

**State of Alabama**  
**Standards of Practice for Attorneys Representing**  
**Parents in Dependency and Termination-of-Parental-Rights Cases**

The Alabama Parents' Attorney Standards Subcommittee, chaired by John Bodie, Esquire, of Trussville, Alabama, met in October 2012 to discuss the adoption of standards for representing parents in dependency and termination-of-parental-rights (TPR) cases in the State of Alabama. In preparation for the meeting, a copy of the American Bar Association (ABA)'s "Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases" was distributed to the subcommittee members. The subcommittee agreed that the ABA standards would serve as a working draft for the meeting, and several amendments were made. Subcommittee comments identified as "Alabama Comments" are included to provide clarifications for interpretation and/or implementation in Alabama.

The ABA graciously granted permission to use its guidelines with the following disclaimer and notice:

The American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases has been updated by the Family Court Division, Alabama Administrative Office of Courts. The updates expressed within do not necessarily reflect the views or policies of the American Bar Association or the Commission on Children and the Law. Reprinted with permission. ©Copyright 2006 American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the American Bar Association.

These standards have been approved by the Alabama State Bar Association Family Law Section Board and apply to all State-provided attorneys (whether the attorneys are appointed, provided under contract, are public defenders, or are otherwise paid for by State funds), recognizing that individuals always maintain the right to hire counsel of their own choosing.

Introduction

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

The standards are divided into the following categories:

1. Summary of the Standards
2. Basic Obligations of Parents' Attorneys
3. Obligations of Attorney Manager

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

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

Representing a parent in juvenile dependency or TPR case is a difficult and emotional job. There are many responsibilities. These standards are intended to help the attorney prioritize duties and manage the practice in a way that will benefit each parent on the attorney's caseload.

Part of the Scope of the Alabama Rules of Professional Conduct provides as follows:

“Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.”

## **SUMMARY: Alabama Standards of Practice for Attorneys Representing Parents in Juvenile Dependency and TPR Cases**

Basic Obligations: The parent's attorney shall:

### **General:**

- 1. Adhere to all relevant training and mentoring requirements before accepting a court appointment to represent a parent in a juvenile dependency and TPR case.**
- 2. Acquire sufficient working knowledge of all relevant federal and state laws, regulations, policies, and rules.**
- 3. Understand and protect the parent's rights to information and decision making while the child is in foster care.**
- 4. Avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the client.**
- 5. Cooperate and communicate regularly with other professionals in the case.**

### **Relationship with the Client:**

- 6. Advocate for the client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel.**
- 7. Act in accordance with the duty of loyalty owed to the client.**
- 8. Adhere to all laws and ethical obligations concerning confidentiality.**
- 9. Provide the client with contact information in writing and establish a message system that allows regular attorney-client contact.**
- 10. Meet and communicate regularly with the client sufficiently in advance of court proceedings. Counsel the client about all legal matters related to the case, including specific allegations against the client, the individualized service plan, the client's rights in the pending proceeding, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with individualized service plans.**
- 11. Work with the client to develop a case timeline and tickler system.**
- 12. Provide the client with, or ensure the client has, copies of all petitions, court orders, individualized service plans, and other relevant case documents, including**

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

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

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

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

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

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

**Investigation:**

18. Conduct or direct a thorough and independent investigation at every stage of the proceeding, whether personally or through staff.

19. Interview the client sufficiently in advance of each hearing, in time to use client information for the case investigation.

**Informal Discovery:**

20. Review the DHR case file.

21. Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the DHR social worker and providers.

**Formal Discovery:**

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

**Court Preparation:**

23. Develop a case theory and strategy to follow at hearings and negotiations.

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

25. Engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.
26. Aggressively advocate for regular visitation in a family-friendly setting.
27. With the client's permission, and when appropriate, engage in settlement negotiations to resolve the case.
28. Thoroughly prepare the client to testify at the hearing.
29. Identify, locate and prepare all witnesses.
30. Identify, secure, prepare and qualify expert witness when needed. When permissible, interview opposing counsel's experts.

**Hearings:**

31. Attend and prepare for all hearings, including pretrial conferences.
32. Prepare and make all appropriate motions and evidentiary objections.
33. Present and cross-examine witnesses, prepare and present exhibits.
34. Request closed proceedings (or a cleared courtroom) in appropriate cases.
35. Request the opportunity to make opening and closing arguments.
36. Prepare proposed findings of fact, conclusions of law, and orders when they will be used in the court's decision or may otherwise benefit the client.

**Post Hearings/Appeals:**

37. Review court orders to ensure accuracy and clarity and review with client.
38. Take reasonable steps to determine whether the case needs to be brought back to court.
39. Consider and discuss the possibility of appeal with the client.
40. If the client decides to appeal, timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the Alabama Rules of Appellate Procedure and the Alabama Rules of Juvenile Procedure.
41. Communicate the results of the appeal and its implications to the client.

**Obligations of Attorney Managers:**

Attorney Managers are urged to:

1. Clarify attorney roles and expectations.
2. Determine and set reasonable caseloads for attorneys.
3. Advocate for competitive salaries for staff attorneys.
4. Develop a system for the continuity of representation.
5. Provide attorneys with training and education opportunities regarding the special issues that arise in the client population.
6. Establish a regular supervision schedule.
7. Create a brief and forms bank.
8. Ensure the office has quality technical and support staff as well as adequate equipment, library materials, and computer programs to support its operations.
9. Develop and follow a recruiting and hiring practice focused on hiring highly qualified candidates.
10. Develop and implement an attorney evaluation process.
11. Work actively with other stakeholders to improve the child welfare system, including court procedures.

Basic Obligations: The parent's attorney shall:

### **General<sup>1</sup>**

- 1. Adhere to all relevant training and mentoring requirements before accepting a court appointment to represent a parent in a juvenile dependency or TPR case.**

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

Commentary: As in all areas of law, it is essential that attorneys learn the substantive law as well as local practice. A parent's fundamental liberty interest in the care and custody of his or her child is at stake, and the attorney must be adequately trained to protect this interest. Training should directly relate to the attorney's child welfare practice.<sup>2</sup> This is further detailed in Attorney Managers Standard 5 below. In addition, the parent's attorney should actively participate in ongoing training opportunities. Even if training or mentoring is not readily available, the attorney should seek it. Training may include relevant online or video training.

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

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

- Titles IV-B and IV-E of the Social Security Act, including the Adoption Assistance and Child Welfare Act and the Adoption and Safe Families Act and the Adoption and Safe Families Act Regulations
- Child Abuse Prevention and Treatment Act
- Indian Child Welfare Act, the Indian Child Welfare Act Regulations, and the Guidelines for State Courts: Indian Child Custody Proceedings
- Multi-Ethnic Placement Act, as amended by the Inter-Ethnic Adoption Provisions of 1996
- Interstate Compact on Placement of Children and Safe and Timely Interstate Placement and Foster Children Act
- Fostering Connections to Success and Increasing Adoptions Act
- Foster Care Independence Act of 1999
- Individuals with Disabilities Education Act
- Family Education Rights Privacy Act, as amended by the Uninterrupted Scholars Act
- Health Insurance Portability and Accountability Act of 1996

- Public Health Act
- Immigration laws relating to child welfare and child custody
- Servicemembers Civil Relief Act (and state law as well)
- State laws and rules of juvenile procedure
- State laws and rules of evidence
- State laws and rules of civil procedure
- State laws and rules of criminal procedure
- State laws concerning privilege and confidentiality, public benefits, education, and disabilities
- State laws and rules of professional responsibility or other relevant ethics standards
- State laws regarding domestic violence
- State domestic relations laws
- Key federal and state caselaw on child welfare

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

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

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

Commentary: Unless and until parental rights are terminated, the parent has parental obligations and rights while a child is in foster care. Advocacy may be necessary to ensure the parent is allowed to remain involved with key aspects of the child’s life. Not only should the parent’s rights be protected, but continuing to exercise as much parental responsibility as possible is often an effective strategy to speed family reunification.

Often, though, a parent does not understand that he or she has the right to help make decisions for, or obtain information about, the child. Therefore, it is the parent's attorney's responsibility to counsel the client and help the parent understand his or her rights and responsibilities and try to assist the parent in carrying them out.

**4. Avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the client.<sup>3</sup>**

Action: The parent's attorney should not request continuances unless there is an emergency or it benefits the client's case. If continuances are necessary, the parent's attorney should request the continuance in writing, as far as possible in advance of the hearing, and should request the shortest delay possible, consistent with the client's interests. The attorney must notify all counsel of the request. The parent's attorney should object to repeated or prolonged continuance requests by other parties if the continuance would harm the client.

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

**5. Cooperate and communicate regularly with other professionals in the case.<sup>4</sup>**

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

Commentary: The parent's attorney must have all relevant information to try a case effectively. This requires open and ongoing communication with the other attorneys and service providers working with the client and family. Rules 4.2 and 4.3, Alabama Rules of Professional Conduct, governs contact with represented and unrepresented parties.

**Relationship with the Client<sup>5</sup>**

**6. Advocate for the client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel.<sup>6</sup>**

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

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

*Alabama Commentary: The subcommittee specifically addressed the capacities for which an attorney may represent a parent, recognizing in particular that attorneys may be appointed as either an advocate or as a guardian ad litem for a parent who is either a minor or an incompetent. As a guardian ad litem, the attorney's obligation will not be to advocate but rather to pursue the client's best interests. Attorneys should be mindful of the capacities for which they are appointed.*

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

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

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

**8. Adhere to all laws and ethical obligations concerning confidentiality.<sup>7</sup>**

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

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

**9. Provide the client with contact information in writing and establish a message system that allows regular attorney-client contact.<sup>8</sup>**

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

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

**10. Meet and communicate regularly with the client sufficiently in advance of court proceedings. Counsel the client about all legal matters related to the case, including specific allegations against the client, the individualized service plan, the client's rights in the pending proceeding, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with individualized service plans.<sup>9</sup>**

Action: The parent's attorney should spend time with the client to prepare the case and address questions and concerns. The attorney should clearly explain the allegations made against the parent, what is likely to happen before, during and after each hearing, and what steps the parent can take to increase the likelihood of reuniting with the child. The attorney should explain any settlement options and determine whether the client wants the attorney to pursue such options. The attorney should explain courtroom procedures. The attorney should write to the client to ensure the client understands what happened in court and what is expected of the client.

The attorney should ensure a formal interpreter is involved when the attorney and client are not fluent in the same language. The attorney should advocate for the use of an interpreter when other professionals in the case who are not fluent in the same language as the client are interviewing the client as well.

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

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

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

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

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

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

Action: At the beginning of a case, the parent's attorney and client should develop timelines that reflect projected deadlines and important dates and a tickler/calendar system to remember the dates. The timeline should specify what actions the attorney and parent will need to take and dates by which they will be completed. The attorney and the client should know when important dates will occur and should be focused on accomplishing the objectives in the case plan in a timely way. The attorney should provide the client with a timeline/calendar, outlining known and prospective court dates, service appointments (if attorney has this information), deadlines and critical points of attorney-client contact. The attorney should record federal and state law deadlines in the system (e.g., the 12 of 22 month point that would necessitate a TPR, if exceptions do not apply).

Commentary: Having a consistent calendaring system can help an attorney manage a busy caseload. Clients should receive a hard copy calendar to keep track of appointments and important dates. This helps parents stay focused on accomplishing the service plan goals and meeting court-imposed deadlines.

*Alabama Commentary: In Alabama, attorneys may not be invited to the Individualized Service Plan meetings. In fact, it is becoming standard practice that if a parent's attorney attends an Individualized Service Plan meeting, then DHR will have its attorney at the meeting also. At these meetings, where services to be provided by DHR are identified, DHR social workers rarely (if ever) provide service dates to attorneys. Attorneys should make every effort to be available to clients for all phases of the clients' cases, including Individualized Service Plan meetings; however, clients continue to have to request that attorneys be present.*

## **12. Provide the client with, or ensure the client has, copies of all petitions, court orders, individualized service plans, and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule or court order.<sup>10</sup>**

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

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

**13. Be alert to and avoid potential conflicts of interest that would interfere with the competent representation of the client.<sup>11</sup>**

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

Commentary: In most cases, attorneys should avoid representing both parents in a juvenile dependency or TPR case. In the rare case in which an attorney, after careful consideration of potential conflicts, may represent both parents, it should only be with their informed consent. Even in cases in which there is no apparent conflict at the beginning of the case, conflicts may arise as the case proceeds. If this occurs, the attorney might be required to withdraw from representing one or both parents. This could be difficult for the clients and delay the case. Other examples of potential conflicts of interest that the attorney should avoid include representing multiple fathers in the same case or representing parties in a separate case who have interests in the current case.

In analyzing whether a conflict of interest exists, the attorney must consider "whether pursuing one client's objectives will prevent the lawyer from pursuing another client's objectives, and whether confidentiality may be compromised."<sup>12</sup>

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

Action: The parent's attorney should learn about and understand the client's background, determine how that has an impact on the client's case, and always show the parent respect. The attorney must understand how cultural and socioeconomic differences impact interaction with clients, and must interpret the client's words and actions accordingly.

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

*Alabama Commentary: The subcommittee specifically addressed two concerns. First, attorneys should pay particular attention to clients with a disability to make sure those needs are accommodated. Second, and in particular to representing minor parents, attorneys should understand that the minor parents may have Lesbian Gay Bisexual Transgender issues that require special attention and/or accommodations.*

**15. Take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.<sup>13</sup>**

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

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

Commentary:

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

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

because that may better protect the client's right to vacate orders made in the client's absence.

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

Action:

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

*Services:* Obtaining services such as substance abuse treatment, parenting skills, or job training while in jail or prison is often difficult. The parent's attorney may need to advocate for reasonable efforts to be made for the client, and assist the parent and the DHR social worker in accessing services. The attorney must assist the client with these services. Without services, it is unlikely the parent will be reunified with the child upon discharge from prison.

If the attorney practices in a jurisdiction that has a specialized unit for parents and children, and especially when the client is incarcerated for an offense that is unrelated to the child, the attorney should advocate for such a placement. The attorney must learn about available resources, contact the placements and attempt to get the support of DHR and child's attorney.

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

If the client cannot meet the attorney before court hearings, the attorney must find alternative ways to communicate. This may include visiting the client in prison or

engaging in more extensive phone or mail contact than with other clients. The attorney should be aware of the challenges to having a confidential conversation with the client, and attempt to resolve that issue.

The parent's attorney should also communicate with the parent's criminal defense attorney. There may be issues related to self-incrimination as well as concerns about delaying the juvenile dependency or TPR case to strengthen the criminal case or vice versa.

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

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

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

Commentary: Many parents charged with abuse and neglect or another dependency allegation have serious or long-standing mental health challenges. However, not all of those conditions or diagnoses preclude the client from participating in the defense. Whether the client can assist counsel is a different issue from whether the client is able to

parent the children, though the condition may be related to ability to parent. While the attorney is not expected to be a mental health expert, the attorney should be familiar with mental health conditions and should review such records carefully. The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the client seems unable to assist the attorney in case preparation, the attorney should seek an assessment of the client's capacity from a mental health expert. If the expert and attorney conclude that the client is not capable of assisting in the case, the attorney should inform the client that the attorney will seek appointment of a guardian ad litem from the court. The attorney should be careful to explain that the attorney will still represent the client in the child protective case. The attorney must explain to the client that appointment of a guardian ad litem will limit the client's decision-making power. The guardian ad litem will stand in the client's shoes for that purpose.

### **Investigation<sup>14</sup>**

#### **18. Conduct or direct a thorough and independent investigation at every stage of the proceeding, whether personally or through your staff.**

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

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

#### **19. Interview the client sufficiently in advance of each hearing, in time to use client information for the case investigation.<sup>15</sup>**

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

Commentary: Often, the client is the best source of information for the attorney, and the attorney should set aside time to obtain that information. Since the interview may involve

disclosure of sensitive or painful information, the attorney should explain attorney-client confidentiality to the client. The attorney may need to work hard to gain the client's trust, but if a trusting relationship can be developed, the attorney will have an easier time representing the client. The investigation will be more effective if guided by the client, as the client generally knows firsthand what occurred in the case.

### **Informal Discovery<sup>16</sup>**

#### **20. Review the DHR case file.**

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

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

*Alabama Commentary: In Alabama, DHR has a statutory duty to maintain their files' confidentiality - see Ala.Code § 38-2-6(8). Accordingly, unless the parent request a copy of the DHR file (a social file) pursuant to Ala.Code § 12-15-133(c)(4), other means (i.e., formal discovery) will be necessary to gain access to DHR's file such as request for production under Rule 34, Ala. R. Civ. P., where DHR is a party or a subpoena under Rule 45, Ala. R. Civ. P., where DHR is not a party. DHR will most likely request a protection order in order that they satisfy their statutory duty.*

#### **21. Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the DHR social worker and providers.**

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

- social service records
- court records
- medical records

- school records
- evaluations of all types

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

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

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

### **Formal Discovery<sup>17</sup>**

#### **22. When needed, use formal discovery methods to obtain information.**

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

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

### **Court Preparation<sup>18</sup>**

#### **23. Develop a case theory and strategy to follow at hearings and negotiations.**

Action: Once the parent's attorney has completed the initial investigation and discovery, including interviews with the client, the attorney should develop a strategy for representation. The strategy may change throughout the case, as the client makes or does not make progress, but the initial theory is important to assist the attorney in staying focused on the client's wishes and on what is achievable. The theory of the case should inform the attorney's preparation for hearings and arguments to the court throughout the

case. It should also help the attorney decide what evidence to develop for hearings and the steps to take to move the case toward the client's ultimate goals (e.g., requesting increased visitation when a parent becomes engaged in services).

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

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

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

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

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

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

Action: The parent's attorney must advocate for the client both in and out of court. The parent's attorney should know about the social, mental health, substance abuse treatment and other services that are available to parents and families in the jurisdiction in which the attorney practices so the attorney can advocate effectively for the client to receive

these services. The attorney should ask the client if the client wishes to engage in services. If so, the attorney must determine whether the client has access to the necessary services to overcome the issues that led to the case.

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

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

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

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

Commentary: For a parent to succeed in a child welfare case, the parent must receive and cooperate with social services. It is therefore necessary that the parent's attorney does whatever possible to obtain appropriate services for the client, and then counsel the client about participating in such services. Examples of services common to child welfare cases include:

- Evaluations
- Family preservation or reunification services
- Medical and mental health care
- Drug and alcohol treatment
- Domestic violence prevention, intervention or treatment
- Parenting education
- Education and job training
- Housing
- Child care
- Funds for public transportation so the client can attend services

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

Action: The parent's attorney should advocate for an effective visiting plan and counsel the parent on the importance of regular contact with the child. Preservation of parent-child bonds through regular visitation is essential to any reunification effort. Courts and DHR may need to be pushed to develop visiting plans that best fit the needs of the individual family. Factors to consider in visiting plans include:

- Frequency
- Length
- Location
- Supervision
- Types of activities
- Visit coaching – having someone at the visit who could model effective parenting skills

Commentary: Consistent, high quality visitation is one of the best predictors of successful reunification between a parent and child. Often visits are arranged in settings that are uncomfortable and inhibiting for families. It is important that the parent's attorney seek a visitation order that will allow the best possible visitation. Effort should be made to have visits be unsupervised or at the lowest possible level of supervision. Families are often more comfortable when relatives, family friends, clergy or other community members are recruited to supervise visits rather than DHR social workers. Attorneys should advocate for visits to occur in the most family-friendly locations possible, such as in the family's home, parks, libraries, restaurants, places of worship or other community venues.

**27. With the client's permission, and when appropriate, engage in settlement negotiations to resolve the case.**

Action: The parent's attorney should, when appropriate, participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the client's goals. Parents' attorneys should be trained in negotiation skills and be comfortable resolving cases outside a courtroom setting when consistent with the client's position. When authorized to do so by the client, the parent's attorney should share information about services in which the parent is engaged and provide copies of favorable reports from service providers. This information may impact settlement discussions. The attorney must communicate all settlement offers to the client and discuss their advantages and disadvantages. It is the client's decision whether to settle. The attorney must be willing to try the case and not compromise solely to avoid the hearing.

Commentary: Negotiation often result in a detailed agreement among parties about actions the participants must take. Generally, when agreements have been thoroughly discussed and negotiated, all parties, including the parents, feel as if they had a say in the decision and are, therefore, more willing to adhere to a plan. Negotiated settlements

generally happen more quickly than full hearings and therefore move a case along swiftly. The attorney should discuss all aspects of proposed settlements with the parent, including all legal effects of admissions or agreements. The attorney should advise the client about the chances of prevailing if the matter proceeds to trial and any potential negative impact associated with contesting the allegations. The final decision regarding settlement must be the client's case.

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

## **28. Thoroughly prepare the client to testify at the hearing.**

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

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

## **29. Identify, locate and prepare all witnesses.**

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

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

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

Commentary: Preparation is the key to successfully resolving a case, either in negotiation or trial. The attorney should plan as early as possible for the case and make

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

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

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

**30. Identify, secure, prepare and qualify expert witness when needed. When permissible, interview opposing counsel's experts.**

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

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

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

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

## Hearings

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

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

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

### **32. Prepare and make all appropriate motions and evidentiary objections.**

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

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

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

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

At each hearing the attorney should keep the case theory in mind, advocate for the child to return home and for appropriate services, if that is the client's position, and request that the court state its expectations of all parties.

Commentary: Becoming a strong courtroom attorney takes practice and attention to detail. The attorney must be sure to learn the rules about presenting witnesses,

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

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

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

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

**35. Request the opportunity to make opening and closing arguments.**

Action: When permitted by the judge, the parent's attorney should make opening and closing arguments to best present the parent's attorney's theory of the case.

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

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

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

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

### **Post Hearings/Appeals**

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

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

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

**38. Take reasonable steps to and to determine whether the case needs to be brought back to court.**

Action: The parent's attorney should answer the parent's questions about obligations under the order and periodically check with the client to determine the client's progress in implementing the order. If the client is attempting to comply with the order but other parties, such as DHR, are not meeting their responsibilities, the parent's attorney should

approach the other party and seek assistance on behalf of the client. If necessary, the attorney should bring the case back to court to review the order and the other party's noncompliance or take other steps to ensure that appropriate social services are available to the client.

Commentary: The parent's attorney should play an active role in assisting the client in complying with court orders and obtaining visitation and any other social services. The attorney should speak with the client regularly about progress and any difficulties the client is encountering while trying to comply with the court order or service plan. When DHR does not offer appropriate services, the attorney should consider making referrals to social service providers and, when possible, retaining a DHR social worker to assist the client.

*Alabama Commentary: The subcommittee believes that a requirement that the attorney personally undertakes to ensure a client's compliance with court orders goes too far beyond the accepted scope of advocacy. The subcommittee does not want to create even an appearance that an attorney can be held accountable for a client's failure or refusal to comply with a court order.*

**39. Consider and discuss the possibility of appeal with the client.<sup>19</sup>**

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

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

**40. If the client decides to appeal, timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the Alabama Rules of Appellate Procedure and the Alabama Rules of Juvenile Procedure.**

Action: The parent's attorney should carefully review his or her obligations under the Alabama Rules of Appellate Procedure and the Alabama Rules of Juvenile Procedure. The attorney should timely file all paperwork, including a notice of appeal and requests for stays of the trial court order, transcript, and case file. If another party has filed an appeal, the parent's attorney should explain the appeals process to the parent and ensure that responsive papers are filed timely. If the client wants to appeal and attorney will not handle the appeal, the attorney shall file a **timely** motion to withdraw and request that the

trial court appoint appellate counsel (if client is entitled to appointed counsel). A “timely” motion is one that gives sufficient time to new counsel to file any post-judgment motions that new counsel may deem necessary or convenient in order to preserve issues for appeal. The attorney shall follow-up on the motion to withdraw to ensure that substitute counsel is appointed (if authorized).

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

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

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

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

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

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

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

## Obligations of Attorney Managers<sup>20</sup>

Attorney Managers are urged to:

### 1. Clarify attorney roles and expectations.

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

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

### 2. Determine and set reasonable caseloads for attorneys.<sup>21</sup>

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

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

### **3. Advocate for competitive salaries for staff attorneys.**

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

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

### **4. Develop a system for the continuity of representation.**

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

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

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

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

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

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

- Relevant state, federal and case law, procedures and rules
- Available community resources
- State and federal benefit programs affecting parties in the child welfare system (e.g., Social Security Income, Social Security Administration, Medicaid, Uniform Child Custody Jurisdiction and Enforcement Act)
- Federal Indian Law including the Indian Child Welfare Act and state law related to Native Americans
- Understanding mental illness
- Substance abuse issues (including assessment, treatment alternatives, confidentiality, impact of different drugs)
- Legal permanency options
- Reasonable efforts
- TPR law
- Child development
- Legal ethics related to parent representation
- Negotiation strategies and techniques
- Protection orders/how domestic violence impacts parties in the child welfare system
- Appellate advocacy
- Immigration law in child welfare cases
- Education law in child welfare cases
- Basic principles of attachment theory
- Sexual abuse
- Dynamics of physical abuse and neglect
  - Shaken Baby Syndrome
  - Broken bones
  - Burns

- Failure To Thrive
- Munchausen's Syndrome by Proxy
- Domestic relations law

Commentary: Parents' attorneys should be encouraged to learn as much as possible and participate in conferences and trainings to expand their understanding of child welfare developments. While parents' attorneys often lack extra time to attend conferences, the knowledge they gain will be invaluable. The philosophy of the office should stress the need for ongoing learning and professional growth. The attorney manager should require the attorneys to attend an achievable number of hours of training that will match the training needs of the attorneys. The court and Court Improvement Program<sup>22</sup> may be able to defray costs of attorney training or may sponsor multidisciplinary training that parents' attorneys should be encouraged to attend. Similarly, state and local bar associations, area law schools or local Child Law Institutes may offer education opportunities. Attorneys should have access to professional publications to stay current on the law and promising practices in child welfare. Child welfare attorneys benefit from the ability to strategize and share information and experiences with each other. Managers should foster opportunities for attorneys to support each other, discuss cases, and brainstorm regarding systemic issues and solutions.

#### **6. Establish a regular supervision schedule.**

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

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

#### **7. Create a brief and forms bank.**

Action: Develop standard briefs, memoranda of law and forms that attorneys can use, so they do not "reinvent the wheel" for each new project. For example, there could be sample discovery request forms, motions, notices of appeal, and petitions. Similarly, memoranda of law and appellate briefs follow patterns that the attorneys could use, although these should always be tailored to the specific case. These forms and briefs

should be available on the computer and in hard copy and should be centrally maintained. They should also be well indexed for accessibility and updated as needed.

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

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

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

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

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

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

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

particularly important to have staff who can communicate with the clients in their first languages, whenever possible.

### **10. Develop and implement an attorney evaluation process.**

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

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

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

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

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

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

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

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

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<sup>1</sup> Model Rules of Professional Conduct 1.1 (Competence).

<sup>2</sup> The National Association of Counsel for Children is accredited by the American Bar Association to certify attorneys as specialists in Child Welfare Law. The Certification Program is open to attorneys who represent children, parents, or agencies in child welfare proceedings.

<sup>3</sup> Model Rule 1.3 (Diligence).

<sup>4</sup> Model Rule 1.4 (Communication).

<sup>5</sup> Model Rule 2.1 (Advisor).

<sup>6</sup> Model Rule 1.2 (Scope of Representation and Allocation of Authority).

<sup>7</sup> Model Rule 1.6 (Confidentiality of Information).

<sup>8</sup> Model Rule 1.4 Communication

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Model Rules 1.7 (Conflict of Interest: Current Client); 1.8 (Conflict of Interest: Current Clients: Specific Rules); 1.9 (Duties to Former Clients).

<sup>12</sup> Renne, Jennifer L. Chapter 4, page 49, "Handling Conflicts of Interest," *Legal Ethics in Child Welfare Cases*. Washington, DC: American Bar Association, 2004.

<sup>13</sup> Model Rule 1.3 (Diligence).

<sup>14</sup> Model Rules 1.1 (Competence); 1.3 (Diligence).

<sup>15</sup> Model Rule 1.4 (Communication).

<sup>16</sup> Model Rules 1.1 (Competence); 1.3 (Diligence).

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Model Rule 3.1 (Meritorious Claims and Contentions).

<sup>20</sup> Model Rule 5.1 (Responsibility of Partners, Managers and Supervisory Lawyers).

<sup>21</sup> Model Rule 1.1 (Competence).

<sup>22</sup> The Court Improvement Program (CIP) is a federal grant to each state's (as well as the District of Columbia and Puerto Rico) supreme court. The funds must be used to improve child abuse and neglect courts. States vary in how they allocate the dollars, but funds are often used for training, benchbooks, pilot projects, model courts and information technology systems for the courts.