to call defense witnesses, to provide supporting information and to argue for the client’s best dispositional outcome.

GUIDELINE FIVE: Effective Advocacy for the Adjudicatory Hearings where Children are Charged with Delinquent Conduct

Section 1: Counsel’s Duties and Responsibilities in Timely Preparation for a Full Adjudicatory Hearing

A. Counsel should know the forum in which the adjudicatory hearing will take place and be familiar with the judge’s past fact-finding history and perspective. If counsel does not have personal experience with an assigned judge, counsel should seek the guidance of other lawyers who have represented clients before that judge.

B. In advance of the adjudicatory hearing, counsel must know the applicable law and rules of evidence and procedure. Counsel must also anticipate the legal issues that may arise.

C. After conducting a comprehensive review of prosecution and defense discovery materials, reports, interviews, and pre-trial motion transcripts and outcomes, counsel should determine what documents and fact or character witnesses are necessary for the defense case at the adjudicatory hearing. Counsel should ensure that the necessary materials and witnesses are easily accessible and available for the hearing. Defense counsel should ensure witnesses are fully prepared to present their testimony with appropriate courtroom demeanor. When necessary, counsel should issue subpoenas for the defense witnesses.

D. In advance of the contested adjudicatory hearing, counsel should prepare an opening statement, where it is strategically advisable to offer one, as well as the cross-examination of prosecution witnesses, the direct examination of defense witnesses and the outline of points for a meaningful closing argument.

E. Counsel should explain all aspects of the adjudicatory hearing process and necessary courtroom demeanor to the client and, as needed, to the client’s parent(s) and family member(s). Counsel should advise the juvenile on appropriate courtroom dress, attitude and language when
addressing the judge. Counsel also should plan with the client the most convenient system for conferring throughout the contested hearing.

Section 2: Juvenile Defense Counsel’s Obligation to Develop a Persuasive Theory for the Case

A. Counsel must develop a persuasive defense theory of the case that justifies a finding of not guilty or that minimizes or reduces the level of guilt.

B. Counsel should consider whether the client’s interests are best served by not putting on a defense case, but by relying upon the prosecution’s failure to meet its constitutional burden of proving each element charged beyond a reasonable doubt.

C. Counsel should know the elements of any affirmative defense and the attendant burden of production or persuasion that rests with the defense.

Section 3: Full Litigation of the Client’s Case and Protecting the Record for Appeal

A. Throughout the adjudicatory process, counsel must raise and argue evidentiary and other objections on the record in order to preserve the client’s appellate rights. Counsel must ensure that oral arguments and rulings in open court or in chambers are fully recorded.

B. Counsel should consider the strategic advantages or disadvantages of entering into any stipulations with the prosecution.

C. Counsel should fully discuss with the client the decision to testify at the contested adjudicatory hearing. Where counsel believes or knows the client will testify in an untruthful manner, counsel should appropriately advise the client of counsel’s ethical responsibilities and duties under the Pennsylvania Rules of Professional Conduct.\textsuperscript{27}

D. Counsel must actively protect the client’s due process trial rights, holding the prosecution to its burden of proof beyond a reasonable doubt and ensuring that the “best interests of the child” is not the standard applied by the judge at the conclusion of the contested adjudicatory hearing.

GUIDELINE SIX: Effective Advocacy for the Disposition of an Adjudicated Child

Section 1: Juvenile Defense Counsel’s Responsibilities in Preparing for the Disposition Hearing\textsuperscript{28} and Final Dispositional Decision

A. Counsel’s preparation for an appropriate client-centered dispositional outcome begins upon appointment and continues throughout the adjudicatory process.

B. Counsel must know the local, state and national dispositional alternatives available to the client and the financing mechanisms necessary to pay for them.
C. Counsel should prepare the client and the family for the interview with the official preparing the dispositional report for the judge. Counsel should decide whether or not to personally attend the interview, knowing he may be able to provide supportive client information or reports to the interview official.

D. In advance of the dispositional hearing, counsel should review the dispositional recommendations of the judge, the probation department and other court departments. Prior to the disposition hearing, counsel must explain these dispositional recommendations and their consequences to the client.

E. Counsel has a duty independent of the probation department or other court-designated entity to develop the client’s own dispositional alternative recommendations. These recommendations should stem from the defense expert’s assessments, as well as the client’s life experience, economic condition and school, family or community support structures.

F. Prior to the dispositional hearing, counsel shall fully consult with the client to determine the final dispositional recommendations to be offered to the judge and the relevant supporting witnesses and/or report materials. Counsel shall candidly describe to the client the nature, obligations and consequences of any proposed disposition, including the conditions of probation, the possibility of conditional release, the characteristics of any institution to which commitment is possible and the probable duration of the child’s responsibilities under the proposed dispositional plan.

G. Counsel shall not agree to a specific dispositional recommendation without the child’s prior consent.

H. When appropriate, counsel should prepare the client to personally address the judge. Where a victim impact statement is to be submitted or the victim may attend the dispositional hearing, counsel should also prepare the client to speak to victim issues.

Section 2: Counsel’s Role in Preparing the Child’s Dispositional Report and in Commenting upon any other Dispositional Report Submitted to the Judge

A. Counsel may choose to submit and file on the record the client’s own written, video or electronic dispositional report or memorandum in advance of the hearing. In addition to presenting the juvenile’s dispositional recommendations and justification, counsel may also correct inaccurate information in any report previously submitted to the judge. Counsel should also object to the distribution of any information or reports that are not properly before the judge.

B. Where counsel decides not to file a formal dispositional recommendation and/or correction memorandum, counsel may present this information orally, along with any relevant testimony, to the judge during the disposition hearing. However, counsel must ensure that the oral argument is transcribed and made part of the official court record.
Section 3: Juvenile Defense Counsel's Dispositional Hearing Advocacy and Post-Disposition Responsibilities

A. Defense counsel shall present to the judge all known and reasonably available mitigating information favorable to the child. It is counsel's responsibility to minimize the negative inferences offered by the prosecution.

B. Where the judge accepts the report of the probation department or other official, counsel should take reasonable steps to correct erroneous or misleading information and to make sure that an amended copy is contained in the official court record.

C. Upon the completion of the dispositional hearing, counsel must fully understand all of the conditions and requirements of the judge's order. Counsel must make sure the written disposition order clearly and accurately states the judge's final ruling, is consistent with any conditions contained in the previously entered plea agreement and clearly reflects any available detention credits. If the order is unclear or inaccurate, counsel must make an immediate effort to make corrections and include them in the official court record.

D. Counsel should meet in an appropriate location with the child and carefully explain all the requirements, responsibilities, and conditions of the judge's dispositional order. If authorized by the client, the child's parent(s) or guardian may be present.

E. Although counsel's adjudicatory and dispositional case preparation included communications with the client regarding possible collateral consequences, such as juvenile sex offender registration and immigration consequences, counsel's post-disposition hearing discussions with the client should reiterate the impact on the child of any of these additional mandates.

GUIDELINE SEVEN: Special Cases Involving Juveniles: Representation and Defense Counsel's Responsibilities

Section 1: Juvenile Sex Cases, SORNA and Act 21

A. The delinquency court representation of children and youth who face allegations of sexual misconduct is a specialized practice area. Defense counsel assigned to these cases must have sufficient delinquency law practice and litigation experience, as well as overall systems knowledge. Defense counsel should not accept appointments in these types of cases unless counsel is fully committed to and capable of providing zealous and quality defense representation.

B. Defense counsel must have current knowledge and special training in the following relevant areas:

1. Child sexuality issues and behavior generally and within the client’s and complainant’s family circumstances

2. Sexual victimization issues
3. Special evidentiary and substantive law issues pertaining to the litigation of sexual misconduct cases

4. Special Collateral Consequences, including DNA Submission, access to commitment treatment programs, probation requirements, Sex Offender Registration and Notification Act, 29 and Act 21.

C. Defense counsel must obtain and review all relevant reports and documents pertaining to both the client and the complainant. Counsel should be prepared to fully investigate the client’s and complainant’s backgrounds, prior relationships and the factual circumstances surrounding the incident. Any witnesses should be identified, interviewed, and investigated.

D. Counsel’s case preparation should include obtaining and reviewing police reports, forensic interviews of the complainant and any witnesses, medical records, psychological and psychiatric evaluations, internet social networks and the CYS/DHS records of the complainant, witnesses and the client.

E. Counsel should actively seek advice from experts in the area of sexual offending who may evaluate the client and provide substantive information related to sexual behaviors, available treatment methodologies and resources to support client advocacy during the pre- and post-adjudication stages.

F. Counsel should carefully screen and analyze any admission “offer” from the district attorney within the context of both the direct and collateral consequences of an admission and the likely disposition by the assigned judge. Counsel should be familiar with the disposition recommendations by the probation office in similar cases and the disposition outcome pattern of the assigned judge.

G. If the case proceeds to a contested adjudication hearing, counsel must be fully prepared to litigate all fact and legal issues, either through motions or at the hearing. Counsel must also actively cross-examine prosecution witnesses, call any reasonable defense witnesses, and present any other evidence to assist the defense case. Counsel has an obligation to create a complete record and ensure the recording of the entire case for appeal.

H. Counsel must prepare for any dispositional hearing and must seek the best possible outcomes for the client. Counsel may seek to present a dispositional report to the judge and argue for a disposition independent from any suggestions offered by the probation department.

I. Counsel must continue to represent clients adjudicated delinquent for a sexual offense after the disposition hearing to ensure that court-ordered services are provided and delivered in an appropriate setting based upon the needs and ability of the client.

J. Counsel should also be prepared to represent these youth when they are aging out of the juvenile justice system, but are not yet twenty-one years of age. During this time, these youth face a civil mental health commitment hearing under Act 21, 42 Pa. C. S. Chapter 64, to determine whether they have a “mental abnormality” that “renders them unable to control their violent sexual impulses.” In preparation for this hearing and to contest civil commitment for a
year or more to the Sexual Responsibility and Treatment Program at Torrance State Hospital, counsel should seek a complete client assessment independent of the one conducted by the Pennsylvania Sexual Offenders Assessment Board (“SOAB”). Throughout the assessment process by SOAB, counsel must protect the client’s rights against self-incrimination.

Section 2: Dual Jurisdiction Cases: Juveniles in both the Delinquency and the Dependency Court Systems

A. When defense counsel is assigned to provide delinquency representation for a child or adolescent who is already under the jurisdiction of the dependency court as an “abused” and/or “neglected” youth, counsel must know the social services and child welfare support services available for that child and his or her family, as well as the protections afforded to foster youth under Title IV-E of the Social Security Act.

B. Counsel must fully protect the due process rights of a “dual jurisdiction” child who faces adjudication and disposition in delinquency court.

C. For delinquency disposition planning, counsel should have full access to child welfare information, assessments and reports that may assist with determining treatment, and placement options available for final delinquency court disposition.

D. When appropriate, counsel should advocate for access to dependency court placement and treatment resources to improve the client’s final delinquency disposition outcomes.

GUIDELINE EIGHT: Continuing Post-Disposition Representation Responsibilities

Section 1: Juvenile Defense Counsel’s Continuing Representation Responsibilities at Review Hearings after Disposition

A. Once counsel has entered an appearance or the court assigns counsel, counsel’s obligation to represent the child continues through final judgment, including probation violation and dispositional review hearings. Counsel may be permitted to withdraw upon filing a motion and subsequent court order for good cause shown or upon the entry of appearance by new retained counsel. If new retained counsel enters an appearance or is appointed, original counsel should comply with the information requests of new counsel so the juvenile client is not prejudiced or representation delayed.

B. When the child is committed to a residential placement facility or program, counsel has a continuing obligation to ensure that the required placement goals are met and that all necessary services are provided. Counsel must review the client’s placement goals and reports and attend all post-disposition placement and progress review hearings. Counsel or counsel’s appropriate authorized agent must also maintain written, face-to-face or telephonic contact with the client to ensure that the health and safety of the child is fully protected.
Section 2: Counsel’s Advocacy Role for Juveniles Placed in Specialty Drug and Treatment Courts

A. Pennsylvania has and will continue to develop a number of juvenile treatment and specialty courts. Treatment courts, especially drug treatment courts, provide juveniles with additional community-based options.

B. Before a child is placed into a treatment court program, the attorney should fully explain the treatment court program and reporting requirements to the client and the parent(s). When a treatment court team defense attorney serves as the client’s advocate solely for the treatment court program, counsel assigned for the adjudicatory hearing must explain the role of this additional attorney. Treatment court counsel must also provide an explanation of his special representational role to the client and the parent(s).

C. Treatment court juvenile defense counsel should ensure that his clients are fairly treated, that effective therapeutic procedures and modalities are applied, and that these courts retain positive rehabilitative rather than punitive goals. Counsel must serve as a zealous advocate for all clients enrolled in the treatment court program, protecting their due process rights, presenting mitigating factors, and advocating for community-based services.

D. As a member of the treatment court team, defense counsel should actively participate in all phases of treatment court, including the establishment of the eligibility criteria, the application process, and the admissions process. Counsel should also help shape the expectations for the court and assist in establishing goals and the means to achieve them.

E. Defense counsel should participate in the administration of treatment court and help increase access to treatment and other services and assist in the development of appropriate incentives and sanctions. Counsel should also participate in the development of appropriate policies related to access, disclosure and distribution of confidential client and family information acquired through the treatment court program.

F. Counsel should advocate for a written treatment court team policy manual and/or memoranda of understanding that clearly describe the treatment court’s operational policies and procedures and limits the disclosure of personal records and information. As circumstances require, counsel may seek to amend these manuals or memoranda to improve the quality of the program and better protect the client’s interests.

G. Treatment court counsel should encourage the evaluation and assessment of the program and suggest areas for improvement consistent with greater client success and graduation from the program.

Section 3: Counsel’s Responsibilities to File Expungement Petitions

A. Consistent with statutory enactment and the Rules of Juvenile Court Procedure, a juvenile may be eligible under specified circumstances to have his juvenile court records expunged. Where there is a good faith basis for the filing of a Motion to Expunge Juvenile Records, defense counsel should so file and represent the client before the court. Counsel should ensure that all
appropriate records subject to expungement, including the official court record, probation records, docket entries, law enforcement records, fingerprints, photographs, DNA samples and any other material, are included in the motion and any final court order to expunge.

GUIDELINE NINE: The Role of Juvenile Defense Counsel in Transfer and Direct File Proceedings

Section 1: Qualifications and Experience of Juvenile Defense Counsel in Transfer and Direct File Proceedings

A. Transfer and direct file proceedings require special knowledge and skill due to the severity of the consequences of these proceedings. Counsel shall not undertake representation assignments of children in these areas without sufficient experience, knowledge and training in this specialized area of practice.

B. Best practices recommend that counsel representing children in transfer and direct file proceedings possess significant prior criminal procedure, law, and jury trial experience, as well as substantive knowledge about adult sentencing law, county and state corrections systems, and any available community-based alternatives to incarceration.

Section 2: Effective Client Centered Case Preparation in Transfer and Direct File Cases

A. Counsel must know the legal issues related to probable cause hearings and transfer/direct file proceedings, and counsel has an obligation to actively investigate the social, psychological and educational history of the child.

B. In order to provide the judge with a comprehensive argument in support of retaining juvenile court jurisdiction, counsel should actively use the services of experts, such as social workers, psychologists and investigators. Counsel should seek funding from either the public defender office or the court to support these essential defense services.

Section 3: Providing Quality Legal Representation for Juveniles in Transfer and Direct File Proceedings

A. Counsel must know the case law related to transfer and direct file proceedings, as well as the required statutory findings that a court must make before transferring jurisdiction to or from the criminal court. To support the retention of juvenile court jurisdiction, counsel must be prepared to offer evidence and testimony, such as from teachers, counselors, psychologists, probation officers, religious associates, and/or employers, to establish amenability to the juvenile system. Counsel should also contrast the sentencing options available in the adult criminal system with those in juvenile delinquency court.

B. Counsel has a continuing obligation to ensure that transfer and direct file hearing proceedings are recorded and that all issues for appeal are preserved in the official court record.
GUIDELINE TEN: Perfecting an Appeal from the Delinquency Adjudication and Disposition

Section 1: Making and Maintaining a Record for Appeal

A. Throughout the adjudicatory, disposition and post-disposition review process, counsel has an obligation make a record that is reviewable on appeal either orally or through written filings.37

B. Counsel should frequently review the juvenile’s official court record38 to ensure that it accurately contains all filed documents, orders, notices, docket entries, evidence admitted into the record, transcriptions, oral arguments and any other appropriate court designated material.

Section 2: Client’s Right to Appeal & Continuing Representation

A. Counsel must fully inform the client of his or her right to appeal and the actions that must be taken to perfect an appeal. Unless permitted by the court to withdraw an appearance, counsel’s initial entry of appearance continues until final judgment, including any proceeding upon direct appeal.

B. Counsel must complete the timely filings necessary for perfecting an appeal.

Section 3: Counsel’s Responsibilities upon Withdrawal as Appellate Counsel of Record

A. Where original counsel is permitted to withdraw and new counsel is retained or appointed for purposes of an appeal, original counsel should cooperate with new appellate counsel and provide requested information to new counsel during the appellate process.
End Notes

3 A juvenile is a person who has attained ten years of age and is not yet twenty-one years of age who is alleged to have committed a delinquent act before reaching eighteen years of age. Pa. R.J.C.P. 120.
4 In re Gault, 387 U.S. 1 (1967); Ten Core Principles pmbl.
5 Ten Core Principles pmbl., princ. 4.
6 Pa. R.P.C. 1.6(a); 1.14(a), Ten Core Principles pmbl.
9 Pa. R.P.C. 1.2(a).
10 Ten Core Principles princ. 7(A).
11 Ten Core Principles princ. 7(B).
13 Pa. R.P.C. 1.11.
14 Ten Core Principles princ. 7(A).
16 Ten Core Principles princ. 7(D).
17 Ten Core Principles princ. 7(C).
18 ABA Standing Comm. on Indigent Defense, supra note 12, princ. 6.
19 Pa. R.C.P. 1.3; Ten Core Principles princ. 5; ABA Comm. on Ethics and Prof’l Responsibility, Ethics Op. 06-441 (2006); ABA, Eight Guidelines of Public Defense Related to Excessive Workloads (2009); ABA Comm. on Indigent Defense, supra note 12, princ. 5.
21 See Nat’l Juvenile Defender Ctr., Ten Principles for Providing Effective Defense Advocacy at Juvenile Detention Hearings (n.d.).
23 ABA Standards for Criminal Prosecution and Defense Function (3d ed. 1993)
27 See Pa. R.P.C. 3.3.
29 As of this writing, states have until July 27, 2010, to “substantially comply” with the requirements of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901, which establishes a national system for registration of sex offenders and notification to particular stakeholders. Juveniles, included under this Act at 42 U.S.C. § 16911, and serious juvenile sexual offenders could face lifetime registration requirements and federal prosecution for failure to comply with the requirements of the Act. The Act also contains retroactive registration requirements for former juvenile sex offenders who are now adults and who come into the criminal justice system. Pennsylvania has yet to be in substantial compliance under the Adam Walsh Act.
30 Chapter 64 of Title 42 of the Pennsylvania Consolidated Statutes (42 Pa. C.S. §§ 6401–6409) is applicable to individuals who reside in a juvenile treatment facility and are about to turn twenty-one years of age, and who have been adjudicated delinquent for the following enumerated sex offenses: Rape (18 Pa. C.S. § 3121), Involuntary Deviate Sexual Intercourse (18 Pa. C.S. § 3123), Sexual Assault (18 Pa. C.S. § 3124.1), Aggravated Indecent Assault (18 Pa. C.S. § 3125), Indecent Assault (18 Pa. C.S. § 3126), and Incest (Pa. C.S. § 4302).
31 ABA, Policy and Report on Crossover and Dual Jurisdiction Youth (2008)
32 See Pa. R.J.C.P. 150(B).
33 Post-dispositional representation is critical to the accountability of the system, and it is a major goal of the MacArthur Foundation’s Models for Change, which includes the Pennsylvania Juvenile Indigent Defense Network.
37 See Pa. R.J.C.P. 127.
38 See Pa. R.J.C.P. 120.
PERFORMANCE GUIDELINES
FOR QUALITY AND EFFECTIVE
JUVENILE DELINQUENCY
REPRESENTATION