

Oregon State Bar

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

June 27, 2014

Foreword

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

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

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

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

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



Tom Kranovich
Oregon State Bar President

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

Summary and Background

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

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

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

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

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

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

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

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

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

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

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

carefully consider their client’s mental development and their decision-making capacity. Lawyers for parents, on the other hand, have a more straightforward attorney-client relationship with fewer complications and pitfalls based on their client’s capacity.

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

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

| The Obligations of the Lawyer for Children begins on page [4X](#).

| The Obligations of the Lawyer for Parents begins on page [44XX](#).

| The appendixes begin on page [85XX](#).

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

STANDARD 1 - ROLE OF ~~THE~~ LAWYER FOR THE CHILD

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

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

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

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

Commentary:

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

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

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

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

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

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

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

Action:

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

Action:

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

Commentary:

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

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

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

Action:

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

Action:

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

Action:

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

Action:

When a child client has been injured or suffers from a disability or congenital condition that results in the child client having a progressive illness that will be fatal and is in an advanced stage, is in a coma or persistent vegetative state, or is suffering brain death, State ex rel. Juvenile Dept. of Multnomah County v. Smith⁴, provides that the child's lawyer ~~for the child~~ should consult with the parent if appropriate. Further, the child's

³ ~~ORCP 1.14(c).~~

⁴ 205 Or. App. 152, 133 P3d 924 (2006).

~~lawyer and should~~ consider seeking appointment of a guardian ad litem under the juvenile and probate code in a consolidated case with the authority to consent to medical care, including the provision or withdrawal of life sustaining medical treatment pursuant to ORS 127.505 et seq.

Commentary:

This standard implements paragraph (b) of Oregon RPC 1.14, which states the generally applicable rule that when a client has diminished capacity and the lawyer believes the client is at risk of substantial harm, the lawyer may take certain steps to protect the client, such as consulting with family members or protective agencies and, if necessary, requesting the appointment of a guardian ad litem (GAL). In addition, the commentary to the Rule notes that if a guardian is not appointed, “the lawyer often must act as de facto guardian.”

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

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

Requesting the judge to appoint a court-appointed special advocate (CASA) or other best interest advocate may undermine the relationship the child’s lawyer has established with the child. It also potentially compromises confidential information the child client may have revealed to the lawyer. The child’s lawyer cannot ever become the best interest advocate, in part due to confidential information that the child’s lawyer receives in the course of representation. Nothing in this section restricts a court from

independently appointing a best interest advocate when it deems the appointment appropriate.

- E. **The child's lawyer should not advise the court of ~~the his or her~~ lawyer's determination of the child client's capacity, and, if asked, should reply that the ~~lawyer's~~ relationship ~~with-between~~ the child client and his or her lawyer is privileged.**

Commentary:

The child's lawyer's assessment of a child client's capacity to direct the case is a confidential matter that goes to the heart of the lawyer-client relationship. Even though sometimes judges want to know whether the child's lawyer is acting at the child client's direction or is making a substituted judgment, the child's lawyer should not provide this information, since doing so fundamentally undermines the lawyer's ability to be an effective advocate for the child client.

STANDARD 2 - RELATIONSHIP WITH THE CHILD CLIENT

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

Establishing and maintaining a relationship with the child client is the foundation of representation. It is often more difficult to develop a relationship and trust with a child client than with an adult client. Meeting with the child client personally and regularly allows the child's lawyer to develop a relationship with the child client and to assess the child client's circumstances. The child client's position, interests, needs and wishes change over time. A lawyer for a child cannot be fully informed of such changes without developing a relationship through frequent contacts.

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

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

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

Action:

The child's lawyer should ensure the child client understands how to contact ~~the~~his or her lawyer and that ~~the~~the child's lawyer wants to hear from the child client on an

ongoing basis. The child's lawyer should explain that even when ~~the lawyer~~ he or she is unavailable, the child client should leave a message.

Action:

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

Action:

The child's lawyer should discuss with the child the potential consequences of using social media.

Commentary:

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

Communicating with child clients and other parties through electronic communication by email may be the most effective means of maintaining regular contact. However, lawyers should also understand the pitfalls associated with communicating sensitive case history and material by email electronically. Not only can email electronic communication create greater misunderstanding and misinterpretation, it can also become documentary evidence in later proceedings. The child's lawyer should ~~treat this form of~~ be aware that that although the use of electronic communication may require special precautions in particular circumstances. communication as not confidential and advise the child client accordingly.

Communication through social media raises additional confidentiality concerns. The child's lawyer should alert the child the child client that anything that is part of a public posting is accessible to, and can be used by, opposing counsel. Additionally, it may be helpful to inform the child client that opposing counsel (or their agent) may request to see their private information or information set behind privacy settings. If this happens, the child client should not accept and should contact you to let you know immediately. The other attorney's contacting the child client may be a violation of the rules of ethics, if the attorney is aware the client is represented. (ORPC 4.3). While social media may be a convenient way to locate and communicate with child clients, attorneys and child clients should be aware that communications are not confidential nor are they protected by attorney-client privilege.

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Commented [OJD2]: Electronic communication is: It includes any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system. (source: US DOJ Criminal Resources Manual Sec 1045)

Commented [OJD3]: See Hirschbiel, Helen *Safeguarding Client information in a Digital World* (<https://www.osbar.org/publications/bulletin/10jul/barcounsel.html>)

Commented [OJD4]: Webster's definition of social media: forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos)

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

In addition to communicating with the child client, the child’s lawyer should review records and consult with appropriate professionals and others with knowledge of the child client. The child’s lawyer also may find it helpful to observe the child client’s interactions with foster parents, birth parents and other significant individuals. This information will help counsel the child’s lawyer to better understand the child client’s

perspective, priorities and individual needs, and will assist the child's lawyer identifying relevant questions to pose to the child client.

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

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Action:

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

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

Action:

A lawyer or a lawyer associated in practice, should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases or closely related matters unless it is clear there is no conflict of interest between the parties as defined by the Oregon Rules of Professional Conduct (~~ORPC~~). Lawyers should also follow Oregon RPC 1.7–1.13 relating to conflicts of interests and duties to former clients.

Commentary:

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

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

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

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

Action:

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

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

Action:

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

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

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

Commentary:

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

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

Action:

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

Action:

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

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

Commentary:

The child’s lawyer may request authority from the appropriate authority to pursue issues on behalf of the [child](#) [client](#), administratively or judicially, even if those issues do not specifically arise from the court appointment. Such ancillary matters may include

special education, school discipline hearings, mental health treatment, delinquency or criminal issues, status offender matters, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth transitioning out of care issues, postsecondary education opportunity qualification and tort actions for injury.

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

STANDARD 3 - TRAINING REQUIREMENTS FOR COMPETENT REPRESENTATION OF CHILDREN/CHILD CLIENTS

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

Action:

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

Action:

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

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

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

Action:

~~A~~ **The** child’s lawyer must be thoroughly familiar with Oregon evidence law and the [Oregon Rules of Professional Conduct](#).

Action:

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

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

Action:

~~A lawyer for children~~ **The child’s lawyer** should become familiar with normal growth and development in children and adolescents as well as common types of condition and impairments.

Action:

~~A lawyer for children~~ **The child’s lawyer** should be familiar with the range of placement options in dependency cases and should visit at least two of the following:

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

Action:

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

Commentary:

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

STANDARD 4 - GENERAL PRINCIPLES GOVERNING CONDUCT OF THE CASE

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

Commentary:

Delaying a case often increases the time a family is separated and can reduce the likelihood of reunification. Appearing in court often motivates parties to comply with orders and cooperate with services. When a judge actively monitors a case, services are often put in place more quickly, visitation may be increased or other requests by the ~~parent-child~~ may be granted. If a hearing is continued and the case is delayed, the ~~parent-child~~ 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.

Commented [AZ5]: This needs to be flipped to discuss child but it seems like there might be substantive changes necessary.

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

Action:

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

Action:

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

Commentary:

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

D. The child’s lawyer or the lawyer’s agency must not contact represented parties without the consent of their lawyer(s).

Commentary:

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

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

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

Commented [AZ6]: Should this be updated to include information regarding agency representation?

Commented [AZ7]: This might need some expansion?

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Action:

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

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

Commentary:

Frequent high-quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the child's lawyer seek a visitation order that will allow the best possible visitation. The child's lawyer should

advocate that visits be unsupervised if safe for the child-child client or at the lowest safe level of supervision, e.g. families often are more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than caseworkers.

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

STANDARD 5 - INVESTIGATION

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

The child's lawyer should interview individuals involved with the child client.

Action:

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

Commented [AZ8]: Is this correct?

Action:

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

Action:

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

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Commentary:

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

Commentary:

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

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

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

Action:

Potential witnesses to be interviewed may include:

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

Commentary:

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

Action:

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

STANDARD 6 - COURT PREPARATION

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

Appropriate pretrial motions include but are not limited to:

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

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

Action:

~~A~~ [The child's](#) lawyer should make motions to meet the [child](#) client's needs pending trial.

Commentary:

Examples of such motions include:

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

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

Action:

The child’s lawyer should, when appropriate, participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the child [client](#)’s goals.

Commentary:

The child’s lawyer should use suitable mediation resources. The child’s lawyer should consult the child [client](#) in a developmentally appropriate way prior to any settlement becoming binding. The ultimate settlement agreement must be consistent with the child [client](#)’s wishes.

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

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

D. Explain to the child [client](#), in a developmentally-appropriate manner, what is expected to happen before, during and after each hearing and facilitate the child [client](#)’s attendance at hearings when appropriate.

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

There is no minimum age below which a child client is automatically incompetent to testify. To testify as a witness, the child client must have the capacity to observe, adequate intelligence, adequate memory, ability to communicate, an awareness of the difference between telling truth and falsehood and understand that she or he must tell the truth as a witness. The court should make the determination of the child client's competency as a witness under the applicable rules of evidence prior to the child client's testimony. If necessary, the child's lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child client on those bases.

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

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

Action:

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

Commentary:

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

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

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

H.F. The child's lawyer should identify, locate and prepare all witnesses.

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Action:

When opposing counsel plans to call expert witnesses, the child's lawyer should seek to interview the witnesses in advance. The child's lawyers should scrupulously comply

with standing orders of the juvenile court regarding contact with court-ordered evaluators.

Commentary:

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

STANDARD 7 - HEARINGS

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

Action:

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

Action:

If the court proceeds in the absence of the child's lawyer, ~~he or she the lawyer~~ should file a motion to set aside.

Commentary:

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

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

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

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

Commentary:

The phrasing of questions should take into consideration the law and research regarding children's testimony, memory and suggestibility. The information a child gives in interviews and during testimony is often misleading because ~~the adults have may not understood understand~~ how to ask children developmentally appropriate questions ~~and nor~~ how to interpret ~~their~~ answers properly. The child's lawyer must become skilled at recognizing the child client's developmental limitations. It may be appropriate to present expert testimony on the issue and even to have an expert present during a young child's testimony to point out any developmentally inappropriate phrasing.

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

Action:

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

Action:

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

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

Action:

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

Commentary:

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

STANDARD 8 - POST HEARINGS

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

Action:

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

Action:

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

Commentary:

The child client may be angry about being involved in the child welfare system and a court order that is not consistent with the child client's wishes could add stress and frustration. It is essential that the child's attorney-lawyer 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 child client. The attorney-child's -lawyer should counsel the child client about all options, including appeal (see Standard 9).

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

Action:

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

Commentary:

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

STANDARD 9 – MODIFYING OR VACATING AN ORDER

~~XXXXXXXXXX~~

STANDARD 9-10 - APPEALS ISSUES FOR CHILD’S-TRIAL LAWYER

- A. ~~The child’s trial lawyer should c~~onsider and discuss the possibility of appeal with the child client.

Action:

The child’s lawyer should immediately consider and discuss with the child client, preferably in person, the possibility of appeal when a court’s ruling is contrary to the child client’s position or interests. Regardless of whether the child’s lawyer believes an appeal is appropriate or that there are any viable issues for appeal, the child’s lawyer should advise the child client—at the conclusion of each hearing—that he or she has a right to appeal from any judgment or order resulting from a jurisdictional hearing, review hearing, permanency hearing or termination of parental rights trial. Further, if the hearing was held before a juvenile court referee, the child’s lawyer should advise the child client that he or she is entitled to a rehearing before a juvenile court judge. Under ORS 419A.150(4), unless a rehearing is requested within 10 days following the

entry of the referee's order, the order will become a final and non-appealable order.⁵ Whether to seek a rehearing of a referee's order or to pursue a direct appeal in the appellate courts is always the child client's decision.

Commentary:

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

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

Action:

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

Commentary:

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

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

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

⁵ORS 419A.150(4)

Commented [AZ9]: Is this still the process?

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

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

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

STANDARD ~~10-11~~ — APPEALS ISSUES FOR APPELLATE LAWYERS

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

Action:

The [child's trial](#) lawyer filing the notice of appeal must comply with statutory and rule requirements in filing the notice of appeal.

Commentary:

~~A-~~Under ORS 19.270, a proper notice of appeal is a jurisdictional requirement.⁶ Consequently, the notice must satisfy statutory requirements in order to prosecute the appeal.⁷

⁶ ~~ORS 19.270.~~

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

ORS 419A.200(5) permits the child's appellate lawyer to move the court for leave to file a late notice of appeal after the statutory 30-day time limit (up to 90 days after entry of judgment). A motion to file a notice of appeal after the 30-day period, to be successful, must demonstrate (1) that the failure to file a timely notice of appeal was not personally attributable to the parent, *and* (2) "a colorable claim of error" exists in the proceeding from which the appeal is taken.⁸

B. The child's appellate lawyer should communicate with the child client.

Action:

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

Commentary:

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

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

Action:

The child's appellate lawyer should review the trial court record and any opposing briefs, identify and research issues, and prepare and timely file and serve the brief on behalf of the child client. The brief should reflect relevant case law and present the best

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

legal arguments available under Oregon and federal law to advance the child client’s position. Novel legal arguments that might develop favorable law in support of the child client’s position should also be advanced if available. The child’s appellate lawyer should send the child client who is able to read, and the child’s trial lawyer, a copy of the filed brief.

Commentary:

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

Commented [AZ10]: Is this distinction important in this commentary?

D. Prosecuting or defending the appeal – Oral Argument.

Action:

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

Commentary:

The child’s appellate lawyer should consider whether ~~the~~ an oral argument might advance the child client’s goals in the appeal and, if the oral argument is desirable, make a timely request for oral argument.¹⁰

E. The child’s lawyer should communicate the results of the appeal and its implications to the child client.

Action:

The child’s appellate lawyer should communicate the result of the appeal and its implications in an age appropriate fashion to the child client. If ~~the client~~ he or she is able to read, a copy of the appellate decision should be provided to the child client. The child’s appellate lawyer should also communicate the result of the appeal to the child’s trial lawyer and provide a copy of the appellate decision as well as any needed consultation. The child’s appellate lawyer should consider whether to petition for

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

¹⁰ ORAP 6.05.

review in the Oregon Supreme Court and advise the child client about such a petition. Whether to petition for review is ultimately the child client's decision unless the child client is of diminished capacity. When the child client is of diminished capacity, and it is not reasonably possible to obtain direction from the child client, the child's appellate lawyer should determine what the child client would decide if ~~the child~~ he or she were capable of making an adequately considered decision and proceed according to that determination.

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

STANDARD 1 - ROLE OF THE LAWYER FOR ~~THE PARENTS~~

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

Action:

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

Commentary:

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

the best ways to achieve the parent client's goals, but the parent client is in charge of deciding the case goals and the parent's lawyer must act accordingly.

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

Action:

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

Commentary:

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

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

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

- C.D. When the parent's lawyer reasonably believes that the parent client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the parent client's own interest, the parent's lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the parent client.**

Action:

Commented [AZ11]: There does not appear to be either action or commentary under Sub(C), nor was there any in the published version. Is that correct?

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

Action:

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

Commentary:

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

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

Information relating to the representation of a parent client with diminished capacity is protected by Oregon RPC 1.6. When taking protective action, the parent's lawyer is implicitly authorized under Oregon RPC 1.6(a) to reveal information about the parent client, but only to the extent reasonably necessary to protect the parent client's

Commented [AZ12]: Is this the missing word?

¹¹ ORCP 1.14(c) Oregon RPC 1.14(c)

¹² Oregon State Bar Formal Opinion No. 2005-159.

interests. Consequently, and as a general proposition, lawyers for a parents should not invade a typical parent client's rights beyond the extent to which it reasonably appears necessary for the parent's lawyer to do so. In other words, lawyers should request GALs for their parents only when a parent client consistently demonstrates a lack of capacity to act in his or her own interests and it is unlikely that the parent client will be able to attain the requisite mental capacity to assist in the proceedings in a reasonable time.

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

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

When a GAL is appointed for a parent client, under ORS 419B.234(3)(a), the GAL must consult with the parent's lawyer.¹⁵ Under, ~~OR~~ ORS 419B.234(3)(d) the GAL also has the statutory authority to control the litigation and provide direction to the parent's lawyer on decisions that would ordinarily be made by the parent client in the proceeding.¹⁶ Further, under ORS 419B.234(5), ~~the~~ parent's lawyer is required to follow such directions provided by the GAL, but must inquire at every critical stage of the proceedings as to whether the parent client's competence has changed.¹⁷ If appropriate, the parent's lawyer must request removal of the GAL.

STANDARD 2 - RELATIONSHIP WITH THE PARENT CLIENT

A. The parent's lawyer must meet and communicate regularly with the parent client.

Action:

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

Action:

¹³ *United States v. 30.64 Acres*, 795 F2d 796 (9th Cir 1986).

¹⁴ *Id.* at 806.

¹⁵ ~~ORS 419B.234(3)(a)~~;

¹⁶ ~~ORS 419B.234(3)(d)~~;

¹⁷ ~~ORS 419B.234(5)~~;

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

Commented [AZ13]: Should this be plural? Generally, I've edited that as a default, a parent is going to have his or her own attorney and not share. However, it makes sense to me that the parent's lawyer should contact both parents prior to a court hearing.

Commented [AZ14]: Should their be contact only if it is the child client or any child of the parent?

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

Gaining the parent client's trust and establishing ongoing communication are two essential aspects of representing the parent client. The parent client may feel angry and believe that all of the lawyers in the system work with the child welfare agency and against that parent client. It is important that the parent's lawyer, from the beginning of the case, is clear with the parent client that the parent's lawyer works for the parent client, is available for consultation and wants to communicate regularly. This will help the parent's lawyer support the parent client, gather information for the case and learn of any difficulties the parent client is experiencing that the parent's lawyer might help

address. The parent's lawyer should explain to the parent client the benefits of bringing issues to the lawyer's his or her attention rather than letting problems persist. The parent's lawyer should also explain that the parent's lawyer is available to intervene when the parent client's relationship with the agency or provider is not working effectively. The parent's lawyer should be aware of the parent client's circumstances, such as whether the parent client has access to a telephone, and tailor the communication system to the individual parent client. For example, it may involve telephone contact, email or communication through a third party when the parent client agrees to it.

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

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

Action:

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

Action:

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

Action:

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

Action:

The parent's lawyer should provide or insure that the parent client is provided with copies of all petitions, court orders, service plans and other relevant case documents,

including reports regarding the child except when expressly prohibited by law, rule, or court order.

Action:

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

Commentary:

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

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

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

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

A-The parent's lawyer should give the parent client time to ask questions and consider the alternatives. A-The parent's lawyer should obtain information from the parent client about: the parent client's prior contacts with the agency; the parent client's knowledge about the allegations of the petition; the accuracy of information provided by the state supporting the petition; alternative or amended allegations that

should be sought as part of the negotiations with the parties; services provided before removal or intervention (i.e. In-Home Safety and Reunification Services “ISRS”); reasons for removal or intervention; services the parent client feels would have avoided the need for removal; alternatives to removal, including relative placements, in-home services, or removal a person who allegedly endangers the child from the parent client’s and child’s home; current efforts to reunify the family; family history, including paternity issues, if any, and identity of prior caretakers of the child; services needed by the child, each parents or guardians; the parent client’s concerns about placement; the parent client’s long and short-term goals; and current visitation and the parent client’s desires concerning visitation.

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

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

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

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

Action:

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

Commentary:

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

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

Under Oregon RPC 1.7(a), ~~when~~ analyzing whether a conflict of interest exists, the lawyer must consider whether : "(1) the representation of one parent will be directly adverse to another parent; (2) there is a significant risk that the representation of one or more parents will be materially limited by the lawyer's responsibilities to another parent, a former parent or a third person or by a personal interest of the lawyer; or (3) the lawyer is related to another lawyer, as a parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter."¹⁸

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

Action:

The parent's lawyer should learn about and understand the parent client's background, determine how that has an impact on the parent client's case and always show the

¹⁸ ~~Oregon Rules of Professional ConductRPC, Rule 1.7(a)~~

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parent client respect. The parent's lawyer must understand how cultural, linguistic and socioeconomic differences impact interaction with the parents client, and must interpret the parent client's words and actions accordingly.

Commentary:

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

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

The parent's lawyer should help the parent client identify potential kinship placements and relatives who can provide care for the child while the parent client is incarcerated. Lawyers must understand the implications of Adoption and Safe Families Act (ASFA) for an incarcerated parent client who has difficulty visiting and planning for the child.

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

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

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

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

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

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

Action:

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

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

Commentary:

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

STANDARD 3 - TRAINING REQUIREMENTS FOR COMPETENT REPRESENTATION OF PARENT CLIENTS

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

Action:

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

Action:

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

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

- 1) Oregon Revised Statutes chapters 419A and 419B, Oregon Juvenile Code;
- 2) Oregon Revised Statutes chapter 418, Child Welfare Services;
- 3) Oregon Revised Statutes, ORS 418.925–418.945 Refugee Child Act;
- 4) Oregon Revised Statutes concerning paternity, guardianships and adoption;
- 5) Oregon Revised Statutes, ORS 417.200-417.260, Interstate Compact on Placement of Children, and Oregon Administrative Rules;
- 6) Oregon Revised Statutes, ORS 109.701-109.834, Uniform Child Custody Jurisdiction and Enforcement Act, and Oregon Administrative Rules;
- 7) The basic structure and functioning of the Department of Human Services and the juvenile court, including court procedures, the functioning of the Citizen Review Board (CRB) and court-appointed special advocates (CASA) programs;
and
- 8) Indian Child Welfare Act 25 USC §1901 -1963; Bureau of Indian Affairs Guidelines; and Oregon Administrative Rules.

Action:

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

Action:

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

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

Action:

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

Commentary:

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

STANDARD 4 - GENERAL PRINCIPLES GOVERNING CONDUCT OF A CASE

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

Action:

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

Action:

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

Action:

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

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

Commentary:

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

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

Action:

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

Action:

The **child’s-parent’s** lawyer should respond promptly to inquiries from other parties and their representatives.

Commentary:

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

D. The parent’s lawyer may not contact represented parties without the consent of their lawyer(s).

Commentary:

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

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

Commented [AZ16]: Will this need to be updated with the agency standards being written by the other work group?

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

The ~~lawyer for the parent~~parent's lawyer should consider whether the child's lawyer or the court-appointed special advocates (CASA) might be an ally on service and visitation issues. If so, the parent's lawyer should solicit their assistance.

Action:

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

Commentary:

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

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

Action:

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

Action:

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

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

Commentary:

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

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

A-The parent's lawyer for an incarcerated parent must be aggressive in ensuring frequent, high quality visitation. In general, visits in prison are governed by the Department of Corrections directives, available on line, which tend to be far more generous than the practices (as opposed to the policies) of DHSDepartment of Human Services. A-The parent's lawyer may need to be personally familiar with the visitation

rules and visiting rooms of a particular prison to be an effective advocate for the parent client.

STANDARD 5 - INVESTIGATION

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

Action:

The parent's lawyer should meet with the parent client regularly throughout the case. The meetings should occur well before any hearings, not at the courthouse just minutes before the case is called before the judge. The parent's lawyer should ask the parent

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

Commentary:

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

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

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

Action:

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

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

Action:

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

Action:

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

Commentary:

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

Action:

When appropriate, the parent's lawyer, or ~~the lawyer's~~ his or her-trained and qualified staff, should observe visitations between the parent client and child.

STANDARD 6 - COURT PREPARATION

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

Appropriate pretrial motions include but are not limited to:

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

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

Action:

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

Commentary:

Examples of such motions include:

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

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

Action:

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

Commentary:

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

While the ~~parents-parent client~~ may admit to facts, ~~parents-he or she~~ cannot stipulate to jurisdiction.¹⁹ Jurisdiction is a legal conclusion for the judge to determine.

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

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

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

Action:

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

Commentary:

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

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

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

Action:

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

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

Action:

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Action:

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

Commentary:

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

STANDARD 7 - HEARINGS

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

Action:

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

STANDARD 8 - POST HEARING

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

Action:

At the conclusion of the hearing, the parent's lawyer should request and obtain a copy of the written order or judgment to ensure it reflects the court's verbal order. If the order or judgment is incorrect, *i.e.*, it does not reflect the court's verbal rulings, the parent's lawyer should take whatever steps are necessary to correct it to the extent that the corrections are beneficial to the parent client. The parent's lawyer should provide the parent client with a copy of the order or judgment and should review the order or judgment with the parent client to ensure ~~the client~~ that he or she understands it and ~~the client's~~ his or her obligations under the order. If the parent client is unhappy with the order, the parent's lawyer should counsel ~~the client~~ him or her about any options to appeal or request a rehearing on the order, but should explain that the order is in effect unless a stay or other relief is secured.

Commentary:

The parent client may be angry about being involved in the child welfare system and a court order that is not in the parent client's favor could add stress and frustration. It is essential that the parent's ~~attorney-lawyer~~ 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 parent client. The parent's lawyer should counsel the parent client about all options, including appeal (see Standard 10).

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

Action:

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

Commentary:

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

STANDARD 9 - MODIFYING OR VACATING AN ORDER

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

Action:

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

Commentary:

The parent's lawyer should be aware that ORS 419B.923 requires that a motion to modify or vacate an order or judgment of the juvenile court must be filed within a

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

STANDARD 10 - APPEALS ISSUES FOR TRIAL -LAWYER

- A. **The parent’s lawyer should Consider and discuss the possibility of appeal with the parent client.**

Action:

The parent’s lawyer should immediately consider and discuss with the parent client, preferably in person, the possibility of appeal when a court’s ruling is contrary to the parent client’s position or interests. Regardless of whether the parent’s lawyer believes an appeal is appropriate or ~~that if~~ there are any viable issues for appeal, the parent’s lawyer should advise the parent client—at the conclusion of each hearing—that he or she has a right to appeal from any judgment or order resulting from a jurisdictional hearing, review hearing, permanency hearing or termination of parental rights trial. Further, if the hearing was held before a juvenile court referee, the parent’s lawyer should advise the parent client that he or she is entitled to a rehearing before a juvenile court judge. Under ORS 419A.150(4), unless a rehearing is requested within 10 days following the entry of the referee’s order, the order will become a final and non-appealable order.²⁰ Whether to seek a rehearing of a referee’s order or to pursue a direct appeal in the appellate courts is always the parent client’s decision.

Commentary:

²⁰ ORS 419A.150(4).

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

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

Action:

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

Commentary:

Pursuant to ORS 419A.200(4)²², the parent's trial attorney must file the notice of appeal or, if court-appointed, the parent's trial attorney may discharge his or her duty to file the notice of appeal by referring the case to the Juvenile Appellate Section of OPDS using the on-line referral form and complying with OPDS procedures.

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

- 1) Electronically complete and submit the referral form to OPDS at least five (5) days prior to the due date for the notice of appeal (If the referral is within fewer

²¹ See ORS 19.360.

²² ORS 419A.200(4) "The counsel in the proceeding from which the appeal is being taken shall file and serve those documents necessary to commence an appeal if the counsel is requested to do so by the party the counsel represents. If the party requesting an appeal is represented by court-appointed counsel, court appointed counsel may discharge the duty to commence and appeal under this subsection by complying with policies and procedures established by the office of public defense services for appeals of juvenile court judgments."

than 5 business days of the notice of appeal due date, the trial lawyer remains responsible for filing the notice of appeal and should contact OPDS for assistance locating counsel on appeal.); and

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

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

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

STANDARD 11 - APPEALS ISSUES FOR APPELLATE LAWYER

A. Timely file the notice of appeal.

Action:

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

Commentary:

Commented [AZ17]: Under Standard 10A on page 42, the child's trial attorney is responsible for timely filing of appeal. Here it's the appellate lawyer. Is this correct or an inconsistency?

A-Under ORS 19.270, proper notice of appeal is a jurisdictional requirement.²³ Consequently, the notice must satisfy statutory requirements in order to prosecute the appeal.²⁴

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

B. The parent’s appellate lawyer should ~~maintain communication~~ communicate with the parent client.

Action:

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

Commentary:

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

In all cases, except appeals from a judgment, terminating a parent’s parental rights, the appeal from a discrete judgment, ~~and~~ the ongoing dependency litigation will be occurring concurrently. The parent’s appellate lawyer and the trial lawyer should be thoughtful about their respective roles and relationship with the parent client. For example, the parent’s trial lawyer should be careful to safeguard the appeal by consulting with the parent’s appellate lawyer prior to upcoming hearings and immediately notifying the parent’s appellate lawyer should the court enter any new order or judgment to determine whether the new judgment should be referred for appeal. The parent’s appellate lawyer should consult with the parent’s trial lawyer

Commented [AZ18]: Not sure if I edited this sentence correctly. It’s possible there is something missing from the list after the “and” and removing the “and” is not appropriate.

²³

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

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

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

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

C. Prosecuting or defending the appeal – issue selection and briefing.

Commented [AZ19]: Changed to make consistent with the child standards.

a. Issue Selection and Briefing.

Action:

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

Action:

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

Commentary:

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

Commented [AZ20]: Is this an important distinction?

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

disagrees with the judgement of the attorney's parent's appellate lawyer judgment.²⁷

b. Prosecuting or defending the appeal - Oral Argument.

Action:

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

Commentary:

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

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

Action:

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

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

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