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Public Defense Services Commission

Strategic Plan 2013 – 2015

September 2014

Background

The Public Defense Services Commission's strategic plan for the 2013-2015 biennium reflects the Commission's statutory responsibilities, and its vision, mission, values, policies, and standards.

Vision

The Public Defense Services Commission (PDSC) is responsible for creating a state public defense system that provides quality representation to eligible clients in trial and appellate court proceedings. The Commission is a leader in the delivery of a quality, cost-efficient legal services system that ensures the continuing availability of competent and dedicated public defense counsel. To that end, the PDSC is a

- visionary planner for the effective delivery of public defense services and administration of justice.
- responsive and cooperative policy maker in the state's justice system.
- responsible steward of taxpayer dollars devoted to public defense.
- vigilant guardian of the legal rights and interests of public defense clients and the public's interest in equal justice and due process of law.

Further, the PDSC ensures that the Office of Public Defense Services remains a model for other Oregon state agencies in terms of

- efficiency in the delivery of quality public services.
- effectiveness of financial management standards and practices.
- responsiveness to clients, customers and stakeholders.
- accountability to itself, PDSC, the Oregon Legislature, and the public through innovations in performance measurement and evaluation.

Mission

It is the mission of the PDSC to administer a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution, and Oregon and national standards of justice. See ORS 151.216.

Values & Policies

- **Quality** – PDSC is committed to providing quality public defense services consistent with the state and federal constitutions and with Oregon and national standards of justice, while seeking opportunities for its capable and diverse employees and contractors to experience fulfilling careers in public defense service.
- **Cost-Efficiency** - PDSC is a responsible steward of taxpayer dollars and constantly seeks the most cost-efficient methods of delivering and administering public defense services. PDSC’s commitment to providing quality public defense services also promotes cost-efficiency by reducing the chances of legal error and the need for appeals, post-conviction proceedings, retrials, and other costly remedial actions.
- **Leadership** – PDSC is a responsible leader and cooperative partner with other state and local agencies in the development of justice policy and the administration of justice in Oregon. PDSC is a vigorous advocate for adequate public funding to support Oregon’s public defense system. PDSC and the Office of Public Defense Services (OPDS) are credible sources of information and expertise about public defense and justice policies, practices and their implications, for the benefit of the public, the Oregon Legislature, the media and other justice agencies and professionals.
- **Accountability** – PDSC is a results-based organization with employees and managers who hold themselves accountable by establishing performance standards and outcome-based benchmarks and who implement those measures through regular performance evaluations and day-to-day best practices. PDSC and OPDS award and administer public defense services contracts in an open, even-handed and business-like manner ensuring fair and rational treatment of all affected parties and interests.
- **Legislative Advocacy** – PDSC views its role in appearing before the Oregon Legislative Assembly and committees of the Assembly to be limited to:
 - providing information in response to requests from legislators or legislative staff;
 - advocating for a state budget sufficient to ensure (a) the delivery of quality public defense services in a manner consistent with the state and federal constitutions and state and national standards of justice, and (b) the continuing availability of competent and dedicated public defense counsel; and
 - informing legislators of (a) the fiscal impact on the public defense system of proposed legislation or existing laws relevant to public defense, and (b) any potential constitutional or other problems that might occur as the result of the enactment, implementation, or amendment of legislation.

As a general matter, PDSC does not view its role before the Legislative Assembly to include advocacy for changes in criminal, juvenile, mental health or other areas of substantive law or procedure. The Commission may decide to take a position before the Legislative Assembly with regard to particular legislation proposing changes in substantive law or procedure only if such legislation is likely to substantially affect the quality of public defense services in the state, the cost-efficient operation of the state's public defense system, the continuing availability of competent and dedicated public defense counsel, or the fundamental fairness of Oregon's justice system.

PDSC does not intend this policy to affect the ability of OPDS's Appellate Division (AD) or its attorneys to advocate positions before the Legislative Assembly that are designed to protect or promote the legal rights and interests of AD's clients.

Organization and Decision Making

PDSC serves as a governing body for the administration of Oregon's public defense system, providing policy direction, guidance, and oversight to its operating agency, OPDS. As chief executive officer of OPDS, its Executive Director reports to PDSC and serves at its pleasure.

OPDS is comprised of several work units:

- (1) Executive Services provides support to the entire office and includes human resources, information technology, operations, and general counsel;
- (2) Contract Services administers the state's public defense contracting;
- (3) Financial Services manages agency funds and processes all payments and reimbursements; and
- (4) the Appellate Division (AD), provides (a) appellate legal services to financially eligible individuals on direct criminal appeal and parole and post prison supervision appeals, DNA appeals, victim's rights appeals, and mandamus support (b) appellate legal services in juvenile dependency and termination of parental rights appeals, and (c) training and support to public defense attorneys at the trial level in criminal and juvenile matters.

ORS 151.216 sets forth the policy and decision-making responsibilities of PDSC, including the responsibilities to:

- establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the state and federal constitutions and state and national standards of justice;
- establish OPDS and appoint its Executive Director;
- review and approve the Executive Director's budget proposals, and submit the final budget proposal to the Legislature;

- review and approve any public defense services contract negotiated by the Executive Director;
- adopt compensation and personnel plans and an employee classification system for OPDS that are commensurate with other state agencies; and
- adopt policies, procedures, standards, and guidelines regarding
 - determination of financial eligibility for public defense services,
 - appointment of legal counsel,
 - fair compensation for appointed counsel,
 - disputes over compensation for appointed counsel,
 - any other costs associated with public defense representation,
 - professional qualifications for appointed counsel,
 - performance of appointed counsel,
 - contracting of public defense services, and
 - any other matters necessary to carry out the duties of PDSC.

PDSC has delegated to the Executive Director its authority to execute public defense services contracts that it has reviewed and approved.

PDSC will continue to devote most of its time and energy to developing policies that will guide the shape and direction of the state's public defense system and will improve the overall quality and cost-effectiveness of public defense services in Oregon, and to overseeing implementation of the strategies set forth in its Strategic Plan.

ORS 151.216 directs PDSC **not** to:

- make any decision regarding the handling of an individual public defense case;
- have access to any case file; or
- interfere with the Executive Director or staff in carrying out professional duties involving the legal representation of public defense clients.

Accordingly, public defense contractors under contract with PDSC act as independent contractors in the operation of their law offices and practices and in the representation of their public defense clients. However, contractors are subject to the terms and conditions of their contracts with PDSC, which include provisions regarding overall management, performance and quality assurance requirements, and standards designed to ensure the provision of high quality, cost-efficient public defense services.

Standards of Service

The statute establishing PDSC (ORS 151.216) and the state and federal constitutions require PDSC to serve the interests of public defense clients by ensuring the provision of constitutionally mandated legal services. In addition to public defense clients, PDSC serves

- the community of public defense contractors, attorneys, and allied professionals through its professional and contracting services, legislative advocacy, and policy making.
- the public and Oregon taxpayers, primarily through their elected representatives in the Oregon Legislature, and secondarily by responding to direct inquiries from the public and the media.
- criminal justice agencies and other justice stakeholders through interagency collaboration, planning, and policy making.

All of OPDS's employees will:

- deliver directly or contract for professional services in a manner that meets the highest applicable legal and ethical standards;
- conduct all legal, contracting, and business services in a rational and fair manner;
- address all requests for information and inquiries in a timely, professional, and courteous manner;
- implement policies and best practices that serve as models for the cost-efficient delivery of public services and the effective administration of government;
- utilize results-based standards and performance measures that promote quality, cost-efficiency, and accountability.

Accomplishments

Stabilization of public defense services in Oregon through a service delivery system that has become a national model for excellence.

PDSC oversight of the contracting process, including review and approval of the statewide service delivery plan for the state of Oregon, with a summary review and approval of each proposed contract.

Increased understanding within the public safety community and with the Legislative Assembly and staff regarding the increased costs and other risks associated with underfunding public defense services.

Advancement in compensation for public defense lawyers, with significant room left for continued improvement.

Service Delivery Reviews in every region of the state and in over half of the judicial districts, with additional reviews in three substantive areas of practice.

Peer reviews of 48 providers who handle a majority of public defense services across the state.

Annual co-sponsorship of a Management Conference for public defense providers, at which contractors learn about effective business management, OPDS policies and procedures, legal ethics, and sharing of information about successful business strategies.

Creation and use of a secure and reliable method for sending non-routine expense authorizations and denials by email.

Adoption of PDSC policy governing the release of public records and recoupment of production costs.

PDSC review, revision, and adoption of standards and processes for determining the eligibility of attorneys for court-appointments.

Creation of policies, procedures, standards and guidelines that guide the Commission, courts, and providers in the provision of public defense services:

- “Best Practices” for public defense boards and commissions to use as a guide for establishing and maintaining a public defense practice;
- a “minimum qualifications” document outlining the experience an attorney must have before providing representation in various case types;
- “Performance Standards,” created and revised through continued collaboration with the Oregon State Bar, that incorporate Oregon and national standards of representation as well as lessons learned through the peer review process, and
- “Drug Court Guidelines” created after extensive informational hearings and final review by the Commission, and provided to contractors who have drug court responsibilities.

Creation of a formalized complaint policy and procedure, with a database specifically designed to store and search complaints related to a particular provider. OPDS works closely with the Oregon State Bar to ensure that the complaint process operates fairly and effectively, avoids duplication with the Bar’s processes, and protects confidential and privileged information from disclosure.

Annual survey sent to judges, district attorneys, and other juvenile and criminal justice system representatives to assess the quality of representation provided by public defense contractors and hourly rate attorneys. The Chief Justice has assisted OPDS by sending a letter urging judges to respond, which has generated a high response rate.

Biennial survey of public defense providers regarding their satisfaction with OPDS business practices and delivery of services, with consistently high levels of satisfaction reported, and annual opportunities for contractors to testify to the Commission regarding any concerns or issues they have regarding public defense services in Oregon.

Annual survey of OPDS staff to ensure that employees' needs are met and the office continues to improve the quality of its services and work environment.

Creation of an extensive training curriculum for Appellate Division attorneys, and annual review of an Appellate Division practice and procedures manual that sets forth detailed expectations for employees in that Division.

Annual performance reviews of all Appellate Division attorneys and management team members.

Reduction of the Appellate Division's median number of days to filing of the opening brief, from 330 days to 227 days.

Creation of a program connecting Appellate Division attorneys with particular regions across the state to provide guidance on substantive legal issues upon request, and regular advancement of legal issues through attorney participation in continuing legal education seminars and submission of articles for publication.

Creation of the Juvenile Attorney Section (JAS) within OPDS; the attorneys in this section have pursued cases that further develop and clarify juvenile law in Oregon, and are frequent presenters at continuing legal education seminars focusing on juvenile law.

Creation and circulation of a waiver of counsel colloquy to reduce the number of youth found within the jurisdiction of the juvenile court without having had the benefit of counsel, and without understanding the risks of proceeding without counsel.

Conversion to a paperless office model that includes electronic case files and an electronic business processes model, with electronic filing and receipt of case and business documents, and electronic signature capabilities.

Quarterly meetings of the Public Defense Advisory Group, experienced contract administrators who volunteer their time to offer guidance on general public defense matters and contribute to oversight of the peer review process.

Eight separate meetings with contract providers in all regions of the state to gather perspectives on the benefits and challenges of providing public defense services and suggestions for improving representation across the state.

Review of all lawyers providing representation in capital cases, and a complete revision of the lawyer certification process to require a full explanation of qualifications as well as writing samples, continuing legal education attendance report, and letters of reference.

Launch of the Parent Child Representation Program, a pilot program implemented in Yamhill and Linn counties, which specifically targets improved representation in juvenile cases. Modeled after a very successful Washington state program that reduced time

children spent in foster care and reduced the time required to achieve permanency, the PCRCP ensures that lawyers have reduced caseloads, the assistance of social workers, and additional training.

2013-2015 Goals and Strategies

Goal I: Ensure the Provision of High Quality Public Defense Services

Challenges Addressed by Achieving this Goal: The PDSC has a statutory obligation to ensure the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution, and Oregon and national standards of justice. In order to fulfill its obligation, the PDSC must routinely examine Oregon's public defense system and the structure within each judicial district, and pursue quality improvement standards and measures that conform to standards adopted at state and national levels. By providing high quality public defense services, the PDSC serves as a prudent manager of state resources, ensuring that state funds are not spent on inferior providers. Quality representation at the trial court level reduces other costs to the public safety system, such as legal challenges and wrongful convictions in criminal cases, foster care costs in juvenile dependency cases, and unnecessary commitment of allegedly mentally ill individuals through the civil commitment process.

The PDSC faces many challenges in its efforts to provide quality public defense services, but the issue of under-compensation remains one of the largest hurdles. Public defense providers struggle to attract and retain quality candidates due to comparatively low pay for public defense work. This is particularly true in light of increasing student debt upon graduation.¹ Low rates of pay also make it difficult for providers to maintain manageable workloads that permit attorneys to discharge their ethical and constitutional obligations to clients. New graduates often take positions with public defense providers, but move on once they have gained some experience in order to avoid low pay and high caseloads. This leaves the provider in a constant cycle of hiring and training, without sufficient internal resources for recruitment and mentoring.

Adequate funding for the public defense system is also a critical component of the public safety system. In the 2001-2003 biennium, the Public Defense Services Account was reduced by \$27.6 million (17%) over the course of several special sessions. Though \$5 million was restored, the cuts were so late in the

¹ "A legal education can cost upwards of \$150,000, and students, on average, graduate from law school with \$93,359 in debt..." Hopkins, Katy, *10 Law Degrees With Most Financial Value at Graduation*, U.S. News & World Report, March 29, 2011.

biennium that Oregon's public defense system was drastically underfunded, and the state was unable to appoint attorneys during the last four months of the biennium. Cases had to be dismissed or deferred to the following biennium, and the entire public safety system suffered. Crime rates increased and repeat property offenders could not be held. Fox Butterfield reported in the June 7, 2003, edition of the *New York Times* that "[b]ecause [there is] little money for public defenders, Mark Kroeker, the Portland police chief, said officers were now giving a new version of the Miranda warning when they arrested a suspect in a nonviolent crime. They effectively have to say, 'If you can't afford a lawyer, you will be set free. Enjoy.' Chief Kroeker said. Noting a significant increase in shoplifts, car break ins, and other crimes, Kroeker said, 'The scary thing is that the worst results are still six months down the road, as the bad guys realize nothing is going to happen to them....'"

Strategy 1: Build legislative support for adequate funding of public defense in a time of significant revenue shortfalls.

Strategy 2: Continue to pursue policy option packages to fund reduced caseloads and increased compensation for lawyers providing public defense services.

Strategy 3: Continue to work toward fair compensation for all publicly funded lawyers practicing in the area of criminal and juvenile law.

Strategy 4: Continue OPDS tradition of planning and coordinating legal education seminars, participating in committees and ad hoc work groups, and co-sponsoring an annual public defense management conference to promote good business practices that will assist public defense contractors in their efforts to provide quality representation.

Strategy 5: Continue to focus on quality improvements within juvenile dependency and delinquency representation.

Strategy 6: Continue to develop quality assurance standards, including minimum attorney qualifications, standards of representation, and best practices and programs to improve public defense services across the state.

Strategy 7: Continue to administer PDSC's formal complaint process fairly and effectively without duplicating processes of the Oregon State Bar

Strategy 8: Continue annual surveys of judges, district attorneys, and other juvenile and criminal justice system representatives regarding the quality of representation provided by public defense contractors and hourly rate attorneys.

Strategy 9: Encourage the adoption of best practices for public defense contract providers as identified by the Quality Assurance Task Force, including the regular evaluation of attorneys, a plan for recruiting new attorneys, and a system for training and mentoring new attorneys and experienced attorneys found to be in need of such training or mentoring.

Strategy 10: Expand AD's capacity to offer training and support for public defense contract and hourly attorneys.

Strategy 11: Continue efforts to improve the quality of AD's legal services and reduce the median number of days to file the opening brief.

Goal II: Assure Continued Availability of Qualified and Culturally Competent Public Defense Providers in Every Judicial District

Challenges Addressed by Achieving this Goal: As described above, public defense providers, particularly those in rural areas, struggle to attract and retain lawyers. The challenge is increasing as experienced lawyers, who were drawn to public defense by a desire to perform public service, retire, and new lawyers, burdened with significant law school debt, are unable to meet their financial obligations while working as public defenders. New attorneys often leave once they have enough experience to be successful in the private sector, and the number of experienced public defense attorneys who are prepared and interested in becoming the next generation of public defense providers remains inadequate. Additionally, Oregon public defense lawyers provide representation to an increasingly diverse client population, and need to have a strong understanding of different cultures and the challenges faced by individuals in culturally diverse communities. Ensuring diversity within the public defense bar contributes to positive communication and increased trust in attorney-client relationships, and with the culturally diverse populations in Oregon's jurisdictions.

Strategy 1: Continue recruitment efforts by fostering positive relationships with law schools in Oregon and by participating in job fairs and recruitment programs.

Strategy 2: Promote the diversity and cultural competence of Oregon's public defense provider community through recruitment efforts and by offering regular diversity training for OPDS employees and the public defense community.

Strategy 3: Continue the role of PDSC in oversight of the contracting process.

Strategy 4: Continue to encourage the creation and existence of boards of directors or advisory boards for public defenders and consortia that include

outside members in order to (a) broaden the support and understanding of public defense in local communities, (b) strengthen the management of contractors, (c) ensure that adequate quality assurance and monitoring systems are in place, (d) facilitate communication with PDSC and OPDS, and (e) increase the number of advocates for adequate state funding for public defense.

Strategy 5: Continue PDSC's service delivery planning and peer review processes to ensure availability of qualified providers in every judicial district in the state and in all substantive areas of public defense practice.

Goal III: Continue to Strengthen the Efficiency and Management of OPDS and the Contracting System

Challenges Addressed by Achieving this Goal: OPDS manages approximately 96 contracts within Oregon's 27 judicial districts. In order for the public defense system to operate smoothly, OPDS must be able to execute contracts and reimburse providers through a predictable, reliable, systematic, and efficient process.

Strategy 1: Maintain positive working relationships with public defense contractors.

Strategy 2: Continue to improve the effectiveness and cost-efficiency of OPDS's administration of the contracting system.

Strategy 3: Ensure that PDSC and OPDS adhere to strategic plan goals and objectives.

PUBLIC DEFENSE SERVICES COMMISSION

Annual Performance Progress Report (APPR) for Fiscal Year (2013-2014)

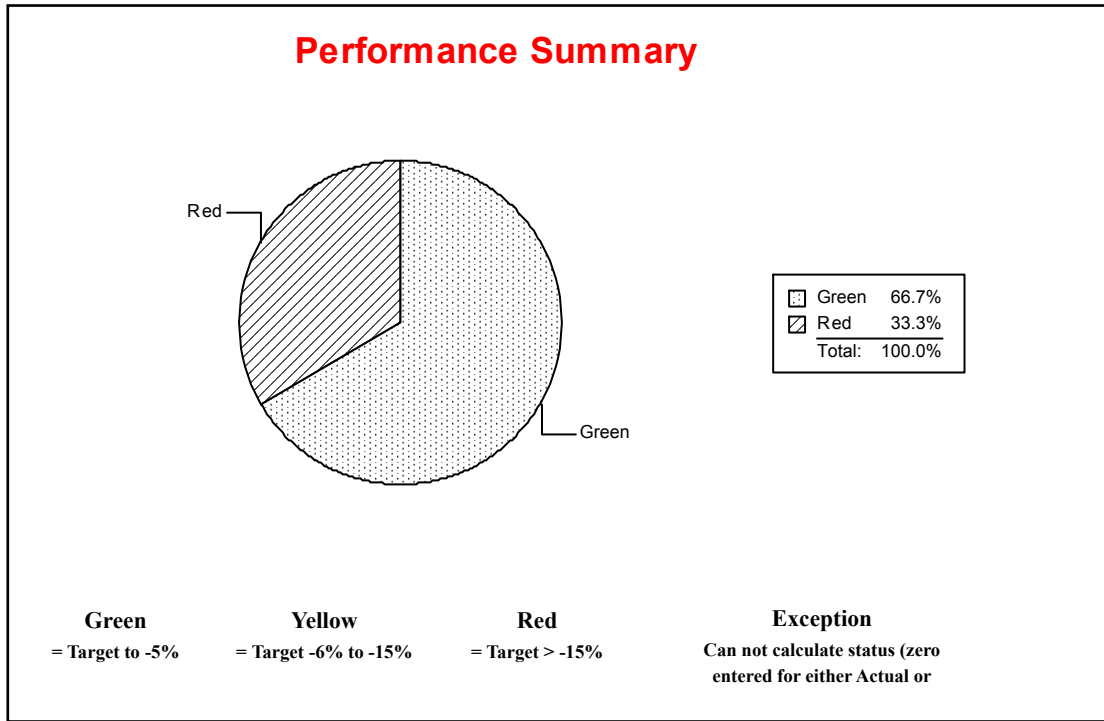
Original Submission Date: 2014

Finalize Date: 8/28/2014

2013-2014 KPM #	2013-2014 Approved Key Performance Measures (KPMs)
1	APPELLATE CASE PROCESSING - Median number of days to file opening brief.
2	CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.
3	BEST PRACTICES FOR BOARDS AND COMMISSIONS - Percentage of total best practices met by Commission.

New Delete	Proposed Key Performance Measures (KPM's) for Biennium 2015-2017
	Title: Rationale:

PUBLIC DEFENSE SERVICES COMMISSION		I. EXECUTIVE SUMMARY	
Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.			
Contact: Caroline Meyer			Contact Phone: 503-378-2508
Alternate: Angelique Bowers			Alternate Phone: 503-378-2481



1. SCOPE OF REPORT

Key performance measures address all agency programs.

2. THE OREGON CONTEXT

The Public Defense Services Commission is responsible for the provision of legal representation in Oregon state courts to financially eligible individuals who

have a right to counsel under the US Constitution, Oregon's Constitution and Oregon statutes. Legal representation is provided for individuals charged with a crime, for parents and children when the state has alleged abuse and neglect of children, and for people facing involuntary commitment due to mental health concerns. In addition, there is a right to counsel in a number of civil matters that could result in incarceration such as non-payment of child support, contempt of court, and violations of the Family Abuse Prevention Act. Finally, there is a statutory right to counsel for petitioners seeking post-conviction relief.

3. PERFORMANCE SUMMARY

The agency was not able to show improvement in all three Key Performance Measures in 2014. We have described in greater detail below measures that will be taken to improve payment processing and the availability of information, as well as reducing the median filing date of appellate briefs. With these improvements, we would expect to see progress in all three measures in 2016.

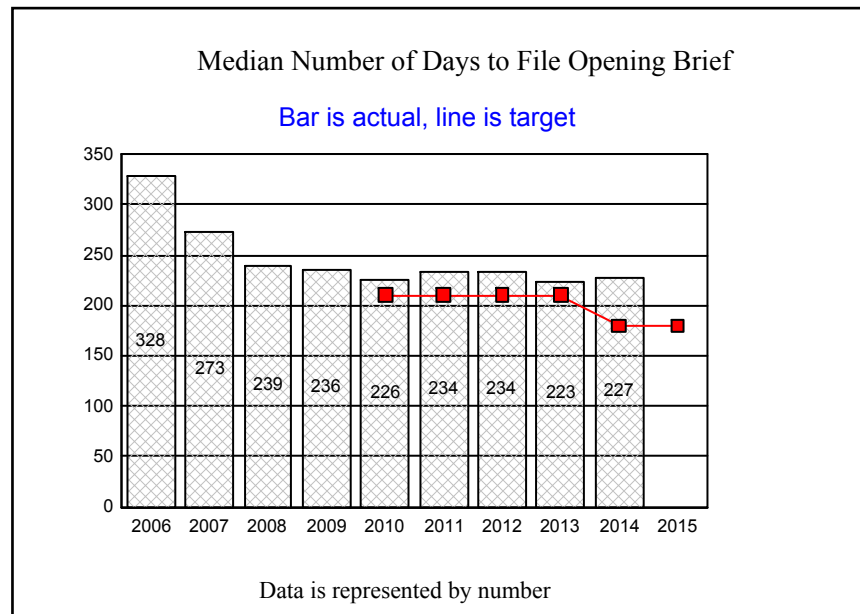
4. CHALLENGES

The primary challenge for the agency is that public defense in Oregon has been chronically underfunded. Prior to fiscal year 2008, the hourly rate for an attorney appointed on a non-Aggravated Murder case was \$40 per hour (the rate established in 1991). Over time, the skills, abilities, and experience-level of the attorneys willing and able to work at that rate has steadily declined. Although the 2007 Legislature provided funding to increase that rate to \$45 per hour, and the 2013 Legislature provided a one dollar increase to \$46, this still represents a decline in real dollars based on the Consumer Price Index increases over this 21-year period. Contractors who are paid a flat rate under a contract are assigning excessively high caseloads to their attorneys in order to cover operating expenses. This combination of being either over-worked or under-paid, and in most cases both, prevents attorneys from being able to provide an acceptable level of representation. Another challenge for the agency is that workload is driven by a variety of factors outside the agency's control. The enactment of laws that create new crimes or increase penalties for existing crimes impact the agency's expenditures and workload. Federal requirements have shortened the timelines and increased the complexity of cases involving abuse and neglect of children. If additional funding is not provided to address such changes, the quality of representation will continue to erode.

5. RESOURCES AND EFFICIENCY

The agency's 2013-15 Legislatively Adopted Budget was \$248,747,113. Within existing resources, the agency continues to convert to electronic storage and retrieval of documents; has further automated document production with improvements to the case management database. With the implementation of e-filing, the agency continues to move toward a largely paperless office. In addition to saving paper and file storage costs, it saves attorney and staff time by having files instantly available at the click of a button.

KPM #1	APPELLATE CASE PROCESSING - Median number of days to file opening brief.	2009
Goal	GOAL 1: Reduce delay in processing appeals. GOAL 2: Ensure cost-efficient service delivery.	
Oregon Context	Mission Statement.	
Data Source	Case Management Database Reports.	
Owner	Appellate Division, Peter Gartlan, (503) 378-2371.	



1. OUR STRATEGY

Our goal is to reduce the delay in the appellate system. Reducing the number of open cases in the pre- briefing stage enables Appellate Division attorneys to address and resolve cases more efficiently, instead of "managing" – without resolving – an excessive caseload.

2. ABOUT THE TARGETS

In recent years the Criminal Section of the Appellate Division set its target date for filing the opening brief at 210 days following record settlement. In February 2014, the Legislature approved the Appellate Division's request to set a new goal of filing the opening brief within 180 days of record settlement. The 180-day target addresses several considerations. First, the agency considers it intolerable that an individual would have to wait more than six months before an appellate attorney was in a position to review a transcript and competently advise the client of the viability of his appellate challenge to his conviction and/or sentence. Second, past budget reductions in the Attorney General's Office caused the Solicitor General to slow its briefing schedule in criminal cases, which causes additional delay in the appellate process and additional delay for the client. Third, federal courts have intervened when a state appellate system routinely takes two years to resolve criminal appeals. The 180-day target represents a reasonable attempt to meet various systemic considerations in a criminal justice system that is fair, responsible, and well administered.

3. HOW WE ARE DOING

The agency has made significant progress over the past ten years but, regrettably, little progress over the past year. In 2006, the median number of days to file the opening brief was 328; in 2013 that number was reduced to 223 days. In 2014, the number was 227 days. The increase is primarily attributable to two causes. First, appellate practice is a specialty area. It generally takes about five years to develop a sound, reliable attorney who can confidently and efficiently manage an appellate caseload. Fourteen of the thirty three non-managing attorneys in the Criminal Section (over 40%) have less than 5 years of appellate experience. Second, in 2012 the Criminal Section stopped assigning overflow cases, up to 289 cases per year, to attorneys outside the office and absorbed all work internally, other than conflict cases. Assuming adequate resources, the continued development of attorneys with less than 5 years of appellate experience, and the retention of attorneys with five or more years of experience, the agency anticipates making significant strides toward its 180-day goal by the end of fiscal year 2015.

4. HOW WE COMPARE

Appellate Division attorneys have significant workloads. Nationally, an appellate public defender's workload ranges from 25 to 50 cases annually. For example, Florida and Louisiana set the maximum annual appellate caseload at 50 cases per attorney; Nebraska sets the maximum appellate caseload at 40 cases; and Georgia, Indiana, and Washington set the maximum annual appellate caseload at 25 cases per attorney. US Department of Justice, Compendium of Standards for Indigent Defense Systems, vol. IV, C 1-5 (2000). On average, an Appellate Division criminal defense attorney was assigned 41 cases in the fiscal year ending in 2014, which exceeds most practices.

5. FACTORS AFFECTING RESULTS

The ability to meet and exceed the target correlates positively to the number of experienced attorneys and negatively to the number of cases. The agency does not control the number of referred cases. Attracting, training, and retaining competent attorneys affects progress toward the goal.

6. WHAT NEEDS TO BE DONE

Approximately forty percent (40%) of the attorney group has less than five years of appellate experience. As the attorneys mature, the office efficiency will improve. Systemically, the agency continues to meet regularly and work cooperatively with the appellate courts and the Attorney General 's Office to promote system efficiencies. The agency has made significant progress over the past several years to reduce the median brief filing date for its criminal cases (from 328 days in 2006 to 227 days in 2014), but the agency aspires to reduce that number over the coming fiscal year. Barring significant and unforeseen events, such as a significant increase in caseload, the issuance of milestone Supreme Court decisions that affect hundreds of open cases, or an excessive loss of talented and experienced attorneys, the agency expects to make significant progress in fiscal year 2015 toward its target of filing briefs in criminal cases within 180 days of record settlement.

7. ABOUT THE DATA

The data is derived from the agency's case management database. The strength of the data lies in historical comparison with prior years. The weakness is attributable to the inherent difficulty in quantifying appellate caseloads. The agency continues to refine caseloads based on case type, transcript length, and issues presented.

KPM #2	CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall customer service, timeliness, accuracy, helpfulness, expertise and availability of information.	2007
Goal	To provide greater accountability and results from government by delivering services that satisfy customers.	
Oregon Context	To maintain and improve the following category ratings of agency service: overall quality of services, timeliness, accuracy, helpfulness, expertise and availability of information.	
Data Source	Customer Service Surveys (survey and results stored on SurveyMonkey).	
Owner	Contract Services, Caroline Meyer, (503) 378-2508	



1. OUR STRATEGY

The general strategy is to utilize feedback to address cited problems and improve the general level of service provided by the agency.

2. ABOUT THE TARGETS

Targets for 2014-15 have been set at 95% of respondents rating the agency as good or excellent.

3. HOW WE ARE DOING

The survey results indicate a high level of customer satisfaction with the agency. The overall service provided by OPDS was rated as good or excellent by more than 90% of the respondents. The standard reporting measure for state agencies groups both “good” and “excellent” into one category. In the category of helpfulness of OPDS employees, over 95% of respondents rated the agency’s service as “good” or “excellent”. Our lowest rating was in the category of availability of information, where 85% of the respondents rated the agency’s service as “good” or “excellent”.

4. HOW WE COMPARE

Services and customers differ greatly among state agencies, so a direct comparison to other state agencies is not feasible. Similarly, comparisons to public defense systems in other jurisdictions have not been useful due to variations in the survey questions, the survey pool, and the types of services provided. Given the high percentages of positive ratings received by the agency, we would likely compare favorably were such a comparison possible.

5. FACTORS AFFECTING RESULTS

Despite the overwhelmingly positive responses, the ratings in all but one category were somewhat lower this year than in prior surveys. The agency believes the lower ratings are a reflection of some dramatic changes in the office structure that took effect in the spring of 2013. As a result of the retirements of two tenured management level employees, there was a complete reassignment of particular tasks associated with the processing of non-routine expense requests and billings. This change naturally required additional time for training and oversight which translated to slightly increased processing delays. This change also meant that phone calls and other requests for information that had been routed through the same management level employees with years of experience, were now being assigned to other individuals in the office with less experience and authority to respond. The agency believes this resulted in providers feeling that their questions were not always being fully answered and information being less available to them.

6. WHAT NEEDS TO BE DONE

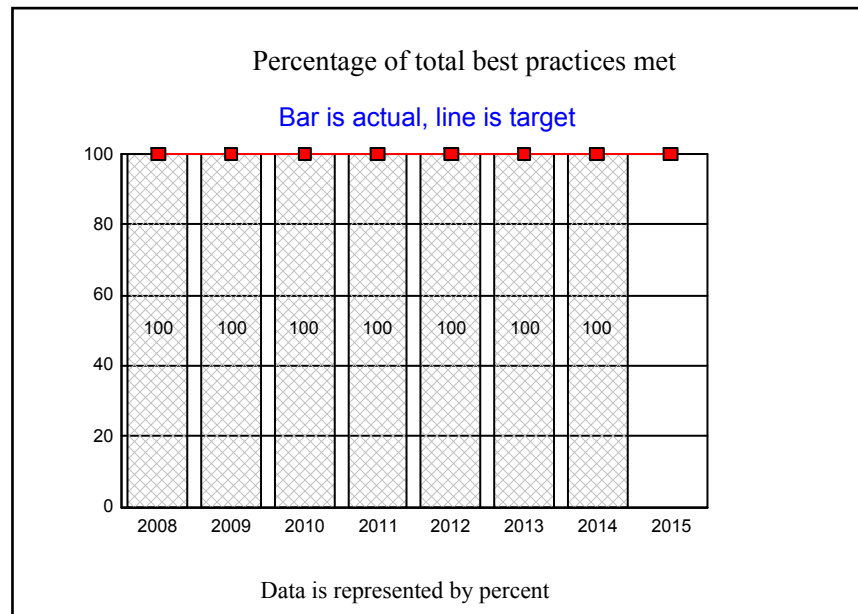
The agency’s rating declined most significantly in the area of availability of information, and timely payment processing. Providers commented that although the

agency still processes payments much more quickly and efficiently than other agencies, they saw a noticeable decrease in processing time as a result of the office changes mentioned above. Agency management and staff have met and discussed specific steps that can be taken to ensure information continues to be readily accessible to providers, and payments get processed more timely. We are in the process of implementing these improvements.

7. ABOUT THE DATA

A total of 1,348 contract attorneys, private bar attorneys, and service providers were invited to complete the agency's Customer Service Survey. In 2012, the survey was sent to only 886 providers. We recognize that this significant increase of 462 participants included a fair number of providers that, although in our database, do not work with our office on a regular basis and therefore, were not in the best position to respond. Many of them did take the time to respond and tell us they couldn't fully answer the survey questions for this reason. The survey was administered in June 2014. There was a 25% response rate (342 responses) to the survey. The agency administers the customer service survey every two years to coincide with its two-year contract cycle. The next survey will be conducted in June 2016.

KPM #3	BEST PRACTICES FOR BOARDS AND COMMISSIONS - Percentage of total best practices met by Commission.	2007
Goal	Best practices as a pathway to improved performance and accountability.	
Oregon Context	Required KPM for all Oregon boards and commissions.	
Data Source	Commission agendas and minutes.	
Owner	Office of Public Defense Services, Nancy Cozine, (503) 378-2515.	



1. OUR STRATEGY

The agency's commission currently follows all of the best practices.

2. ABOUT THE TARGETS

The agency anticipates meeting all of the best practices for boards and commissions.

3. HOW WE ARE DOING

The Commissions minutes provided in the materials for its July 31, 2013 meeting included the discussion of the self-assessment confirming that the agency met all of the best practices for boards and commissions. Another self-assessment is on the agenda for the September 18, 2014 meeting.

4. HOW WE COMPARE

The agency assumes that most boards and commissions will be able to implement all best practices.

5. FACTORS AFFECTING RESULTS

There are no factors that would prohibit the agency from meeting all of the best practices.

6. WHAT NEEDS TO BE DONE

No change is needed.

7. ABOUT THE DATA

The Commission continues to meet all of the best practices as documented in the Commission meeting minutes.

PUBLIC DEFENSE SERVICES COMMISSION	III. USING PERFORMANCE DATA
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Agency Mission: Ensure the delivery of quality public defense services in Oregon in the most cost-efficient manner possible.

Contact: Caroline Meyer	Contact Phone: 503-378-2508
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Alternate: Angelique Bowers	Alternate Phone: 503-378-2481
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The following questions indicate how performance measures and data are used for management and accountability purposes.

<p>1. INCLUSIVITY</p>	<p>* Staff: The agency's Management Team drafted initial performance measures.</p> <p>* Elected Officials: The Joint Legislative Audit Committee and the interim Judiciary Committee assisted the agency in refining and finalizing its performance measures. After five years of data collection, it was apparent that some performance measures were not providing useful information and were eliminated by the Legislature during the 2009 session.</p> <p>* Stakeholders: Input was received from the agency's Contractor Advisory Group comprised of public defense service providers.</p> <p>* Citizens: The agency developed, discussed and revised its performance measures during two public meetings.</p>
<p>2 MANAGING FOR RESULTS</p>	<p>The agency's lowest customer service rating in 2014 (85% good or excellent) regarding availability of information has caused us to explore ways to improve our website and other improvements in our communication with providers. We are in the process of implementing these improvements and would expect to see a corresponding increase in this rating in the next survey.</p>
<p>3 STAFF TRAINING</p>	<p>The agency has advised staff of the goals outlined in the performance measures and staff is directly involved in the data collection and/or direct daily implementation of the measures. The performance measures serve as important tools for the agency's managers as they identify and develop necessary staff skills as well as determine the best use of overall resources in order to attain the goals enumerated in the measures.</p>
<p>4 COMMUNICATING RESULTS</p>	<p>* Staff: The Annual Performance Progress Reports are available to staff online. The results and future plans are discussed at staff meetings.</p> <p>* Elected Officials: The agency communicates results to the Legislature through the Executive Director's biennial report to the Legislature, and by the inclusion of the APPR in the Agency Request Budget binder.</p>

* **Stakeholders:** Performance results are communicated through the agency's website and DAS's website as well as being provided in the materials distributed at public meetings.

* **Citizens:** Performance results are communicated through the agency's website and DAS's website as well as being provided in the materials distributed at public meetings.

Client Representation in Criminal and Delinquency Cases



Arraignment or First Appearance

In many counties, the first event in a case takes place at court facilities separate from the main courthouse, sometimes many miles away.

The Attorney

- PDSC Qualification Standards
- Performance Standards
 - Oregon State Bar
 - American Bar Association
 - National Juvenile Defender Center
- Oregon Rules of Professional Conduct
 - Obligations Regarding Workload
 - Formal Ethics Opinion 2007-178
- Continuing Education Requirements

Obligations at First Appearance

- Lawyer must be present
- Contact client and obtain case information prior to court where possible
- Inform client of allegations
- Assert pertinent rights on the records
- Attempt to secure release where appropriate
- Address emergency circumstances
- Obtain and provide contact information

The Real World



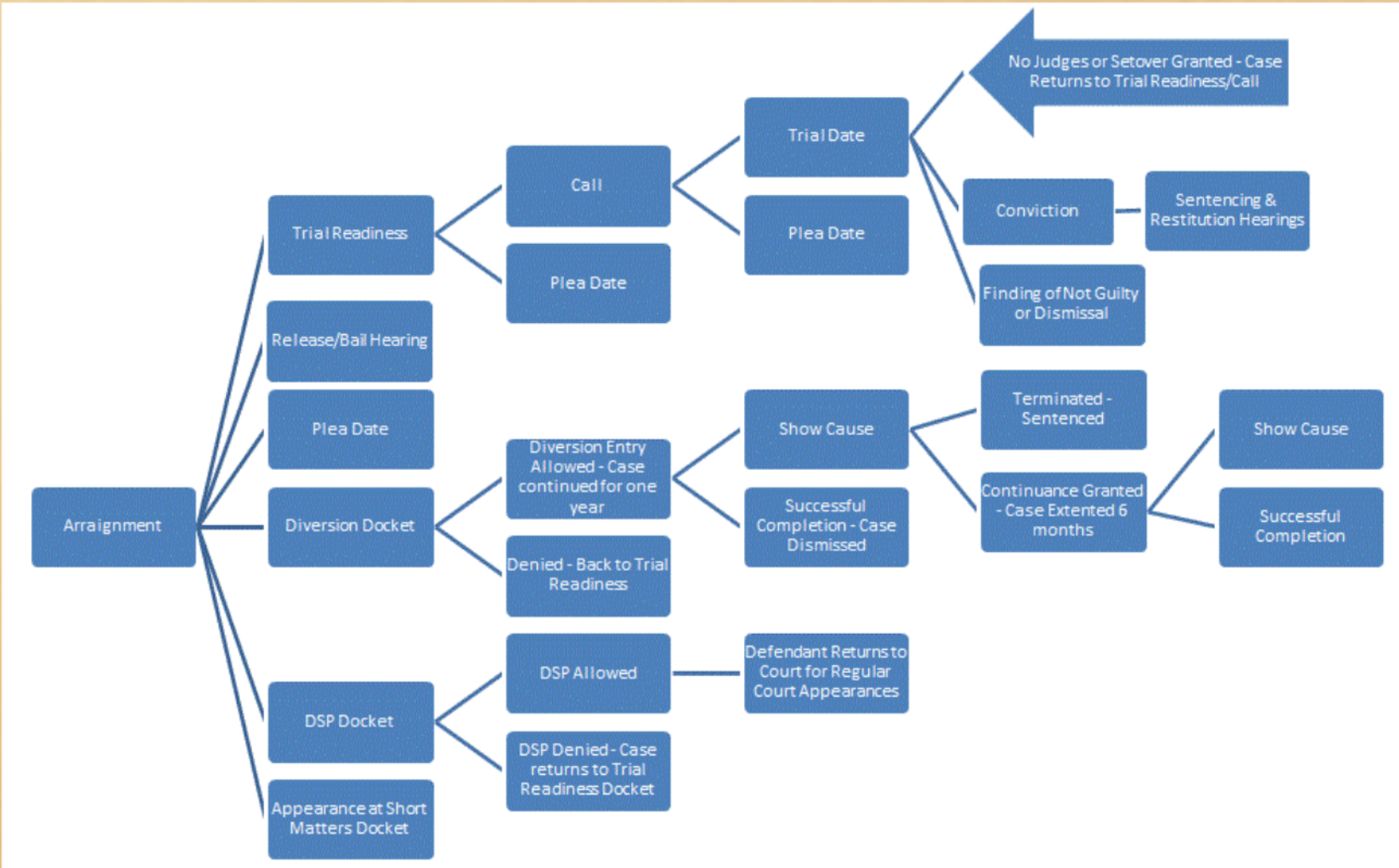
The Attorney

- PDSC Qualification Standards
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- Oregon Rules of Professional Conduct
 - Obligations Regarding Workload
Formal Ethics Opinion 2007-178
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Obligations at First Appearance

- Lawyer must be present
- Contact client and obtain case information prior to court where possible
- Inform client of allegations
- Assert pertinent rights on the records
- Attempt to secure release where appropriate
- Address emergency circumstances
- Obtain and provide contact information

The Real World



Early Disposition Programs

PDSC Guidelines for Participation of Public Defense Attorneys in Early Disposition Programs:

- An EDP should permit the establishment and maintenance of attorney/client relationships
- An EDP should provide opportunity for necessary pretrial discovery, investigation and review of case-relevant circumstances
- An EDP should provide for adequate physical space and adequate time for confidential attorney/client consultations
- An EDP should provide for additional time where needed to complete investigations or conclude a civil compromise or diversion agreement

Client Communication

- PDSC Contractual Obligations (24/72 hours)
- OSB RPC 1.4 ("...keep client reasonably informed...and promptly comply with reasonable requests for information.")
- Obtain pertinent personal information (employment, educational, medical, mental health, military, community and family ties, etc.)
- Obtain information about allegations (client's perspective, potential witnesses, evidence to gather)
- Provide information (explain process, role of counsel, applicable law)

Release Hearing

- Duty to seek release
- If denied, should continue to seek release at appropriate subsequent hearings
- Requires familiarity with security release procedures, third-party release agencies, and exploration of other third-party options (in-patient treatment, group homes, etc.)

Investigation

- Duty to conduct independent investigation
- Legal Research
 - Element of the charged offense
 - Constitutional and statutory challenges to the charging instrument
 - Applicable defenses
- Collateral consequences (immigration, employment, public benefits, professional licensing, education opportunities)
- Interview witnesses
- Consult with forensic experts (drugs, firearms, arson, DNA, computers, accountants)
- Psychological and other evaluations of client

Pretrial Motions

- Fitness to proceed (ability to "aid and assist")
- Discovery (*Brady* motions, to compel, protective orders)
- Severance of charges or defendants
- Continuance of trial
- Motions to dismiss (speedy trial violations, double jeopardy, statute of limitations)
- Motions to suppress (search and seizure, involuntary confessions, violation of right to remain silent)
- Unreliable identifications

Disposition Without Trial

"A lawyer should not recommend that a client enter a dispositional plea or admission unless appropriate investigation and evaluation of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward." OSB Standard 6.1

- Plea agreements, civil compromise, diversion, Formal Accountability Agreements, dismissal
- Explain strength and weaknesses of defense, impact on possibility of other charges
- Keep client fully informed of continued negotiations
- Seek mediation or judicial settlement conference
- Advise client of likely sentencing outcomes, including eligibility for community-based programs, DOC programs, likely release dates
- Fully advise regarding "collateral consequences"

Entry of Plea

"The lawyer must not unduly influence the decision to enter a plea and must ensure that the client's acceptance of the plea is voluntary and knowing, and reflects an intelligent understanding of the plea and the rights the client will forfeit." OSB Standard 6.2

Sentencing or Disposition

- See Slide 23
- A lawyer should ensure that the judicial record is clear, accurate and contains the full contents and conditions of any agreements concerning the client's sentence or disposition that are adopted by the court

Trial Preparation

- A lawyer should develop, in consultation with the client, an overall defense strategy for the conduct of the trial
- A lawyer should be fully informed as to the rules of evidence
- A lawyer should be familiar with the legal and evidentiary issues that can reasonably be anticipated to arise in the trial
- A lawyer should analyze potential prosecution evidence for admissibility problems and develop strategies for challenging inadmissible evidence
- A lawyer should be prepared to address objections to defense evidence and testimony
- A lawyer should Be Prepared!

Trial

- Pretrial oral and written motions
- The decision of bench or jury trial
- Jury Selection, OSB Standard 7.2
- Opening Statement, OSB Standard 7.3
- Cross-examination, OSB Standard 7.4
- Presenting the defense case, OSB Standard 7.5
- Closing argument, OSB Standard 7.6
- Jury instructions, OSB Standard 7.7

Acquittal

- May be of all or some counts
- Return of seized property
- Expungement of arrest

Sentencing or Disposition

- Be knowledgeable about the applicable law, including concerning length of sentences, imposition of concurrent and consecutive sentences, merger of convictions, repeat offender sentencing, proportionality challenges, prohibitions on ex post facto laws, and the imposition of fines, fees, and restitution
- Understand availability of deferred sentences, conditional discharge, early termination of probation, informal dispositions, alternative dispositions including conditional postponement and diversion
- Be familiar with law governing credit for pretrial detention, earned time credit, time limits on post-trial and post-disposition juvenile detention and out-of-home placement, eligibility for correctional programs and furloughs, and eligibility for and length of post-prison supervision or parole from juvenile dispositions
- Be prepared to present evidence concerning client's relevant history and circumstances, including prior military circumstances, physical and mental health needs, and educational needs, among other things
- Prepare to present available mitigating evidence and other favorable information, and object to inaccurate or immaterial information
- Review judgments and move to correct errors that disadvantage the client





Probation

A lawyer should assist the client in seeking to clarify or correct erroneous, inappropriate and inapplicable conditions of probation



Prison

The number of clients sentenced to prison and the duration of those sentences is a direct function of the ability of the lawyer to provide each client with the representation outlined in the preceding slides

Appeal

"A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the client and apprise the client of which issues have been preserved for review." OSB Standard 9.2

Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases

April 25, 2014

Foreword

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

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

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

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

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



Tom Kranovich
Oregon State Bar President

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Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases

Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases

Summary and Background

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

On the following pages the criminal task force has provided updated standards which are recommended to replace what is currently published on the OSB website as the specific standard “Specific Standards for Representation in Criminal and Juvenile Delinquency Cases.” These changes, when combined with the proposed revisions to the third specific standard (juvenile dependency – expected to be completed soon), will make the “general standards” in Section 1 unnecessary.

The task force included representative from academia, the bench and from both private practice and public defender offices. Task force members were Margie Paris, Professor of Law, University of Oregon; Shaun McCrea, in private practice in Eugene; The Honorable Lisa Grief, Jackson County Circuit Court; Lane Borg, Executive Director, Metropolitan Public Defender; Julie McFarlane, Supervising Attorney, Youth, Rights & Justice; Shawn Wiley, Chief Deputy Defender, Appellate Division, Office of Public Defense Services. Paul Levy, General Counsel, Office of Public Defense Services, served as chair of the task force.

The task force began its work by conducting a detailed examination of the existing standards and a review of other states' standards and the standards of national organizations. The task force found that although Oregon's standards, like those of most other states, are firmly grounded in the standards first promulgated by the National Legal Aid and Defender Association (NLADA) in 1994, the structure and substance of Oregon's standards had significant modifications.

The task force determined that the variations from the NLADA standards were both good and bad. On the positive side, through an earlier revision of the Bar standards in 2005, they reflected a growing recognition that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to delinquency cases in addition to those required in adult criminal cases. The standards also placed emphasis on the collateral consequences of criminal convictions, presaging the U.S. Supreme Court's seminal decision on that subject.¹ Indeed, overall, the existing Oregon standards serve as strong and valid guideposts to effective criminal and juvenile defense.

But the task force also found that the structure of the standards was confusing and unhelpful. Why, for instance, should Oregon recognize five "general standards," only to repeat them again in another set of "specific standards"? And is it really necessary to set out in the standards specific provisions of the Oregon Rules of Professional Conduct when those obligations already exist for all attorneys in the state? More fundamentally, since the last revision in 2005, the defense of both criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of accountability in both delinquency and adult criminal cases. Adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to some sentencing proceedings.

The ubiquity of computers and smartphones has also dramatically changed the type of evidence lawyers are likely to encounter, as well as how lawyers are likely to do their own work.

The task force decided that the original organization of NLADA's standards provided the best structure for our own standards, while preserving much of the good work that had already been done to update the Oregon standards prior to our revision. Thus, within a new structure, the task force maintained a format of a short statement of a standard followed by more detailed implementation language. New for this revision, and in keeping with the NLADA and many other state standards, is commentary following many of the standards, which provides

¹ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

additional background and guidance regarding a particular aspect of criminal or delinquency defense.

The task force also had the benefit of recently published National Juvenile Defense Standards (2012), a work of the highly regarded National Juvenile Defender Center, which present a systematic approach to defense practice in juvenile court. While the new revision specifically recognizes this work as establishing a national norm for representation in delinquency cases, it also incorporates specific elements of this work into relevant Oregon standards.

The task force also brought its own considerable expertise and perspective to the review of existing standards and the drafting of revisions, consulting as required with other practitioners with recognized expertise in certain areas of practice. Building on an existing set of very good standards, the revision, if approved by the BOG, will serve as a useful tool for both the lawyer new to criminal and delinquency defense and the experienced lawyer who seeks guidance on the best practices for diligent and high quality representation. As such, the revision should be a useful tool for lawyers and law firms providing training for new lawyers. And they should serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

Introduction to the Revised Standards

Since 2005, when these performance standards were last revised, the defense of criminal and delinquency cases has become increasingly complex and challenging. Advances in neuroscience, for instance, have challenged traditional notions of the legal status of juveniles under the United States Constitution, as reflected in cases limiting the authority of states to impose the most severe penalties on juvenile offenders² and requiring consideration of a youth's age in determining whether *Miranda* warnings should be given.³ Likewise, adult criminal defense has changed dramatically with the evolution of constitutional doctrine applying the right to jury trial to sentencing proceedings⁴ and expanding the obligations of lawyers to advise clients concerning the collateral consequences of guilty pleas.⁵ The performance standards that follow reflect new best practices that have developed in response to these and other developments in the law, science and professional responsibilities of lawyers.

As in earlier versions of these standards, most of the guidance that follows applies in both adult criminal and juvenile delinquency cases. However, this revision reflects a growing recognition, already evident in the 2005 revision, that the role of a juvenile defender is highly specialized and complex, requiring knowledge and skills unique to the duties of counsel in delinquency cases in addition to those required to perform most of the functions of counsel in an adult criminal case. In addition, since the last revision, the National Juvenile Defender Center has published the *National Juvenile Defense Standards (2012)*, which present a systematic approach to defense practice in juvenile court and establish a national norm for this work. These new standards have informed the standards presented here but should also be consulted directly for detailed guidance on the obligations of counsel in delinquency cases.

The standards that follow do not address the special obligations of counsel in capital cases. While lawyers representing clients facing the death penalty will ordinarily be expected to meet the standards that follow here, additional duties of counsel in capital cases are presented and explained in detail in the *American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)*. Lawyers in death penalty cases should continue to consult the ABA standards as well as the standards in this revision.

² *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

³ *J.D.B. v. North Carolina*, 131 S. Ct. 502 (2011).

⁴ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

⁵ *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010).

As noted in earlier versions of these standards, the guidance here will serve as a valuable tool for both the lawyer new to criminal or delinquency cases but also the experienced lawyer who seeks guidance on the best practices for diligent and high quality legal representation. But these standards should serve others as well. While they are not intended, nor should they be used, to establish a mandatory course of action in every case, they do reflect the current best practices for representation in criminal and delinquency cases. As such, they are a useful tool for lawyers and organizations providing training for new lawyers. They should also serve as a helpful guide for courts, clients, the media and others in the interested public who wish to understand the expectations for defense lawyers in criminal and delinquency cases.

Specific Standards for Representation in Criminal and Juvenile Delinquency Cases

STANDARD 1.1 – ROLE OF DEFENSE COUNSEL

The lawyer for a defendant in a criminal case and for a youth in a delinquency case should provide quality and zealous representation at all stages of the case, advocating at all times for the client’s expressed interests. The lawyer shall abide by the Oregon Rules of Professional Conduct and applicable rules of court.

Implementation:

1. In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information.
2. The defense of a delinquency case requires knowledge and skills specific to juvenile defense in addition to what is required for the defense of an adult criminal case. Lawyers representing clients in juvenile court should be familiar with and follow the National Juvenile Defender Center’s *National Juvenile Defense Standards (2012)*.
3. In both criminal and juvenile delinquency cases, a lawyer is bound by the client’s definition of his or her interests and should not substitute the lawyer’s judgment for that of the client regarding the objectives of the representation. In delinquency cases, a lawyer should explain to the client and, where appropriate, to the client’s parents that the lawyer may not substitute either his or her own view of the client’s best interests or a parent’s interests or view of the client’s best interests for those expressed by the client.
4. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.

5. A lawyer should consult with the client on the strategy and means by which the client's objectives are to be pursued and exercise the lawyer's professional judgment concerning technical and tactical decisions involved in the representation.

Commentary:

The paramount obligation of a lawyer is to advocate for a client's cause with zeal, skill and devotion. It is wrong to assert that the vague notion that a lawyer's role as an "officer of the court" should temper a lawyer's commitment to a client's cause. "The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the [client's] counselor and advocate with courage and devotion and to render effective, quality representation."⁶ Indeed, a former Oregon State Bar General Counsel and Executive Director has argued convincingly that "the notion that [lawyers] have ethical duties to courts and judges as 'officers of the court' is erroneous and confusing."⁷

Especially in criminal and delinquency cases, where lawyers often represent troubled clients accused of conduct that may be widely condemned, the overarching duty of counsel is a "vigorous advocacy of the client's cause," guided by "a duty of loyalty" and the employment of the skill and knowledge necessary for a reliable adversarial system of justice.⁸ As a matter of professional responsibility, "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."⁹

The same obligations of counsel in criminal cases apply with equal force in representing youth in juvenile delinquency proceedings. "At each stage of the case, juvenile defense counsel acts as the client's voice in the proceedings, advocating for the client's expressed interests, not the client's 'best interest' as determined by counsel, the client's parents or guardian, the probation officer, the prosecutor, or the judge."¹⁰ Likewise, "[t]here is no exception to attorney-client confidentiality in juvenile cases for parents or guardians," nor in service of what counsel

⁶ *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993).

⁷ *Officers of the Court: What does it mean?* George Riemer, Bar Counsel Column, Oregon State Bar Bulletin, August 2001.

⁸ *Strickland v. Washington*, 446 U.S. 668, 104 S. Ct. 2052 (1984).

⁹ *ABA Model Rules of Professional Conduct, Commentary to Rule 1.3*, ABA Center for Professional Responsibility (2007).

¹⁰ *The Role of Juvenile Defense Counsel in Delinquency Court*, p. 7, National Juvenile Defender Center (2009).

or others consider the client’s “best interest.”¹¹ Nor does a juvenile’s minority status “automatically constitute diminished capacity such that a juvenile defense attorney can decline to represent the client’s expressed interests.”¹²

In both delinquency and criminal cases, “[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.”¹³ In both circumstances, however, decisions by either the client or lawyer should be made after full consultation. The ABA standards identify decisions for the client as what pleas to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify in his or her own behalf and whether to appeal. The ABA standards likewise identify strategic and tactical decisions made by the lawyer to include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence should be introduced.

As noted, that allocation of decisional authority applies with equal force in delinquency cases.¹⁴ However, in delinquency cases, a lawyer may need to emphasize that the client is “in charge” of the critical decisions in the case. “In clear, concise, and developmentally appropriate terms, counsel must exercise special care at the outset of representing a client to clarify the scope and boundaries of the attorney-client relationship.”¹⁵

Although Standard 1.1 calls for a strong client-centered model of advocacy, “[d]efense counsel is the professional representative of the accused, not the accused’s alter ego.”¹⁶ Thus, defense counsel “has no duty to execute any directive of the accused which does not comport with law” or with the lawyer’s obligations under standards of professional conduct. *Id.* Moreover, in those areas of strategic and tactical decision making that are committed to the informed judgment of counsel after consultation with the client, there is no obligation on counsel “to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points.”¹⁷ Indeed, it would be an abdication of counsel’s professional responsibilities to acquiesce to a client’s ill-advised directions in these matters for the sake of expediency or to mollify a difficult client.

¹¹ *Id.* p. 12.

¹² *Id.* p. 10.

¹³ *ABA Standards for Criminal Justice, The Defense Function, Standard 4-5.2, Control and Direction of the Case* (3d ed. 1993).

¹⁴ See, *National Juvenile Defense Standards, Standard 2.2, Explain the Attorney-Client Relationship*, National Juvenile Defender Center (2012).

¹⁵ *Id.*

¹⁶ *ABA Standards for Criminal Justice, Standard 4.1.2 The Function of Defense Counsel* (3d ed. 1993).

¹⁷ *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308 (1983).

Previous versions of these standards often repeated verbatim are applicable provisions of the Oregon Rules of Professional Conduct and predecessor rules of professional responsibility. The absence of specific reference to the Rules of Professional Conduct in the current version of these standards should not be taken as reflecting a position that they apply with any less force to defense counsel.

STANDARD 1.2 – EDUCATION, TRAINING AND EXPERIENCE OF DEFENSE COUNSEL

- A. To provide quality representation, a lawyer must be familiar with the applicable substantive and procedural law, and its application in the particular jurisdiction where counsel provides representation. A lawyer has a continuing obligation to stay current with changes and developments in the law and with changing best practices for providing quality representation in criminal and delinquency cases. Where appropriate, a lawyer should also be informed of the practices of the specific judge before whom a case is pending.**

- B. Prior to handling a criminal or delinquency matter, a lawyer should have sufficient experience or training to provide quality representation.**

Implementation:

1. In order to remain proficient in the law, court rules and practice applicable to criminal and delinquency cases, a lawyer should regularly monitor the work of Oregon and pertinent Federal appellate courts and the Oregon State Legislature.

2. To stay current with developments in the law and practice of criminal and delinquency cases, a lawyer should maintain membership in state and national organizations that focus on education and training in the practice of criminal and delinquency cases and subscribe to listservs, consult available online resources, and attend continuing legal education programs devoted to the practice of criminal and delinquency cases.

3. A lawyer practicing criminal or juvenile delinquency law should complete at least 10 hours of continuing legal education training in criminal and delinquency law each year.

4. A lawyer practicing in criminal or juvenile delinquency law should become familiar with the basics of immigration law pertinent to the possible immigration consequences of a criminal conviction or an adjudication in a delinquency case for noncitizen clients. At

least two hours of a lawyer's mandatory continuing legal education training requirements each year should involve training on such immigration consequences. Lawyers should also be familiar with other non-penal consequences of a criminal conviction or delinquency adjudication, such as those affecting driving privileges, public benefits, sex offender registration, residency restrictions, student financial aid, opportunities for military service, professional licensing, firearms possession, DNA sampling, HIV testing, among others.

5. Before undertaking representation in a criminal or delinquency case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including nonlawyers. A less experienced lawyer should observe and, when possible, serve as co-counsel to more experienced lawyers prior to accepting sole responsibility for a criminal or delinquency case. More experienced lawyers should mentor less experienced lawyers.
6. Lawyers in delinquency cases and, where relevant, in criminal cases, should develop a basic knowledge of child and adolescent development, including information concerning emotional, social and neurological development that could impact effective communication by the lawyer with clients and the defense of charges against the client. Lawyers in delinquency cases should have training in communicating with youth in a developmentally appropriate way.
7. Lawyers representing youth who are prosecuted in the adult criminal system should have the specialized training and experience of a juvenile defender in addition to the training and experience required to handle the most serious adult criminal cases.
8. A lawyer providing representation in criminal and juvenile delinquency cases should be familiar with key agencies and services typically involved in those cases, such as the Oregon Department of Corrections, local community corrections programs, the Oregon Youth Authority, the Department of Human Services, county Juvenile Departments, private treatment facilities and programs, along with other services and programs available as dispositional alternatives to detention and custody.

Commentary:

The complexity and seriousness of criminal and juvenile delinquency cases require specialized training and expertise in a broad area of law and practical skills. Moreover, as the practice of law in these areas continues to develop, lawyers must devote a substantial amount

of time to on-going training. From complex, ever-changing sentencing schemes to the increased role of scientific evidence and forensic experts, defense lawyers must master not only the skills of trial advocacy but also the complex legal and factual issues attendant to many cases. For instance, recent advances in neuroscience and the understanding of infant and adolescent brain development undermine traditional notions of culpability and blameworthiness for both juvenile and adult offenders, requiring defense lawyers to learn the pertinent scientific principles and present them as evidence in appropriate cases. Likewise, as computers, smartphones and other electronic devices become an integral part of everyday life for most youth and adults, counsel must understand and utilize their evidentiary potential.

As criminal and delinquency cases have become more serious and complex, the collateral consequences of convictions and adjudications have become more numerous and significant. Lawyers must now understand and explain the immigration consequences of a criminal conviction to noncitizen clients in order to fulfill the Sixth Amendment rights of those clients.¹⁸ Depending upon the particular circumstances of a client, other collateral consequences may be just as important as deportation, requiring a lawyer to understand and seek to mitigate the impact of a conviction on a client's employment, housing, public assistance, schooling and other fundamental life activities.

The increased complexity and seriousness of criminal and delinquency cases require lawyers to take advantage of membership organizations that provide not only seminars and other training but also access to blogs, listservs, videos, motions and memoranda, and other online resources that alert lawyers to the latest developments in a pertinent area of law, provide a forum to seek case-specific guidance, and promote a culture of zealous, client-centered representation. The days of the solo practitioner toiling alone are in the past. In Oregon, the Oregon Criminal Defense Lawyers Association, the Oregon State Bar, the National Association of Criminal Defense Lawyers and the National Juvenile Defender Center help provide the tools essential to successful practice in these areas. While direct peer-to-peer consultation, mentoring or guidance remains important, membership in an organization focused on criminal and juvenile defense has become the norm for best practices in Oregon.

STANDARD 1.3 – OBLIGATIONS OF DEFENSE COUNSEL REGARDING WORKLOAD

Before agreeing to act as counsel or accept appointment by a court, a lawyer has an obligation to make sure that he or she has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a criminal matter or a youth in a

¹⁸ *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L Ed 2d 284 (2010).

delinquency case. If it later appears that the lawyer is unable to offer quality representation in the case, the lawyer should move to withdraw.

Implementation:

1. A lawyer, whether court-appointed or privately retained, should not accept workloads that, by reason of size or complexity, interfere with the ability of the lawyer to meet professional obligations to each client.
2. A lawyer should have access to sufficient support services and resources to allow for quality representation.

Commentary:

In 2007, the Oregon State Bar (OSB) Board of Governors approved Formal Ethics Opinion No. 2007-178, which was based upon the American Bar Association Formal Ethic Opinion No. 06-441, entitled “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.” The OSB opinion, which makes clear that it addresses appointed and retained counsel, commands lawyers to control their workloads to enable them to discharge their ethical obligations “to provide each client with competent and diligent representation, keep each client reasonably informed about the status of his or her case, explain each matter to the extent necessary to permit the client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make.” The opinion observes, quoting the ABA opinion, that for every client a lawyer is required to “keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; and communicate effectively on behalf of and with clients[.]” The opinion observes that a “lawyer who is unable to perform these duties may not undertake or continue with representation of a client.”

STANDARD 2.1 – OBLIGATIONS OF DEFENSE COUNSEL AT INITIAL APPEARANCE

At the initial court appearance in a criminal or delinquency case, a lawyer should inform the client of the offenses alleged in the charging instrument or petition, assert pertinent statutory and constitutional rights of the client on the record and, where appropriate, attempt to secure the pretrial release of detained clients under the conditions most favorable and acceptable to the client.

Implementation:

1. A lawyer should be familiar with the law regarding initial appearance, arraignment, and juvenile detention.
2. A lawyer should be familiar with the local practice regarding case docketing and processing so that the lawyer may inform the client regarding expected case events and the dates for upcoming court appearances.
3. A lawyer should be prepared to enter an appropriate assertion that preserves the client's rights and demands due process, whether that is a not guilty plea or a denial of the allegations in a delinquency petition, demand for preliminary hearing or request for some other further proceeding. A lawyer should make clear that the defendant reserves the following rights in the present and any other matter:
 - a. Right to remain silent under State and Federal Constitutions;
 - b. Right to counsel under State and Federal Constitutions;
 - c. Right to file challenges to the charging instrument or petition;
 - d. Right to file challenges to the evidence;
 - e. Right to file notices of affirmative defenses; and
 - f. Right to a speedy trial.
4. A lawyer should be prepared to object to the court's failure to comply with the law regarding the initial appearance process, such as the statute requiring an ability to confer confidentially with the client during a video arraignment.
5. If the client is in custody, a lawyer should seek release from custody or detention (See Standard 2.3).
6. A lawyer should obtain all relevant documents and orders that pertain to the client's initial appearance.
7. A lawyer may waive formal reading of the allegations and advice of rights by the court, providing the lawyer advises the client what rights are waived, the nature of the charges, and the potential consequences of relinquishing his rights.

8. If the adjudicatory judge is assigned at the initial appearance, the lawyer must be familiar with the law and local practice for filing motions to disqualify a judge, discuss this with the client, and be prepared to timely file appropriate documents challenging an assigned judge.

Commentary:

While substantive law has been largely standardized throughout the state, court procedural rules still vary significantly by county or judicial district. A lawyer should be familiar with the local practice codified in the Supplementary Local Rules (SLRs) as well as those preserved only as oral tradition (the local unwritten rules). Because Oregon allows for self-bail on posting security, the lawyer should be familiar with local sheriff office practices regarding posting security and when deposited moneys will be available to clients.

Jurisdictions vary on when a trial judge is actually assigned and, therefore, the time for filing motions for change of judge will vary. Some counties require all plea discussions to occur prior to entry of the not guilty plea, but will often set over plea entry to allow for discovery and negotiations. Some counties will stick closely to the time requirements in the Uniform Trial Court Rules, but constitutional due process rights may trump a jurisdiction's procedural requirements or administrative rules.¹⁹

STANDARD 2.2 – CLIENT CONTACT AND COMMUNICATION

A lawyer should conduct a client interview as soon as practicable after representation begins and thereafter establish a procedure to maintain regular contact with the client in order to explain the allegations and nature of the proceedings, meet the ongoing needs of the client, obtaining necessary information from the client, consult with the client about decisions affecting the course of the defense and to respond to requests from the client for information or assistance concerning the case.

Implementation:

1. A lawyer should provide a clear explanation, in developmentally appropriate language, of the role of both the client and the lawyer, and demonstrate appropriate commitment to the client's expressed interests in the outcome of the proceedings. A lawyer should

¹⁹ *State v. Owens*, 68 Or. App. 343 (1984).

elicit the client's point of view and encourage the client's full participation in the defense of the case.

2. The initial interview should be in person, in a private setting that allows for a confidential conversation. When the client is a youth, a lawyer should not allow parents or other people to participate in the initial meeting with the client, in order to maintain privileges and assure that the client knows the communication is confidential.
3. If the client is in custody and a release or detention hearing is pending, the lawyer should be familiar with the law regarding detention, the criteria for release and discuss with the client release factors and resources available to the client to obtain pretrial release.
4. At the initial meeting, the lawyer should review the charges facing the client and be prepared to discuss the necessary elements of the charges, the procedure the client will be facing in subsequent court appearances, and inquire if the client has any immediate needs regarding securing evidence or obtaining release.
5. Prior to all meetings, the lawyer should:
 - a. Be familiar with the elements of the charged offense(s) and the potential punishment;
 - b. Obtain copies of any relevant documents that are available including any charging documents, recommendations and reports made by agencies concerning pretrial release and law enforcement reports that might be available;
 - c. Be familiar with the legal procedure the client will encounter and be prepared to discuss the process with the client;
 - d. If a client is in custody, be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release, and in a juvenile proceeding be prepared to discuss the process of ongoing detention review.
6. During an initial interview with the client, a lawyer should:
 - a. Obtain information concerning:
 - 1) The client's ties to the community, including the length of time he or she has lived at current and former addresses, family relationships, immigration status (if applicable), employment record and history;

- 2) The client's history of service in the military, if any;
 - 3) The client's physical and mental health, educational and military services records;
 - 4) The client's immediate medical needs;
 - 5) The client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;
 - 6) The ability of the client to meet any financial conditions of release;
 - 7) The names of individuals, or other sources, that counsel can contact to verify the information provided by the client; and the client's permission to contact these individuals;
- b. Provide to the client information including but not limited to:
- 1) An explanation of the procedures that will be followed in setting the conditions of pretrial release;
 - 2) An explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;
 - 3) An explanation of the lawyer-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the lawyer;
 - 4) The charges and the potential penalties, as well as potential collateral consequences, of any conviction and sentence;
 - 5) A general procedural overview of the progression of the case, where possible;
 - 6) Advice that communication with people other than the defense team is not privileged and, if the client is in custody, may be monitored.
7. A lawyer should use any contact with the client as an opportunity to gather timely information relevant to preparation of the defense. Such information may include, but is not limited to:
- a. The facts surrounding the charges against the client;
 - b. Any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;

- c. Any possible witnesses who should be located;
- d. Any evidence that should be preserved;
- e. Where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Commentary:

The purpose of the initial contact is to quickly ascertain and identify work that needs to be done to prepare for the defense, including documenting the status or condition of evidence that could be lost, such as injuries to the defendant or crime scene conditions; establishing a relationship with the client; informing the client of the charges against him or her and the possible consequences; and reviewing next steps such as preparing for a release hearing or preliminary hearing. The relationship between a criminal defendant or youth charged with delinquency and a lawyer will be directly affected by the quality of their communication, which starts with the initial interview where the lawyer can provide the client important information and obtain relevant case information from the client. There is a strong correlation between good lawyer/client communication and the lack of complaints from clients about poor representation or requests for substitute counsel. If this correlation is more than coincidence then it is likely that the key to successful representation is good communication that begins with a timely and thorough initial interview.

The duty to communicate is found in Oregon Rule of Professional Conduct 1.4 and forms a core duty that the lawyer owes the client. Aside from addressing the immediate needs of the client to secure release or preserve evidence, the initial interview (along with subsequent meetings) forms the source of another core duty, the duty to investigate. A review of information with the client may assist in determining who needs to be interviewed or what evidence may need expert evaluation.

Communication and contact with the client is an important source for the lawyer to assess the client's mental status to understand the proceedings. The lawyer should make note of concerns and consult appropriate experts regarding concerns over competency.

STANDARD 2.3 – RELEASE OF CLIENT

- A. A lawyer has a duty to seek release from custody or detention of clients under the conditions most favorable and acceptable to the client.**

- B. Release should be sought at the earliest possible opportunity and if not successful a lawyer should continue to seek release at appropriate subsequent hearings.**

Implementation:

1. If the client is in custody or detention, the lawyer should review the documents supporting probable cause and, if appropriate, challenge any finding of probable cause. In all cases where detention continues, the lawyer should move for release if appropriate or ask that bail be reduced to an amount the client can afford.
2. If the court will not consider release at initial appearance, the lawyer should request a release hearing and decision within the statutory time requirements. In delinquency proceedings, the lawyer should be familiar with the law and procedures for detention hearings and the risk factors that the court is likely or required to consider. In criminal cases, at any release hearing, the lawyer should be familiar with the statutory criteria for release and be prepared to address those release factors on the record.
3. In preparation for a release hearing the lawyer should discuss statutory release criteria with the client and be prepared to address the court regarding these factors including residence, employment, compliance with release conditions such as no contact with victims and any release compliance monitoring.
4. If the client is subject to release on security, the lawyer should be familiar with the rules and requirements to post security, including procedures for client “self-bailing” with funds from an inmate account, posting a security interest in property, or third party posting requirements.

STANDARD 3 - INVESTIGATION

A lawyer has the duty to conduct an independent review of the case, regardless of the client’s admissions or statements to the lawyer of facts constituting guilt or the client’s stated desire to plead guilty or admit guilt. Where appropriate, the lawyer should engage in a full investigation, which should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for trial or hearing, and to best advise the client as to the possibility and consequences of conviction or adverse adjudication. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.

Implementation:

1. A lawyer should obtain copies of all charging documents and should examine them to determine the specific charges that have been brought against the client.
2. A lawyer should engage in research, including a review of all relevant statutes and case law, in order to determine:
 - a. The necessary elements of the charged offenses;
 - b. Any defects in the charging instrument, both constitutional and non-constitutional, including statute of limitations and double jeopardy;
 - c. Whether the court's jurisdiction can be challenged;
 - d. Applicability of defenses, ordinary and affirmative, including defenses based on mental disease or defect, diminished capacity, or partial responsibility, and whether any notice of such defenses is required and specific timelines for giving notice; and
 - e. Potential consequences of conviction or adverse adjudication, including those relating to immigration and possible deportation.
3. A lawyer should conduct an in-depth interview with the client as described in [Standard 2.2](#). The interview should be used to identify:
 - a. Additional sources of information concerning the incidents or events giving rise to the charges and to any defenses;
 - b. Evidence concerning improper conduct or practices by law enforcement, juvenile authorities, mental health departments, or the prosecution, which may affect the client's rights or the admissibility of evidence;
 - c. Information relevant to the court's jurisdiction;
 - d. Information relevant to pretrial or prehearing release and possible pretrial or prehearing disposition; and
 - e. Information relevant to sentencing or disposition and potential consequences of conviction or adverse adjudication.
4. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during the course of witness interviews, the lawyer should locate and assess its value to the client. Witness interviews should be conducted by an investigator or in the presence of a third person who will be available, if necessary, to testify as a defense witness at the trial or hearing.

When speaking with third parties, the lawyer has a duty to comply with the Oregon Rules of Professional Conduct, including Rule 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing with Unrepresented Persons). The lawyer also has a duty, where appropriate, to comply with statutory rights of victims, such as those embodied in ORS 135.970(2) and (3).

5. A lawyer should attempt to interview all law enforcement officers involved in the arrest and investigation of the case and should obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement, including, where relevant, law enforcement personnel records and documentation of prior officer misconduct. In cases involving child witnesses or victims, the lawyer should seek records of counseling sessions with those children. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.1.
6. Where appropriate, a lawyer should inspect the scene of the alleged offense under circumstances (including weather, lighting conditions, and time of day) as similar as possible to those existing at the time of the alleged incident.
7. Where appropriate, a lawyer should obtain school, mental health, medical, drug and alcohol, immigration, and prior criminal offense and juvenile records of the client and witnesses.

Commentary:

A skilled and knowledgeable lawyer will be of little use to a client without a thorough understanding of the facts of a case. As explained in the Commentary to the *National Juvenile Defense Standards*:

Most cases are won on facts, not legal arguments, and it is investigation that uncovers the facts. The facts are counsel's most important asset, not only in litigating the case at trial, but in every other function counsel performs, including negotiating for reduced or dismissed charges, diversion, or a plea agreement, as well as influencing a favorable disposition.

An investigation is important even when the client has admitted culpability or expresses a desire to plead guilty. An investigation may yield evidence that can lead to suppression of key state evidence, negate or block the

admissibility of state evidence, or limit the client's liability. Even if the investigation does not result in an acquittal or dismissal, it may yield evidence that can be useful in negotiating a more favorable plea agreement or mitigation of disposition.²⁰

STANDARD 4.1 – DISCOVERY

A lawyer has the duty to pursue formal and informal discovery in a prompt fashion and to continue to pursue opportunities for discovery throughout the case.

Implementation:

1. A lawyer should be familiar with all applicable statutes, rules and case law governing discovery, including those concerning the processes for filing motions to compel discovery or to preserve evidence, as well as those making sanctions available when the prosecution has engaged in discovery violations.
2. A lawyer should also be familiar with and observe the applicable statutes, rules and case law governing the obligation of the defense to provide discovery. A lawyer should file motions for protective orders or otherwise resist discovery where a lawful basis exists to shield information in the possession of the defense from disclosure.
3. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions and should continually seek all information to which the client is entitled, especially any exculpatory, impeaching and mitigating evidence. Discovery should include, but is not limited to, the following:
 - a. Potentially exculpatory, impeaching and mitigating information;
 - b. Law enforcement reports and notes, 911 recordings and transcripts, inter-officer transmissions, dispatch reports, and reports or notes of searches or seizures and the circumstances in which they were accomplished;
 - c. Written communications, including emails, between prosecution, law enforcement and/or witnesses;
 - d. Names and addresses of prosecution witnesses, their prior statements, their prior criminal records and their relevant digital, electronic and social media postings;

²⁰ National Juvenile Defender Center, *National Juvenile Defense Standards*, Sec. 4.1, at 68-69 (citations omitted).

- e. Oral or written statements by the client and the circumstances under which those statements were made;
 - f. The client's prior criminal or juvenile record and evidence of any other misconduct that the prosecution may intend to use against the client;
 - g. Copies of, or the opportunity to inspect books, papers, documents, photographs, computer data, tangible objects, buildings or places, and other material relevant to the case;
 - h. Results or reports of physical or mental examinations, and of scientific tests or experiments, and the data and documents on which they are based;
 - i. Statements and reports of experts and the data and documents on which they are based; and
 - j. Statements of co-defendants.
4. A lawyer should consider filing motions seeking to preserve evidence where it is at risk of being destroyed or altered.

STANDARD 4.2 – THEORY OF THE CASE

A lawyer should develop and continually reassess a theory of the client's case that advances the client's goals and encompasses the realities of the client's situation.

Implementation:

1. A lawyer should use the theory of the case when evaluating strategic choices throughout the course of the representation.
2. A lawyer should allow the theory of the case to focus the investigation and trial or hearing preparation, seeking out and developing facts and evidence that the theory makes material.
3. A lawyer should remain flexible enough to modify or abandon the theory if it does not serve the client.

Commentary:

The theory of the case is a construct that can guide the preparation and presentation of a case. A theory of the case should explain the facts of the case in such a way that a judge or jury will understand why the client is entitled to a favorable verdict. As such, it is first and

foremost a factual narrative that presents the client’s story in straightforward common sense terms that support a favorable verdict under the law applicable to the case. It must be informed by thorough investigation and preparation so that a lawyer will know which facts a judge or jury is likely to accept as proven. It must also account for what fact finders are likely to believe based upon their own life experiences. Finally, a theory of the case must account for the jury instructions and other law applicable to the case. Although a theory of the case should be developed early in the representation of a client and be largely built upon the client’s version of events, a lawyer must be able to revisit and revise the theory, in consultation with the client, as investigation and preparation continue to develop the facts that a judge or jury are likely to accept as true at the conclusion of the trial.

STANDARD 5.1 – PRETRIAL MOTIONS AND NOTICES

A lawyer should research, prepare, file and argue appropriate pretrial motions and notices whenever there is reason to believe the client may be entitled to relief.

Implementation:

1. The decision to file a particular pretrial motion or notice should be made after thorough investigation and after considering the applicable law in light of the circumstances of the case.
2. Among the issues the lawyer should consider addressing in pretrial motions are:
 - a. The pretrial custody of the accused;
 - b. The competency or fitness to proceed the accused (see Standard 5.3);
 - c. The constitutionality of relevant statutes;
 - d. Potential defects in the charging process or instrument;
 - e. The sufficiency of the charging document;
 - f. The severance of charges and/or co-defendants for trial;
 - g. Change of venue;
 - h. The removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice;
 - i. The discovery obligations of both the prosecution and the defense, including:

- 1) Motions for protective orders;
 - 2) *Brady v. Maryland*²¹ motions; and
 - 3) Motions to compel discovery.
- j. Violations of federal and/or state constitutional or statutory provisions, including:
- 1) Illegal searches and/or seizures;
 - 2) Involuntary statements or confessions;
 - 3) Statements obtained in violation of the right to counsel or privilege against self-incrimination;
 - 4) Unreliable identification evidence;
 - 5) Speedy trial rights; and
 - 6) Double jeopardy protections.
- k. Requests for, and challenges to denial of, funding for access to reasonable and necessary resources and experts, such as:
- 1) Interpreters;
 - 2) Mental Health Experts;
 - 3) Investigative services; and
 - 4) Forensic services.
- l. The right to a continuance in order to adequately prepare and present a defense or to respond to prosecution motions;
- m. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion *in limine*, including:
- 1) The competency or admissibility of particular witnesses, including experts and children;
 - 2) The use of prior convictions for impeachment purposes;
 - 3) The use of prior or subsequent bad acts;
 - 4) The use of reputation or other character evidence; and
 - 5) The use of evidence subject to “rape shield” protections.
- n. Notices of affirmative defenses and other required notices to present particular evidence;
- o. The dismissal of charges on the basis of a civil compromise, best interests of a youth in delinquency cases, in the furtherance of justice and the general equitable powers of the court.
3. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should carefully consider all facts in the case, applicable law, case strategy and other relevant information, including:

²¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

- a. The burden of proof, the potential advantages and disadvantages of having witnesses testify at pretrial hearings and to what extent a pretrial hearing reveals defense strategy to a client’s detriment;
- b. Whether a pretrial motion may be necessary to protect the client’s rights against later claims of waiver, procedural default or failure to preserve an issue for later appeal;
- c. The effect the filing of a motion may have upon the client’s speedy trial rights; and
- d. Whether other objectives, in addition to the ultimate relief requested by a motion, may be served by the filing and litigation of a particular motion.

STANDARD 5.2 – FILING AND ARGUING PRETRIAL MOTIONS

A lawyer should prepare for a motion hearing just as he or she would prepare for trial, including preparing for the presentation of evidence, exhibits and witnesses.

Implementation:

- 1. Motions should be timely filed, comport with the formal requirements of the court and succinctly inform the court of the authority relied upon.
- 2. When a hearing on a motion requires taking evidence, a lawyer’s preparation should include:
 - a. Investigation, discovery and research relevant to the claims advanced;
 - b. Subpoenaing all helpful evidence and witnesses;
 - c. Preparing witnesses to testify; and
 - d. Fully understanding the applicable burdens of proof, evidentiary principles and court procedures, including the costs and benefits of having the client or other witnesses testify and be subject to cross examination.
- 3. A lawyer should consider the strategy of submitting proposed findings of fact and conclusions of law to the court at the conclusion of the hearing.
- 4. After an adverse ruling, a lawyer should consider seeking interlocutory relief, if available, taking necessary steps to perfect an appeal and renewing the motion or objection during trial in order to preserve the matter for appeal.

STANDARD 5.3 – PRETRIAL DETERMINATION OF CLIENT’S FITNESS TO PROCEED

A lawyer must be able to recognize when a client may not be competent to stand trial and take appropriate action.

Implementation:

1. A lawyer must learn to recognize when a client’s ability to aid and assist in the proceedings may be compromised due to mental health disorders, developmental immaturity or developmental and/or intellectual disabilities.
2. A lawyer must assess whether the client’s level of functioning limits his or her ability to communicate effectively with counsel, as well as his or her ability to have a factual and rational understanding of the proceedings.
3. When a lawyer has reason to doubt the client’s competency to stand trial, the lawyer should gather information and consider filing a pretrial motion requesting a competency determination.
4. In deciding whether to request a competency determination, a lawyer must consider, among other things:
 - a. His or her obligations, under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-client relationship, to the extent possible, with a client with diminished capacity; and
 - b. The likely consequences of a finding of incompetence and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client or referral to other agencies.
5. If the lawyer decides to proceed with a competency hearing, he or she should secure the services of a qualified expert. When the client is a youth, such an expert should be versed in the emotional, physical, cognitive and language impairments of children and adolescents; the forensic evaluation of youth; the competence standards and accepted criteria used in evaluating juvenile competence; and effective interventions or treatment for youth.

6. If a court finds an adult client incompetent to proceed, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment available. If the client is a youth, a lawyer should seek to resolve the delinquency case by having the petition converted to a dependency petition or through a motion to dismiss in the best interests of the youth.
7. If a court finds a client is competent to proceed, a lawyer should continue to raise the matter during the course of the proceedings if the lawyer has a good faith concern about the client's continuing competency to proceed and in order to preserve the matter for appeal.

STANDARD 5.4 – CONTINUING OBLIGATIONS TO FILE OR RENEW PRETRIAL MOTIONS OR NOTICES

During trial or subsequent proceedings, a lawyer should be prepared to raise any issue which is appropriately raised pretrial but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Counsel should also be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

Commentary:

In many cases, the dispositive issue may concern some issue other than whether the client committed the alleged offense. Invariably, these issues should be the subject of pretrial motions, supported by thorough factual investigation and legal research. The range of such issues is broad, as illustrated by the foregoing standard. The timing of motions is a strategic consideration and a function of court rule and, in many instances, local court practice. In every case, in order to determine whether to litigate a pretrial motion, a lawyer must be knowledgeable about current developments in the defense of criminal and delinquency cases and be skilled in presenting evidence and arguments on complex legal issues.

The potential advantages of litigating pretrial motions are many. This point is perhaps best summarized by the commentary on this subject in the [National Juvenile Defense Standards](#), which reads as follows:

Pre-trial motions hearings provide immediate and long-term benefits. Immediately, counsel has the opportunity to convince the judge that the case should be dismissed, or at the very least that certain evidence should

be suppressed. Counsel also has the benefit of additional discovery through the state's responses to the motion prior to trial.

In the long-term, when motions generate a hearing, counsel can gain invaluable opportunities to pin down prosecution witnesses on the record and develop transcripts that could be used to impeach the witnesses with their prior inconsistent statements. Counsel has the opportunity to strengthen his or her relationship with the client through a demonstration of counsel's willingness to fight for the client. Because in many jurisdictions the vast majority of cases are resolved through a plea agreement, pre-trial motions practice may have an enormous impact on the kind of plea offer the prosecutor is willing to consider.²²

STANDARD 6.1 - EXPLORATION OF DISPOSITION WITHOUT TRIAL

A lawyer has the duty to explore with the client the possibility, advisability and consequences of reaching a negotiated disposition of charges or a disposition without trial. A lawyer has the duty to be familiar with the laws, local practices and consequences concerning dispositions without trial.

Implementation:

1. A lawyer should explore and consider mediation, civil compromise, diversion, Formal Accountability Agreements, having the case filed as a juvenile delinquency or dependency case, alternative dispositions including conditional postponement, motion to dismiss in the interest of justice, negotiated pleas or disposition agreements, and other non-trial dispositions.
2. A lawyer should explain to the client the strengths and weaknesses of the prosecution's case, the benefits and consequences of considering a non-trial disposition and discuss with the client any options that may be available to the client and the rights the client gives up by pursuing a non-trial disposition.
3. A lawyer should assist the client in weighing whether there are strategic advantages to be gained by taking a plea or whether the sentence or disposition results would likely be the same.

²² National Juvenile Defender Center, *National Juvenile Defense Standards*, Sec. 4.8, at 81-82.

4. With the consent of the client, a lawyer should explore with the prosecutor and, in juvenile cases, the juvenile court counselor, when appropriate, available options to resolve the case without trial. The lawyer should obtain information about the position the prosecutor and juvenile court counselor will take as to non-plea dispositions and recommendations that will be made about sentencing or disposition. Throughout negotiation, a lawyer must zealously advocate for the expressed interests of the client, including advocating for some benefit for the client in exchange for a plea.
5. A lawyer cannot accept any negotiated settlement or agree to enter into any non-trial disposition without the client's express authorization.
6. A lawyer must keep the client fully informed of continued negotiations and convey to the client any offers made by the prosecution or recommendations by the juvenile court counselor for a negotiated settlement. The lawyer must assure that the client has adequate time to consider the plea and alternative options.
7. A lawyer should continue to take steps necessary to preserve the client's rights and advance the client's defenses even while engaging in settlement negotiations.
8. Before conducting negotiations, a lawyer should be familiar with:
 - a. The types, advantages and disadvantages, and applicable procedures and requirements of available pleas or admissions to juvenile court jurisdiction, including a plea or admission of guilty, no contest, a conditional plea or admission of guilty that reserves the right to appeal certain issues, and a plea or admission in which the client is not required to acknowledge guilt (*Alford* plea);
 - b. Whether agreements between the client and the prosecution would be binding on the court or on the prison, juvenile, parole and probation, and immigration authorities; and
 - c. The practices and policies of the particular prosecuting authorities, juvenile authorities and judge that may affect the content and likely results of any negotiated settlement.
9. A lawyer should be aware of, advise the client of, and, where appropriate, seek to mitigate the following, where relevant:
 - a. Rights that the client would waive when entering a plea or admission disposing of the case without trial;

- b. The minimum and maximum term of incarceration that may be ordered, including whether the minimum disposition would be indeterminate, possible sentencing enhancements, probation or post-confinement supervision, alternative incarceration programs and credit for pretrial detention;
- c. The likely disposition given sentencing guidelines;
- d. The minimum and maximum fines and assessments, court costs that may be ordered and the restitution that is being requested by the victim(s);
- e. Arguments to eliminate or reduce fines, assessments and court costs, challenges to liability for and the amount of restitution, the possibilities of civil action by the victim(s), and asset forfeiture, and the availability of work programs to pay restitution and perform community service;
- f. Consequences relating to previous offenses;
- g. The availability and possible conditions of protective supervision, conditional postponement, probation, parole, suspended sentence, work release, conditional leave and earned release time;
- h. The availability and possible conditions of deferred sentences, conditional discharges, alternative dispositions and diversion agreements;
- i. For non-citizen juvenile clients, the possibility of temporary and permanent immigration relief through the available legislative or administrative immigration programs and Special Immigrant Juvenile Status;
- j. For non-citizen clients, the possibility of adverse immigration consequences;
- k. For non-citizen clients, the possibility of criminal consequences of illegal re-entry following conviction and deportation;
- l. The possibility of other consequences of conviction, such as:
 - 1) Requirements for sex offender registration, relief and set-aside;
 - 2) DNA sampling, AIDS and STD testing;
 - 3) Loss of civil liberties such as voting and jury service privileges;
 - 4) Effect on driver's or professional licenses and on firearms possession;
 - 5) Loss of public benefits;
 - 6) Loss of housing, education, financial aid, career, employment, vocational or military service opportunities; and
 - 7) Risk of enhanced sentences for future convictions.
- m. The possible place and manner of confinement, placement, or commitment;
- n. The availability of pre-and post-adjudication diversion programs and treatment programs;
- o. Standard sentences for similar offenses committed by offenders with similar backgrounds; and
- p. The confidentiality of juvenile records and the availability of expungement.

10. A lawyer should identify negotiation goals with the following in mind:

- a. Concessions that the client might offer to the prosecution, including an agreement:
 - 1) Not to contest jurisdiction;
 - 2) Not to dispute the merits of some or all of the charges;
 - 3) Not to assert or litigate certain rights or issues;
 - 4) To fulfill conditions of restitution, rehabilitation, treatment or community service; and
 - 5) To provide assistance to law enforcement or juvenile authorities in investigating and prosecuting other alleged wrongful activity.
- b. Benefits to the client, including an agreement:
 - 1) That the prosecution will refile allegations in juvenile court and will not contest juvenile court jurisdiction;
 - 2) That the prosecution will not oppose release pending sentence, disposition or appeal;
 - 3) That the client may reserve the right to contest certain issues;
 - 4) To dismiss or reduce charges immediately or upon completion of certain conditions;
 - 5) That the client will not be subject to further investigation for uncharged conduct;
 - 6) That the client will receive, subject to the court's agreement, a specified set or range of sanctions;
 - 7) That the prosecution will take, or refrain from taking, a specified position with respect to sanctions, and/or that the prosecution will not present preparation of a pre-sentence report, or in determining the client's date of release from confinement; and
 - 8) That the client will receive, or that the prosecution will recommend, specific benefits concerning the place and manner of confinement, conditions of parole or probationary release and the provision of pre- or post-adjudication treatment programs.

11. A lawyer has the duty to inform the client of the full content of any tentative negotiated settlement or non-trial disposition, and to explain to the client the advantages, disadvantages, and potential consequences of the settlement or disposition.

12. A lawyer should not recommend that the client enter a dispositional plea or admission unless appropriate investigation and evaluation of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward.

STANDARD 6.2 – ENTRY OF DISPOSITIONAL PLEA OR ADMISSION

A decision to enter a plea resolving the charges, or to admit the allegations, rests solely with the client. The lawyer must not unduly influence the decision to enter a plea and must ensure that the client’s acceptance of the plea is voluntary and knowing, and reflects an intelligent understanding of the plea and the rights the client will forfeit.

Implementation:

1. A lawyer has the duty to explain to the client the advantages, disadvantages and consequences of resolving the case by entering a dispositional plea or by admitting the allegations.
2. A lawyer has the duty to explain to the client the nature of the hearing at which the client will enter the plea or admission and the role that the client will play in the hearing, including participating in the colloquy to determine voluntary waiver of rights and answering other questions from the court and making a statement concerning the offense. The lawyer should be familiar with the Model Colloquy for juvenile waiver of the right to trial. The lawyer should explain to the client that the court may in some cases reject the plea.
3. At the hearing, a lawyer has the duty to assist the client and to ensure that :
 - a. Any plea petition is legible and accurate and clearly sets forth terms beneficial to the client;
 - b. The court, on the record using any applicable model colloquy, inquires into whether the client’s decision is knowing, voluntary, and intelligent;
 - c. The court enters the plea or admission only after finding that the client’s decision was knowing, voluntary and intelligent; and
 - d. The judicial record is legible, clear, accurate and contains the full contents and conditions of the client’s plea or admission.

4. If during the plea hearing, the client does not understand questions being asked by the court, the lawyer must request a recess to assist the client.

STANDARD 7.1 – GENERAL TRIAL PREPARATION

- A. A trial or juvenile adjudicatory hearing (hereinafter referred to as a trial) is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared on the law and facts, and competently plan a challenge to the state’s case and, where appropriate, presentation of a defense case.**
- B. The decision to proceed to trial with or without a jury rests solely with the client. The lawyer should discuss the relevant strategic considerations of this decision with the client.**
- C. A lawyer should develop, in consultation with the client, an overall defense strategy for the conduct of the trial.**

Implementation:

1. A lawyer should ordinarily have the following materials available for use at trial:
 - a. Copies of all relevant documents filed in the case;
 - b. Relevant documents prepared by investigators;
 - c. Voir dire questions;
 - d. Outline or draft of opening statement;
 - e. Cross-examination plans for all possible prosecution witnesses;
 - f. Direct examination plans for all prospective defense witnesses;
 - g. Copies of defense subpoenas;
 - h. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);
 - i. Prior statements of all defense witnesses;
 - j. Reports from experts;
 - k. A list of all exhibits and the witnesses through whom they will be introduced;
 - l. Originals and copies of all documentary exhibits;
 - m. Proposed jury instructions with supporting authority;
 - n. Copies of all relevant statutes and cases;
 - o. Evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;
 - p. Outline or draft of closing argument; and

- q. Trial memoranda outlining any complex legal issues or factual problems the court may need to decide during the trial.
2. A lawyer should be fully informed as to the rules of evidence, the law relating to all stages of the trial process and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial. The lawyer should analyze potential prosecution evidence for admissibility problems and develop strategies for challenging inadmissible evidence. The lawyer should be prepared to address objections to defense evidence or testimony. The lawyer should be prepared to raise affirmative defenses. The lawyer should consider requesting that witnesses be excluded from the trial.
3. A lawyer should evaluate whether expert testimony is necessary and beneficial to the client. If so, the lawyer should seek an appropriate expert witness and prepare the witness to testify, including possible areas of cross examination.
4. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings.
5. Throughout the trial process, a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all trial proceedings be recorded.
6. Where appropriate, a lawyer should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, a lawyer should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing.
7. A lawyer should plan with the client the most convenient system for conferring throughout the trial. Where necessary, a lawyer should seek a court order to have the client available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter/translator for the client during the course of all trial proceedings.
8. Throughout preparation and trial, a lawyer should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Commentary:

Trial preparation and execution is both an intellectual and logistical exercise. A lawyer must prepare adequately and in a timely manner so that when the trial begins, the lawyer has the necessary exhibits, witnesses, trial materials and any other items necessary during the trial. A lawyer will be performing a number of tasks over the course of trial that must be coordinated so that an adequate defense is presented. A trial judge has a great deal of discretion in managing the courtroom and an unprepared attorney is likely to jeopardize a client's defense.

When appropriate, to preserve an important legal issue or prevent inappropriate comment in opening statement, a lawyer should consider obtaining a pretrial ruling by filing a motion in limine to prevent comment on evidence that may not be ultimately admitted or to inform final analysis of the trial worthiness of a particular case or trial theory.

Expert witnesses present a unique challenge to lawyers. They are chosen for their knowledge base rather than because circumstances made them a percipient witness. The lawyer should evaluate and consider whether a particular expert is helpful to the defense case. Once selected, the expert needs to be given all appropriate information to prepare to testify. Finally, the lawyer should prepare the witness for testimony and anticipate possible lines of cross examination. This preparation can include, where appropriate, a list of questions and it is advisable to have the expert commit to answers prior to calling them as a witness. The expert has his or her own duty as a witness to follow the oath and testify truthfully and therefore the lawyer must determine what the witness will say prior to presenting the witness. If the witness is not helpful to the defense then the witness should not be called to the stand.

STANDARD 7.2 – VOIR DIRE AND JURY SELECTION

- A. A lawyer should be prepared to question prospective jurors and to identify individual jurors whom the defense should challenge for cause or exclude by preemptory strikes.**

- B. A lawyer should carefully observe the prosecutor's questioning of jurors to inform defense challenges for cause and use of preemptory challenges and to object if the prosecutor is attempting to exclude jurors for impermissible reasons.**

Implementation:

Preparation:

1. A lawyer should be familiar with the procedures by which a jury is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
2. A lawyer should be familiar with the local practices and the individual trial judge's procedures for selecting a jury and should be alert to any potential legal challenges to these procedures.
3. Prior to jury selection, a lawyer should seek to obtain a prospective juror list.
4. A lawyer should develop voir dire questions in advance of trial and tailor voir dire questions to the specific case. Among the purposes, voir dire questions should be designed to serve the following:
 - a. To elicit information about the attitudes of individual jurors which will provide the basis for peremptory strikes and challenges for cause;
 - b. To convey to the panel certain legal principles which are critical to the defense case;
 - c. To preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
 - d. To present the client and the defense case in a favorable light, without prematurely disclosing information and the defense case to the prosecutor; and
 - e. To establish a relationship with the jury.
5. A lawyer should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.
6. A lawyer should be familiar with the law concerning challenges for cause and peremptory strikes.
7. In a group voir dire, a lawyer should avoid asking questions that may elicit responses that are likely to prejudice other prospective jurors.

8. If the voir dire questions may elicit sensitive answers, a lawyer should request that questioning be conducted outside the presence of the remaining jurors.
9. A lawyer should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias if it is likely to benefit the client.
10. A lawyer should be familiar with the requirements for preserving appellate review of any defense challenges for cause that have been denied.
11. Where appropriate, the lawyer should consider whether to seek expert assistance in the jury selection process.

Commentary:

Highlighting the importance of jury selection, some commentators maintain that trials are won or lost during jury selection. It is also among the most challenging stages of a jury trial, requiring knowledge, training and skill to accomplish successfully. It is the occasion, of course, for a lawyer to seek to remove potential jurors from the trial panel who may be biased against the client or who may not be favorably disposed to the defense case. And it is well recognized that a lawyer has a right to ascertain if a juror is prejudiced against the client, even if that requires broader latitude in time and scope by the judge than originally allowed.²³ But jury selection is also an opportunity for a lawyer to establish a relationship with jurors, to convey legal principles essential to the defense and to place the client and the defense case in a favorable light. To do so successfully, however, requires a thorough understanding of the law applicable to jury selection, a thoughtful and sensitive approach to interpersonal relations and a well-crafted theory of the defense. Without these components, a lawyer may very well do more harm than good during jury selection.

STANDARD 7.3 – OPENING STATEMENT

An opening statement is a lawyer’s first opportunity to present the defense case. The lawyer should be prepared to present a coherent statement of the defense theory based on evidence likely to be admitted at trial, and should raise and, if necessary, preserve for appeal any objections to the prosecutor’s opening statement.

²³ *State v. Williams*, 123 Or. App. 546 (1993).

Best Practice:

1. Prior to delivering an opening statement, a lawyer should ask that the witnesses be excluded from the courtroom, unless a strategic reason exists for not doing so.
2. A lawyer's objective in making an opening statement may include the following:
 - a. Provide an overview of the defense case emphasizing the defense theme and theory of the case;
 - b. Identify the weaknesses of the prosecution's case;
 - c. Emphasize the prosecution's burden of proof;
 - d. Summarize the testimony of witnesses and the role of each witness in relationship to the entire case;
 - e. Describe the exhibits which will be introduced and the role of each exhibit in relationship to the entire case;
 - f. Clarify the jurors' responsibilities;
 - g. State the ultimate inferences which the lawyer wishes the jury to draw; and
 - h. Humanize the client.
3. A lawyer should listen attentively during the state's opening statement in order to raise objections and note potential promises of proof made by the state that could be used in summation.
4. A lawyer should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
5. Whenever the prosecutor oversteps the bounds of a proper opening statement, a lawyer should consider objecting, requesting a mistrial or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:
 - a. The significance of the prosecutor's error;
 - b. The possibility that an objection might enhance the significance of the information in the jury's mind;
 - c. Whether there are any rulings made by the judge against objecting during the other attorney's opening argument.

6. A lawyer should consider giving an opening statement during a court trial if either the law or facts are sufficiently complex to justify it. In all cases, a lawyer should evaluate if in the particular circumstances giving an opening would help or hurt the client's case. If the consideration is neutral, then the lawyer should give an opening.

Commentary:

The opening statement is the lawyer's opportunity to set forth the defense theory and preview the case for the jury. Judges will vary on their view of the permissible scope of an opening statement. In general, the purpose and rule of opening is for each side to preview their case and offer a summary of any evidence that they have a good faith belief will be admitted at trial. For this reason, a lawyer should consider whether evidence available to the state, but that may have significant prejudice and may be inadmissible, should be challenged prior to opening statements. (See 5.1 on pretrial motions) In the alternative, a lawyer should consider seeking a ruling that the prosecutor be precluded from discussing particular evidence that may or may not be admitted at trial.

Historically, opening statements could be strictly limited to a sterile and bland recitation of what witnesses might say. Objections on argumentative grounds were common and lawyers were restricted from making any conclusions. This has evolved and opening statements in the modern case may include discussions of the law or suggest conclusions that the jury could make. Further, by stipulation or with court permission opening statements can include the use of exhibits that are pre-admitted. Finally, in many cases, effective use of computer graphics and slides may enhance the opening statement, including actual pieces of evidence such as recorded phone calls or videos. When these presentations are used by the state, the lawyer for the defendant should ask to preview it and challenge material that may not be received in evidence.

STANDARD 7.4 – CONFRONTING THE PROSECUTION'S CASE

The essence of the defense in most cases is confronting the prosecution's case. The lawyer should develop a theme and theory of the case that directs the manner of conducting this confrontation. Whether it is refuting, discrediting or diminishing the state's case, the theme and theory should determine the lawyer's course of action.

Implementation:

1. A lawyer should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

2. A lawyer should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
3. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. In order to develop material for impeachment, or to discover documents subject to disclosure, a lawyer should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
4. In preparing for cross-examination, a lawyer should:
 - a. Consider the need to integrate cross-examination, the theory of the defense and closing argument;
 - b. Consider whether cross-examination of each individual witness is likely to generate helpful information;
 - c. Anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
 - d. Consider a cross-examination plan for each of the anticipated witnesses;
 - e. Consider an impeachment plan for any witnesses who may be impeachable;
 - f. Be alert to inconsistencies in a witness testimony;
 - g. Be alert to possible variations in witness testimony;
 - h. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
 - i. If available, review investigation reports of interviews and other information developed about the witnesses;
 - j. Review relevant statutes and police procedural manuals and regulations for possible use in cross-examining police witnesses;
 - k. Be alert to issues relating to witness credibility, including bias and motive for testifying.
5. A lawyer should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.
6. Before beginning cross-examination, a lawyer should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If the lawyer does not receive prior statements of prosecution witnesses until they have completed direct examination, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

7. At the close of the prosecution’s case, and out of the presence of the jury, a lawyer should move for a judgment of acquittal on each count charged. The lawyer should request, when necessary, that the court immediately rule on the motion in order for the lawyer may make an informed decision about whether to present a defense case.

Commentary:

The lawyer should be mindful of how cross-examination may affect the case and whether particular questions might “open the door” to otherwise inadmissible evidence. For example, where the defense attorney questioned the adequacy and thoroughness of the investigating officer’s interview of defendant—an interview that was cut short by the defendant’s invocation of the right to counsel—the prosecutor was allowed to respond by informing the jury that the detective was unable to conduct a more thorough inquiry because of that invocation.²⁴

Cross-examination should be conducted purposefully to cast doubt on the state’s evidence or discredit a state’s witness and in all cases should be consistent with the defense theory of the case. Simply reiterating a witness’s direct examination is at best tedious and at worst strengthens the prosecution’s case in the mind of the trier of fact.

In preparing any topic or questions for cross examination, a lawyer should prepare the legal basis for asking the question and anticipate objections to admissibility. If the court prohibits questioning on a particular topic, a lawyer should make an appropriate record to preserve the error through an offer of proof.

STANDARD 7.5 – PRESENTING THE DEFENSE CASE

A lawyer should be prepared to present evidence at trial where it will advance a defense theory of the case that best serves the interest of the client.

Implementation:

1. A lawyer should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, a lawyer should consider whether the client’s interests are best served by not putting on a defense case and instead rely on the prosecution’s

²⁴ *State v. Guritz*, 134 Or. App. 262 (1995).

failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

2. A lawyer should discuss with the client all of the considerations relevant to the client's decision whether or not to testify.
3. A lawyer should be aware of the elements of any affirmative defense and know whether the client bears a burden of persuasion or a burden of production.
4. In preparing for presentation of a defense case, a lawyer should:
 - a. Develop a plan for direct examination of each potential defense witness and assure each witness's attendance by subpoena if necessary;
 - b. Determine the implications that the order of witnesses may have on the defense case;
 - c. Consider the possible use of character witnesses;
 - d. Consider the need for expert witnesses; and
 - e. Consider whether to present a defense based on mental disease, defect, diminished capacity or partial responsibility and provide notice of intent to present such evidence and consult with the client about the implications of an insanity defense.
5. In developing and presenting the defense case, a lawyer should consider the implications it may have for a rebuttal by the prosecutor.
6. A lawyer should prepare all witnesses for direct and possible cross-examination. Where appropriate, a lawyer should also advise witnesses of suitable courtroom dress and demeanor.
7. A lawyer should conduct redirect examination as appropriate.
8. At the close of the defense case, the lawyer should renew the motion for judgment of acquittal on each charged count.
9. A lawyer should be prepared to object to an improper state's rebuttal case and offer surrebuttal witnesses if allowed.

Commentary:

The Oregon Rules of Professional Conduct properly affirm the constitutional requirement that the client decides whether to testify or not. The lawyer must consult with the client concerning the risks and benefits of testifying. Whether to present other defense evidence, however, is a strategic and tactical decision to be made by the lawyer in consultation with the client. A lawyer should carefully consider the most effective defense presentation that advances the client's cause or whether the client is best served by not presenting evidence.

STANDARD 7.6 – CLOSING ARGUMENT

A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a verdict for the client based upon the evidence presented at trial and the law applicable to the case.

Implementation:

1. A lawyer should be familiar with the substantive limits on both prosecution and defense summation.
2. A lawyer should be familiar with local rules and the individual judge's practice concerning time limits and objections during closing argument as well as provisions for rebuttal argument by the prosecution.
3. A lawyer should prepare the outlines of the closing argument prior to the trial and refine the argument at the end of trial by reviewing the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
 - a. Highlighting weaknesses in the prosecution's case;
 - b. Describing favorable inferences to be drawn from the evidence;
 - c. What the possible effects of the defense arguments are on the prosecutor's rebuttal argument; and
 - d. Incorporating into the argument:
 - 1) Helpful testimony from direct and cross-examinations;
 - 2) Verbatim instructions drawn from the jury charge; and
 - 3) Responses to anticipated prosecution arguments.

4. Whenever the prosecutor exceeds the scope of permissible argument, the lawyer should object, request a mistrial or seek cautionary instructions unless tactical considerations suggest otherwise.
5. In a delinquency case a lawyer should, where appropriate, ask the court, even if sufficient evidence is found to support jurisdiction, not to exercise jurisdiction and move to dismiss the petition (or defer finding jurisdiction until after the dispositional hearing) on the ground that jurisdiction is not in the best interests of the youth or society.

Commentary:

Because summation is an argument, parties will be given broad latitude in drawing inferences and suggesting conclusions. The closing should be tailored to the audience, where legal doctrines may better be emphasized in arguments to a judge, while jurors may be more receptive to arguments focused on the facts. Even in bench trials, it is good practice to prepare jury instructions and use them in preparing the closing argument.

The most likely areas for improper argument by the prosecution are discussion of facts not in evidence and unconstitutional comments on the defendant's right not to testify and attempts to impermissibly shift a burden of proof to the defense. A lawyer should be alert to such improper arguments and raise appropriate objections when they occur.

STANDARD 7.7 – JURY INSTRUCTIONS

A lawyer should ensure that instructions to the jury correctly state the law and seek special instructions that provide support for the defense theory of the case.

Implementation:

1. A lawyer should be familiar with the local rules and individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
2. Where appropriate, a lawyer should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. When possible, a lawyer should provide case law in support of the proposed instructions.

3. A lawyer should object to and argue against improper instructions proposed by the court or prosecution.
4. If the court refuses to adopt instructions requested by the lawyer, or gives instructions over the lawyer's objection, the lawyer should take all steps necessary to preserve the record for appeal.
5. During delivery of the charge, the lawyer should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client and, if necessary, request additional or curative instructions.
6. If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, a lawyer should request that the judge state the proposed charge to the lawyer before it is delivered to the jury and take all steps necessary to preserve a record of objection to improper instructions.

Commentary:

Preservation of jury instruction error can be critical to a defense based on the misapplication of the law. Therefore, a lawyer should carefully review all proposed jury instructions, including uniform jury instructions and others proposed by the court or prosecution, to ensure that they accurately state the applicable law. However, if a jury instruction error is not objected to properly, a client may be deemed to have waived any objection.

STANDARD 8.1 – OBLIGATIONS OF COUNSEL CONCERNING SENTENCING OR DISPOSITION

A lawyer must work with the client to develop a theory of sentencing or disposition and an individualized sentencing or disposition plan that is consistent with the client's desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the client for such an outcome.

Implementation:

1. In every criminal or delinquency case, a lawyer should:

- a. Be knowledgeable about the applicable law governing the length and conditions of any applicable sentence or disposition, the pertinent sentencing or dispositional procedures, and inform the client at the commencement of the case of the potential sentence(s) or disposition for the alleged offense(s);
- b. Be aware of the client's relevant history and circumstances, including prior military service, physical and mental health needs, educational needs and be sensitive to the client's sexual orientation or gender identity to the extent this history or circumstance impacts sentencing or the disposition plan.
- c. Understand and advise the client concerning the availability of deferred sentences, conditional discharges, early termination of probation, informal dispositions, alternative dispositions including conditional postponement and diversion agreements (including servicemember status);
- d. Understand and explain to the client the consequences and conditions that are likely to be imposed as probation requirements or requirements of other dispositions and the potential collateral consequences of any sentence or disposition in a case, including the effect of a conviction or adjudication on a sentence for any subsequent crime;
- e. Be knowledgeable about treatment or other programs, out-of-home placement possibilities for juveniles, including: group homes, foster care, residential treatment programs or mental health treatment facilities, that may be required as part of disposition or that are available as an alternative to incarceration or out of home placement for youth, that could reduce the length of a client's time in custody or in out of home placement;
- f. Be knowledgeable about the requirements of placements that receive Title IV-E of the Social Security Act funding through contracts with the Juvenile Departments or the Department of Human Services and be able to request "no reasonable efforts" findings from the juvenile court when it would benefit the client;
- g. Develop a plan in conjunction with the client, supported where appropriate by a written memorandum addressing pertinent legal and factual considerations, that seeks the least restrictive and burdensome sentence or disposition, which can reasonably be obtained based upon the facts and circumstances of the case and that is acceptable to the client;
- h. Where appropriate, obtain assessments or evaluations that support the client's plan;

- i. Investigate and prepare to present to a prosecutor, when engaged in plea negotiations or to the court at sentencing or disposition, available mitigating evidence and other favorable information that might benefit the client at sentencing or disposition;
 - j. Ensure that the court does not consider inaccurate information or immaterial information harmful to the client in determining the sentence or disposition to be imposed;
 - k. Be aware of and prepare to address, express or implicit bias that impacts sentencing or disposition; and
 - l. Review the accuracy of any temporary or final sentencing or disposition order or judgments of the court and move the court to correct any errors that disadvantage the client.
2. In understanding the sentence or disposition applicable to a client's case, a lawyer should:
 - a. Be familiar with the law and any applicable administrative rules governing the length of sentence or disposition, including the Oregon Sentencing Guidelines as well as laws that establish specific sentences for certain offenses or for repeat offenders and be familiar with juvenile code and case law language that supports a less restrictive disposition that best meets the expressed needs of the youth;
 - b. Be knowledgeable about potential court-imposed financial obligations, including fines, fees and restitution, and, where appropriate, challenge the imposition of such obligations when not supported by the facts or law;
 - c. Be familiar with the operation of indeterminate dispositions and the law governing credit for pretrial detention, earned time credit, time limits on post-trial and post disposition juvenile detention and out-of-home placement, eligibility for correctional programs and furloughs, and eligibility for and length of post-prison supervision or parole from juvenile dispositions;
 - d. As warranted by the circumstances of a case, consult with experts concerning the collateral consequence of a conviction and sentence on a client's immigration status or other collateral consequences of concern to the client, e.g. civil disabilities, sex-offender registration, disqualification for types of employment, consequences for clients involved in the child welfare system, DNA and HIV testing, military opportunities, availability of public assistance, school loans and housing, and enhanced sentences for future convictions;

- e. Be familiar with statutes and relevant cases from state and federal appellate courts governing legal issues pertinent to sentencing or disposition such as the circumstances in which consecutive or concurrent sentences may be imposed or when offenses should merge for the purpose of conviction and sentencing;
 - f. Establish whether the client's conduct occurred before any changes to sentencing or dispositional provisions that increase the penalty or punishment to determine whether application of those provisions is contrary to statute or *ex post facto* prohibitions;
 - g. In cases where prior convictions are alleged as the basis for the imposition of enhanced repeat offender sentencing, determine whether the prior convictions qualify as predicate offenses or are otherwise subject to challenge as constitutionally or statutorily infirm;
 - h. Determine whether any mandatory sentence would violate the state constitutional requirement that the penalty be proportioned to the offense; and
 - i. Advance other available legal arguments that support the least restrictive and burdensome sentence.
3. In understanding the applicable sentencing and dispositional hearing procedures, a lawyer should:
- a. Determine the effect that plea negotiations may have on the sentencing discretion of the court;
 - b. Determine whether factors that might serve to enhance a particular sentence must be pleaded in a charging instrument and/or proven to a jury beyond a reasonable doubt;
 - c. Consult with the client concerning the strategic or tactical advantages of resolving factual sentencing matters before a jury, a judge or by stipulation;
 - d. Understand the availability of other evidentiary hearings to challenge inaccurate or misleading information that might harm the client, to present evidence favorable to the client, and ascertain the applicable rules of evidence and burdens of proof at such a hearing;
 - e. Determine whether an official presentence report will be prepared for the court and, if so, take steps to ensure that mitigating evidence and other favorable information is included in the report, that inaccurate or misleading information harmful to the client is deleted from it. Determine whether the client should participate in an interview with the report writer, advising the client concerning the interview and accompanying the client during any such interview;

- f. Determine whether the prosecution intends to submit a sentencing or dispositional memorandum, how to obtain such a document prior to sentencing or disposition and what steps should be followed to correct inaccurate or misleading statements of fact or law; and
 - g. Undertake other available avenues to present legal and factual information to a court or jury that might benefit the client and challenge information harmful to the client.
- 4. In advocating for the least restrictive or burdensome sentence or disposition for a client, a lawyer should:
 - a. Inform the client of the applicable sentencing or dispositional requirements, options and alternatives, including liability for restitution and other court-ordered financial obligations and the methods of collection;
 - b. Maintain regular contact with the client before the sentencing or dispositional hearing and keep the client informed of the steps being taken in preparation for sentencing or disposition, work with the client to develop a theory for the sentencing or disposition phase of the case;
 - c. Obtain from the client and others information such as the client's background and personal history, prior criminal record, employment history and skills, current or prior military service, education and current school issues, medical history and condition, mental health issues and mental health treatment history, current and historical substance abuse history, and treatment, what, if any, relationship there is between the client's crime(s) and the client's medical, mental health or substance abuse issues, and the client's financial status and sources through which the information can be corroborated;
 - d. Determine with the client whether to obtain a psychiatric, psychological, educational, neurological or other evaluation for sentencing or dispositional purposes;
 - e. If the client is being evaluated or assessed, whether by the state or at the lawyer's request, provide the evaluator in advance with background information about the client and request that the evaluator address the client's emotional, educational and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;
 - f. Prepare the client for any evaluations or interviews conducted for sentencing or disposition purposes;
 - g. Be familiar with and, where appropriate, challenge the validity and/or reliability of any risk assessment tools;

- h. Investigate any disputed information related to sentencing or disposition, including restitution claims;
- i. Inform the client of the client's right to address the court at sentencing or disposition and, if the client chooses to do so, prepare the client to personally address the court, including advice of the possible consequences that admission of guilt may have on an appeal, retrial or trial on other matters;
- j. Ensure the client has adequate time prior to sentencing to examine any presentence or dispositional report, or other documents and evidence that will be submitted to the court at sentencing or disposition;
- k. Prepare a written disposition plan that the lawyer and the client agree will achieve the client's goals in a delinquency case and, in a criminal case, prepare a written sentencing memorandum where appropriate to address complex factual or legal issues concerning the sentence;
- l. Be prepared to present documents, affidavits, letters and other information, including witnesses, that support a sentence or disposition favorable to the client;
- m. As supported by the facts and circumstances of the case and client, challenge any conditions of probation or post-prison supervision that are not reasonably related to the crime of conviction, the protection of the public or the reformation of the client;
- n. In a delinquency case, be prepared to present evidence on the reasonableness of Oregon Youth Authority, Juvenile Department or Department of Human Services efforts that could have been made concerning the disposition and, when supported by the evidence, request a "no reasonable efforts" finding by the court;
- o. In a delinquency case, after the court has found jurisdiction, move the court, when supported by the facts, to not exercise jurisdiction and dismiss the petition, amend the petition or find jurisdiction on fewer than all charges, on the ground that jurisdiction is not in the best interests of the youth or society;
- p. When the court has the authority to do so, request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, mental health treatment or other treatment services, and permission for the client to surrender directly to the place of confinement;
- q. Be familiar with the obligations of the court and district attorney regarding statutory or constitutional victims' rights and, where appropriate, ensure that the record reflects compliance with those obligations;
- r. Take any other steps that are necessary to advocate fully for the sentence or disposition requested by the client and to protect the interests of the client; and

- s. Advise the client about the obligations and duration of sentence or disposition conditions imposed by the court, and the consequence of failure to comply with orders of the court. In a delinquency case, where appropriate, counsel should confer with the client's parents regarding the disposition process to obtain their support for the client's proposed disposition.

Commentary:

In the vast majority of criminal and delinquency cases, there will be a sentencing or disposition hearing and it will be the most significant event in the case. An indispensable first step, in being a good advocate at this stage of a case, is education so that the lawyer has a good working knowledge and access to resources on what is often an ever-changing array of available sentencing and dispositional options. A lawyer should plan for this stage of the case at or near the beginning of representation. That planning will ordinarily require an in-depth interview of the client, and if appropriate, the client's parent or custodian, legal research concerning the applicable terms and conditions of sentencing or dispositional options, discussions with the client about his or her preferred option and a realistic portrayal of the various possibilities, and an investigation into factual matters, such as evidence of aggravating or mitigating factors, that may affect the outcome.

Sentencing and dispositional considerations have long been matters that should take place in the context of an overall plan for achieving the client's stated objectives for the case that works in concert with the handling of plea negotiations and the preparation and presentation of the case at trial. Several developments or trends, some pulling in opposite directions, make a coordinated case approach especially imperative.

First, in criminal cases, the potential role of juries in sentencing hearings weighs in favor of a thoughtful approach to the conduct of a trial if the same jury is reasonably likely to later consider some sentencing matters. Meanwhile, the continued viability of "mandatory minimum" laws in Oregon, which place considerably control over case outcomes in the hands of prosecutors, weighs in favor of an early and vigorous investigation of both the underlying allegations and any available mitigation evidence in order for the lawyer to put the client in the best possible position for plea negotiations with the prosecutor.

In juvenile delinquency cases, the court has broad discretion and will receive reports from the Juvenile Court Counselor and the Department of Human Services caseworker or Oregon Youth Authority parole officer if the Department of Human Services or the Oregon Youth Authority are involved. These reports can be cookie cutter and often view the delinquent

from a social worker perspective that can lead to overreaching into the lives of the client and the client's family. Counsel for the youth should advocate for a client-driven disposition plan that is individualized and tailored to the offense and not overly expansive. A written client driven disposition plan is the only effective way of countering the written plans of government agents. A written disposition plan should always be requested as part of any evaluation. In complex cases, the assistance of a qualified social worker can be obtained to help develop the client-driven disposition plan.

The proliferation and significance of collateral consequences of both criminal and delinquency adjudications also require an informed, vigorous and coordinated approach to sentencing and disposition. It is now better understood that the non-penal consequences of a conviction or adjudication, such a deportation or the loss of employment, housing, public assistance or opportunities for service in the military, may be of greater significance to a client than the time he or she spends in custody or out of the home. Some of these consequences may be triggered by the offense of conviction or adjudication, while others may be triggered by the duration or conditions of sentencing or disposition. The lawyer is now obligated to understand these consequences and conduct the defense in order to avoid or mitigate their impact.

Since the last revision of these standards, there is increased interest by courts and community corrections officials in "smart sentencing," with an emphasis on evidence-based practices that are known to be effective in reducing recidivism. Even without major legislative reforms that embrace this new focus, there are opportunities for clients to benefit from research about what sentencing or dispositional elements work best to protect the public. Lawyers handling criminal and delinquency cases, therefore, should be knowledgeable about the research and its possible application in their cases. To the extent that implementation of evidence based practices also relies upon the use of risk assessment tools, counsel should be aware of the tools used in reports considered by the court at sentencing or disposition and be prepared to challenge the validity and reliability of them, both facially and as applied to a client, where appropriate.

Because sentencing and disposition are subject to frequent legislative attention and vigorous litigation in the trial and appellate courts, lawyers representing clients in both criminal and delinquency cases must stay current with the latest developments in the law and be prepared to undertake litigation on issues such as the retroactive application of changes in punishment, the validity of prior convictions that trigger sentence enhancements, the merger of convictions and the proportionality of punishment.

Finally, lawyers representing youth should take special care to confer with clients in developmentally appropriate language about disposition planning. Although a lawyer must make clear to the client and the client's parents that the youth controls decisions concerning disposition options, to the extent appropriate and with the permission of the youth, a lawyer should explain the disposition process to parents and enlist their support of the youth's choices. The plan submitted to the court by the lawyer, which ordinarily should be in writing, should address the youth's strengths and particular medical, mental health, educational or other needs, and the use of available resources in the home, the community or elsewhere through which the client is most likely to succeed.

STANDARD 9.1 – CONSEQUENCES OF PLEA ON APPEAL

In addition to direct and collateral consequences, a lawyer should be familiar with, and advise the client of, the consequences of a plea of guilty, an admission to juvenile court jurisdiction or a plea of no contest on the client's ability to successfully challenge the conviction, juvenile adjudication, sentence or disposition in an appellate proceedings.

Implementation:

1. A lawyer should be familiar with the effects of a guilty plea, admission to juvenile court jurisdiction or a no contest plea on the various forms of appeal.
2. During discussions with the client regarding a possible admission, plea of guilty or no contest, a lawyer must inform the client of the consequences of such a plea on any potential appeals.
3. A lawyer should be familiar with the procedural requirements of the various types of pleas, including the conditional guilty plea, that affect the possibility of appeal.

Commentary:

A plea of guilty or no contest severely limits the scope of a client's direct appeal. A defendant who has pleaded guilty or no contest must identify a "colorable claim of error" simply in order to file a notice of appeal.²⁵ Even if the client satisfies that procedural hurdle, in cases in which the client pled guilty or pled no contest, the Court of Appeals is limited by

²⁵ ORS 138.050 (2001).

statute to reviewing only the sentence imposed by the court.²⁶ Although ORS 138.050 does not limit appeals in juvenile cases, and thus there is no requirement that “a colorable claim of error” be identified, as a practical matter the client’s admission to facts constituting jurisdiction greatly limits the scope of appeal.

STANDARD 9.2 – PRESERVATION OF ISSUES FOR APPELLATE REVIEW

A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the client and apprise the client of which issues have been preserved for review.

Implementation:

1. A lawyer must know the requirements for preserving issues for review on direct appeal and in federal habeas corpus proceedings.
2. A lawyer should review with the client those issues that have been preserved for appellate review and the prospects for a successful appeal.

Commentary:

A trial lawyer faces the often-challenging task of zealously advocating for the best result for her client at trial while simultaneously preserving legal issues for later challenge on appeal in the event of conviction or adjudication. Some issues require only an objection from the lawyer sufficient to alert the court to the issue and the client’s position in order to preserve the issue for appellate review.²⁷

²⁶ ORS 138.050 (2001). See, *State v. Anderson*, 113 Or. App. 416, 419, 833 P2d 321 (1992) (“[A] disposition is legally defective and, therefore, exceeds the maximum allowable by law if it is not imposed consistently with the statutory requirements.”)

²⁷ *State v. Wyatt*, 331 Or. 335, 15 P3d 22 (2000).

However, other types of issues require additional steps to be taken. For example, if the trial court excludes evidence over the objection of the lawyer, the lawyer often must make an offer of proof to the court detailing what the evidence would have been so that appellate courts can determine the merits of the legal issue and the harm of the exclusion.²⁸

Another example of a more complex preservation requirement involves arguments for or against proposed jury instructions. ORCP 59H, which applies to criminal trials through ORS 136.330(2), requires a party to state its objections to the giving of an instruction (or the failure to give an instruction) “with particularity” and to except after jury instructions have been delivered.

A lawyer’s most important goal at trial is to obtain a favorable ruling for her client. Should that effort fail, the lawyer must insure that she has met the specific requirements for preserving the issue for appellate review should the client decide to appeal the conviction, adjudication, sentence or disposition.

As a subset of the duty to keep the client informed, a lawyer should discuss with the client the various forms of appeal, including the right to a de novo rehearing by a judge of a juvenile adjudication by a referee and the specific issues presented in the client’s case that could be pursued on appeal. The lawyer should advise the juvenile client that the time to file an appeal of an adjudication starts running from the time of the adjudication, not the disposition, and if necessary a separate appeal of the disposition can be filed.²⁹

STANDARD 9.3 -UNDERTAKING AN APPEAL

A lawyer must be knowledgeable about the various types of appeals and their application to the client’s case and should impart that information to the client. A lawyer should inquire whether a client wishes to pursue an appeal. When requested by the client, a lawyer should assure that a notice of appeal is filed and that the client receives information about obtaining appellate counsel.

²⁸ OEC 103(1)(b)(“Error may not be predicated upon a ruling which * * * excludes evidence unless a substantial right of a party is affected” and “the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.”); *State v. Bowen*, 340 Or. 487, 500, 135 P3d 272 (2006) (“[A]n offer of proof ordinarily is required to preserve error when a trial court excludes testimony.”); see also *State v. Wirfs*, 250 Or. App. 269, 274, 281 P3d 616 (2012) (defendant not required to make an offer of proof “because the trial court and the prosecutor were aware of the substance of the testimony that defendant would elicit.”).

²⁹ *State ex rel Juv Dep. V. J.H.-O.*, 223 Or. App. 412 (2008).

Implementation:

1. Throughout the trial proceedings, but especially upon conviction, adjudication, sentencing and disposition, a lawyer should discuss with the client the various forms of appellate review and how they might benefit the client.
2. If the client chooses to pursue a re-hearing of a juvenile referee's order or an appeal, a lawyer should take appropriate steps to preserve the client's rights, including requesting a re-hearing, filing notice of appeal or referring the case to an appellate attorney or public defender organization to have the notice of appeal filed.
3. When the client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the trial court. A trial lawyer must provide the appellate lawyer with all records from the trial case, the court's final judgment and any other relevant or requested information.
4. If a lawyer is representing a client who is financially eligible for appointed counsel, the lawyer shall determine whether the client wishes to pursue an appeal and, if so, transmit to the Office of Public Defense Services the information necessary to perfect an appeal, pursuant to ORS 137.020(6).
5. If the client decides to appeal, a lawyer should inform the client of the possibility of obtaining a stay pending appeal and file a motion in the trial court if the client wishes to pursue a stay.

Commentary:

If the client has been convicted despite the best efforts of a lawyer, a lawyer must discuss the various methods of appealing the conviction or adjudication and resulting sentence or disposition that are available to the client, including rehearing, direct appeal, post-conviction relief and a petition for federal habeas corpus. Each of those forms of appeal has unique applications and requirements and the client should be informed of the potential benefits and disadvantages of all types of appeal. In particular, a lawyer should review filing deadlines and requirements to insure the client does not lose the opportunity to pursue an appeal.

A lawyer is constitutionally mandated to confer with the client about the right to appeal.³⁰ A lawyer should explain both the meaning and consequences of the court's decision and provide the client with the lawyer's professional judgment regarding whether there are meritorious grounds for appeal and the probable consequences of an appeal, both good and bad.

There may be circumstances in which a lawyer should file a notice of appeal on behalf of the client to preserve the client's right to appeal in the face of a looming deadline, despite the fact that the lawyer will not eventually represent the client on appeal. The preferred course of action is to refer the case to the attorney or organization that will represent the client on appeal in time to allow that lawyer or entity to timely file notice of appeal. However, the primary concern is that the client's right to appeal is preserved.

Communication between lawyers who represent the client at the various stages of a criminal or delinquency case (trial, direct appeal, post-conviction relief, etc.) is critical to the client's success. That is particularly true of communication between a client's trial lawyer and the lawyer helping the client file a petition for post-conviction or post-adjudication relief.

STANDARD 9.4 – POST SENTENCING AND DISPOSITION PROCEDURES

A lawyer should be familiar with procedures that are available to the client after disposition. A lawyer should explain those procedures to the client, discern the client's interests and choices and be prepared to zealously advocate for the client.

Implementation:

1. Upon entry of judgment, a lawyer should immediately review the judgment to ensure that it reflects the oral pronouncement of the sentence or disposition and is otherwise free of legal or factual error. In a delinquency case, a lawyer should insure that the judgment includes the disposition probation plan, including any actions to be taken by parents, guardians or custodians.

³⁰ *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S. Ct. 1029, 145 L. ed. 2d 985 (2000) (“We instead hold that counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”)

2. The lawyer must be knowledgeable concerning the application and procedural requirements of a motion for new trial or motion to correct the judgment.
3. The lawyer representing a youth in delinquency proceedings should be versed in relevant case law, statutes, court rules and administrative procedures regarding the enforcement of disposition orders, as well as the methods of filing motions for post-disposition and post-adjudicatory relief, for excusal or relief from sex offender registration requirements, and/or to review, reopen, modify or set aside adjudicative and dispositional orders. For youth whose circumstances have changed; youth whose health, safety, and welfare is at risk; or youth not receiving services as directed by the court, a lawyer should file motions for early discharge or dismissal of probation or commitment, early release from detention, or modification of the court order. Where commitment is indeterminate and youth correctional authorities have discretion over whether and when to release a youth from secure custody, when the period of incarceration becomes excessive, the lawyer should advocate to terminate or limit the term of commitment, if desired by the youth.

Commentary:

In general, when the written judgment conflicts with the court's oral pronouncement of sentence at trial, the written judgment controls.³¹ It is therefore imperative that the written judgment accurately reflects the favorable aspects of the sentence imposed by the court at the sentencing hearing.

Under ORCP 64 and ORS 136.535, a trial court may grant a motion for new trial if certain conditions are met, including irregularities in the proceedings, juror misconduct, or newly discovered evidence that could not have been discovered and produced at trial. Similarly, the trial court has the authority to correct an erroneous term in the judgment under ORS 138.083, even if the case is on appeal. The juvenile court may modify or set aside a jurisdictional order.³² The lawyer should be knowledgeable about the availability and procedural requirements of these motions.

A lawyer should be familiar with the authority of a trial court to stay execution of the sentence, or part of a sentence, pending appeal and seek such relief where appropriate.

³¹ See *State v. Swain/Goldsmith*, 267 Or. 527, 530, 517 P2d 684 (1974); *State v. French*, 208 Or. App. 652, 655, 145 P3d 305, 307 (2006); *State v. Mossman*, 75 Or. App. 385, 388, 706 P2d 203 (1985).

³² ORS 419C.610 (2001).

STANDARD 9.5- MAINTAIN REGULAR CONTACT WITH YOUTH FOLLOWING DISPOSITION

- A. A lawyer for a youth in delinquency proceedings should stay in contact with the youth following disposition and continue representation while the youth remains under court or agency jurisdiction.**
- B. A lawyer should inform a youth of procedures available for requesting a discretionary review of, or reduction in, the sentence or disposition imposed by the trial court, including any time limitations that apply to such a request.**

Implementation:

1. The lawyer should reassure a youth that the lawyer will continue to advocate on the youth's behalf regarding post-disposition hearings, including probation reviews and probation or parole violation hearings, challenges to conditions of confinement and other legal issues, especially when the youth is incarcerated. The lawyer should also provide advocacy to get the client's record expunged or to obtain relief from sex offender registration.
2. Lawyers for youth convicted as adults but who were under 18 years of age at the time of the offense should be familiar with and inform the client of the "second look" provisions of ORS 420A.203 and ORS 420A.206.

Commentary:

Post-disposition access to counsel is critical for youth under the continuing jurisdiction of the court or a state agency. Issues such as significant waiting lists for residential facilities, the failure to provide services ordered by the court, conditions of confinement and enforcement of disposition requirements require the legal acumen and advocacy of counsel.

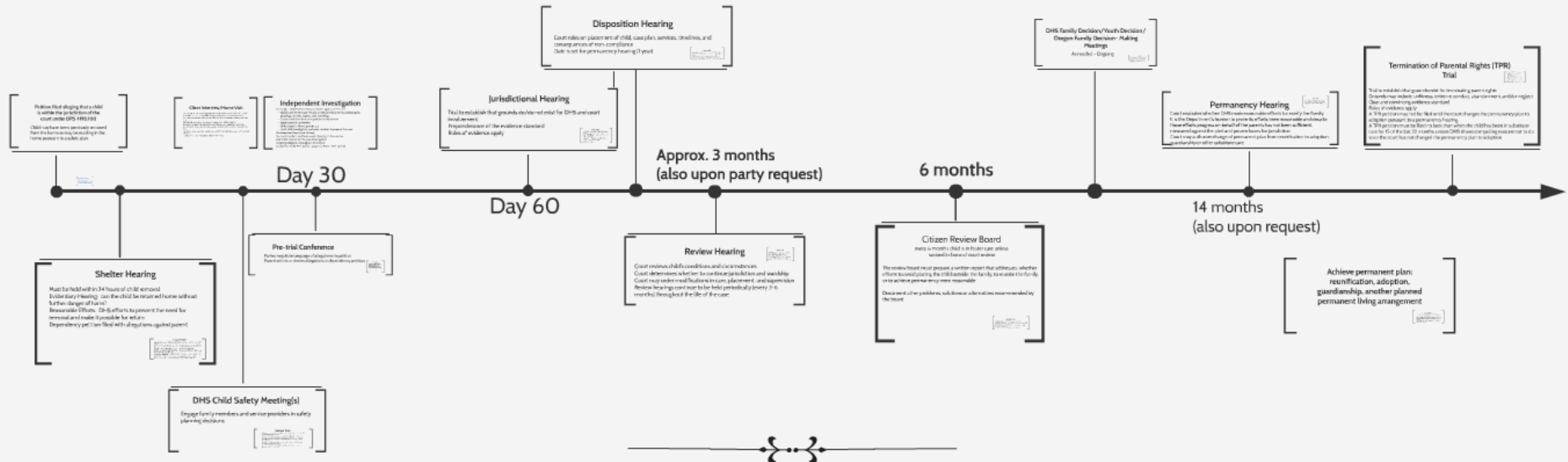
In addition, a lawyer should check in periodically with the youth and routinely ensure that the facility or agency is adhering to the court's directives and that the youth's needs are met and the client's health, welfare and safety are protected.

Special attention is required to insure that secure facilities are providing educational, medical and psychological services.

If the youth is committed to a state agency, a lawyer should maintain regular contact with the caseworker, juvenile court counselor, youth correctional facility staff or juvenile parole officer, advocate for the youth as necessary and ask to be provided copies of all agency reports documenting the youth's progress. A lawyer should participate in case review meetings and administrative hearings. When appropriate, the lawyer should request court review to protect the client's right to treatment.

The lawyer may be the youth's only point of contact within the community when the youth is placed in a residential or correctional facility. The lawyer should advocate for adequate contact between the youth and his or her family and home visits when appropriate, if desired by the youth.

The Lawyer's Role in Oregon Juvenile Dependency Proceedings (as informed by the Oregon State Bar Performance Standards for Representation in Juvenile Dependency Cases)



**Petition filed alleging that a child
is within the jurisdiction of the
court under ORS 419B.100**

Child may have been previously removed
from the home or may be residing in the
home pursuant to a safety plan

Factors which lawyers should consider throughout the case:

- *The client's decision-making capacity as it changes over time (particularly relevant to the child client) (Lawyer for Child Perf. Std. 1A.,1B. & 2A.)*
- *Cultural competency (Lawyer for Child Perf. Std.2C., Lawyer for Parent Perf. Std. 2H.)*
- *Developmentally appropriate representation and trauma-informed practice (Lawyer for Child Perf. Std. 2C.)*
- *Unique issues of incarcerated parents (Lawyer for Parent Perf. Std. 2J.)*
- *Educational, mental health and health needs (Lawyer for Child Perf. Std. 2G.)*
- *Expanding the scope of representation and taking action on collateral issues when appropriate to address client needs: custody issues, school related issues, crossover with the delinquency system, SSI and public benefits, paternity, administrative challenges to DHS findings of abuse and neglect, developmental disability qualification (Lawyer for Child Perf. Std. 2I., Lawyer for Parent Perf. Std. 2K.)*

Shelter Hearing

Must be held within 24 hours of child removal

Evidentiary Hearing: can the child be returned home without further danger of harm?

Reasonable Efforts: DHS efforts to prevent the need for removal and make it possible for return

Dependency petition filed with allegations against parent

Lawyer Role

Obtain and review discovery: shelter report, police report, prior child welfare history (Perf. Std. App. C.(A)(1) & D.(A)(1))
Interview client prior to hearing: purpose of hearing, placement preference, caution the client about self-incrimination, inquire into other available relatives or safety service providers (Perf. Std. App. C.(A)(2) & D.(A)(2))
Assist client in exercising his or her right to an evidentiary hearing (Perf. Std. App. D.(A)(4))
Identify and assess legal issues: jurisdictional sufficiency of the petition, appropriateness of venue, paternity, ICWA, notice, reasonable efforts to prevent the need for removal, removal not in best interest of the child (Perf. Std. App. C.(A)(5) & D.(A)(5))
Argue for temporary orders: visitation, safety plan, placement, services, continued school placement (Perf. Std. App. C.(A)(3-4) & D.(A)(7))
Review order with client to discuss judicial review and appeal (Perf. Std. App. C.(A)(5) & D.(A)(9))
Review consequences with client of not abiding by order (Perf. Std. App. C.(A)(5) & D.(A)(10))

Lawyer Role

Obtain and review discovery: shelter report, police report, prior child welfare history (Perf. Std. App. C.(A)(1) & D.(A)(1))

Interview client prior to hearing: purpose of hearing, placement preference, caution the client about self-incrimination, inquire into other available relatives or safety service providers (Perf. Std. App. C.(A)(2) & D.(A)(2))

Assist client in exercising his or her right to an evidentiary hearing (Perf. Std. App. D.(A)(4))

Identify and assess legal issues: jurisdictional sufficiency of the petition, appropriateness of venue, paternity, ICWA, notice, reasonable efforts to prevent the need for removal, removal not in best interest of the child (Perf. Std. App. C.(A)(5) & D.(A)(5))

Argue for temporary orders: visitation, safety plan, placement, services, continued school placement (Perf. Std. App. C.(A)(3-4) & D.(A)(7))

Review order with client to discuss judicial review and appeal (Perf. Std. App. C.(A)(5) & D.(A)(9))

Review consequences with client of not abiding by order (Perf. Std. App. C.(A)(5) & D.(A)(10))

Client Interview/Home Visit

Required within 72 hours of appointment for children (Lawyer for Child Perf. Std. 2A.)
and within 72 hours when feasible for parents (Lawyer for Parent Perf. Std 2A.)

Describe role of attorney (Lawyer for Child Perf. Std. 2B., Lawyer for Parent Perf. Std. 2C.)

Visit child client in child's environment (Lawyer for Child Perf. Std. 2A)

Counsel client about all legal matters related to the case: allegations against the parents, rights of parents, steps to promote reunification (Lawyer for Parent Perf. Std. 2C.)

Identify pressing needs/barriers (Lawyer for Child Perf. Std, 2G., Lawyer for Parent Perf. Std. 2C.)

Develop case timeline (Lawyer for Parent Perf. Std. 2D.)

DHS Child Safety Meeting(s)

Engage family members and service providers in safety planning decisions

Lawyer Role

Advocate for client's wishes regarding the safety plan (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)
Advise and assist client regarding the role of DHS and Juvenile Court process
Cooperate and communicate with professionals to learn about client's progress and their views of the case (Lawyer for Child Perf. Std. 4C., Lawyer for Parent Perf. Std. 4C.)
Advocate for services and visitation as appropriate (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.-F.)
Identify family members and professionals who may be (or become) a resource (Lawyer for Parent Perf. Std. 4A.)

Lawyer Role

Advocate for client's wishes regarding the safety plan (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)

Advise and assist client regarding the role of DHS and Juvenile Court process

Cooperate and communicate with professionals to learn about client's progress and their views of the case (Lawyer for Child Perf. Std. 4C., Lawyer for Parent Perf. Std. 4C.)

Advocate for services and visitation as appropriate (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.-F.)

Identify family members and professionals who may be (or become) a resource (Lawyer for Parent Perf. Std. 4A.)

Pre-trial Conference

Parties negotiate language of allegations in petition

Parent admits or denies allegations in dependency petition

Lawyer Role

When appropriate, prepare and participate in settlement negotiations to resolve the case quickly. Sources for Child Prot. Stat. §C, Lawren for Parent Prot. Stat. §C(1), Review and Develop legal and fact arguments including discovery, investigative reports, witness case law, and the outcomes from Prot. Stat. App. C (ARIS & CDRS).

Create client & informed of and understand nature, obligation and consequences of decision. Prot. Stat. App. C (ARIS & CDRS). Review orders with the client and advise the client regarding issues for appeal or post-trial motions. Prot. Stat. App. C (ARIS & CDRS).

Present trial methods. Signed as appropriate. Prot. Stat. App. C (ARIS & CDRS).

Lawyer Role

When appropriate, promote and participate in settlement negotiations to resolve the case quickly (Lawyer for Child Perf. Std. 6C., Lawyer for Parent Perf. Std. 6C.)

Review and prepare legal and fact arguments including pleadings, discovery, investigative reports, statutes, case law, and the evidence code (Perf. Std. App. C.(B)(1) & D.(B)(1))

Ensure client is informed of and understands nature, obligation and consequences of decisions (Perf. Std. App. C.(B)(3) & D.(B)(3))

Review orders with the client and advise the client regarding issues for appeal or post-trial motion(s) (Perf. Std. App. C.(B)(4) & D.(B)(3))

File post-trial motion(s)/appeal as appropriate (Perf. Std. App. C.(A)(1) & D.(B)(4))

Independent Investigation

Thorough, independent review and investigation of the case

- Obtain and review case file and all relevant documents, photographs, pleadings, records, reports, and recordings
- Contact and interview other parties and witnesses
- Legal research and review
- Utilize experts where appropriate
- Work with investigators and social workers to prepare the case

Develop case theory and strategy

Counsel the client well before each hearing, in time to use client information for the case investigation

Ongoing obligation throughout life of case

(Lawyer for Child Perf. Std. 5, Lawyer for Parent Perf. Std. 5)

Jurisdictional Hearing

Trial to establish that grounds do/do not exist for DHS and court involvement

Preponderance of the evidence standard

Rules of evidence apply

Lawyer Role

Review and prepare legal and fact argument including pleadings, discovery, investigative reports, statutes, case law, and the evidence code (Perf. Std. App. C, IR(1) & D, IR(1))
Require opening and closing statements, direct and cross examination plans (Perf. Std. App. C, IR(2) & D, IR(2))
Prepare parent/client to testify with a focus on the impact of potential criminal liability (Perf. Std. App. D, IR(2))
Ensure client is informed of and understands the nature, obligation and consequences of his or her disclosure (Perf. Std. App. C, IR(3) & D, IR(3))
Review orders with the client and advise the client regarding issues for appeal or post-trial motions (Perf. Std. App. C, IR(4) & D, IR(4))
File post-trial motions/appeal as appropriate (Perf. Std. App. C, IR(5) & D, IR(5))

Lawyer Role

Review and prepare legal and fact arguments including pleadings, discovery, investigative reports, statutes, case law, and the evidence code (Perf. Std. App. C.(B)(1) & D.(B)(1))

Prepare opening and closing statements, direct and cross examination plans (Perf. Std. App. C.(B)(2) & D.(B)(2))

Prepare parent client to testify with a focus on the impact of potential criminal liability (Perf. Std. App. D.(B)(2))

Ensure client is informed of and understands the nature, obligation and consequences of his or her decisions (Perf. Std. App. C.(B)(3) & D.(B)(3))

Review orders with the client and advise the client regarding issues for appeal or post-trial motion(s) (Perf. Std. App. C.(B)(4) & D.(B)(3))

File post-trial motion(s)/appeal as appropriate (Perf. Std. App. C.(A)(1) & D.(B)(4))

Disposition Hearing

Court rules on placement of child, case plan, services, timelines, and consequences of non-compliance
Date is set for permanency hearing (1 year)

Lawyer Role

Present a disposition plan on behalf of client, advocating for least restrictive disposition possible (Perf. Std. App. C.032) & D.024
Move for dismissal of the jurisdictional petition when appropriate (Perf. Std. App. C.031) & D.033
Respond by inaccurate or untruthful information presented by other parties (Perf. Std. App. C.030) & D.032
Make appropriate motions (placement, visitation, services) (Perf. Std. App. C.035) & D.036
Identify and present all mitigating factors (Perf. Std. App. C.034) & D.033
Ensure client is informed of obligations and consequences (Perf. Std. App. C.033) & D.032
Explain client's rights and possibilities of post-trial remedy and the right to appeal (Perf. Std. App. C.033) & D.033

Lawyer Role

Present a disposition plan on behalf of client, advocating for least restrictive disposition possible (Perf. Std. App. C.(C)(2) & D.(C)(4))

Move for dismissal of the jurisdictional petition when appropriate (Perf. Std. App. C.(C)(1) & D.(C)(3))

Respond to inaccurate or unfavorable information presented by other parties (Perf. Std. App. C.(C)(3) & D.(C))

Make appropriate motions (placement, visitation, services) (Perf. Std. App. C.(C)(5) & D.(C)(5))

Identify and present all mitigating factors (Perf. Std. App. C.(C)(4) & D.(C))

Ensure client is informed of obligations and consequences (Perf. Std. App. C.(1)() & D.(C)(5))

Explain client's rights and possibilities of post-trial motion(s) and the right to appeal (Perf. Std. App. C.(C)(5) & D.(C)(5))

Review Hearing

Lawyer Role

Independent investigation review file, interview witnesses, obtain discovery (Prof. Std. App. C.002) & (D.001)
Prepare for and make appropriate motions. Seek jurisdiction to continue placement, visitation services (Prof. Std. App. C.003 & D.002)
Consider adoptions, written report (Prof. Std. App. C.008 & D.002)
Prepare specific findings and orders that advance the client's position, services, education, evaluation (Prof. Std. App. C.004 & D.004)
Engage in communication before hearings or when a significant change of circumstances or significant event occurs (Lawyer for Child Prof. Std. App. C.005 & D.005)
Police order with client for access to many times, rights and obligations (Prof. Std. App. D.004)

Court reviews child's conditions and circumstances
Court determines whether to continue jurisdiction and wardship
Court may order modifications in care, placement, and supervision
Review hearings continue to be held periodically (every 3-6 months) throughout the life of the case

Lawyer Role

Independent investigation: review file, interview witnesses, obtain discovery (Perf. Std. App. C.(D)(2) & D.(D)(1))

Prepare for and make appropriate motions (basis for jurisdiction to continue, placement, visitation, services) (Perf. Std. App. C.(D)(3) & D.(D)(2))

Consider submitting a written report (Perf. Std. App. C.(D)(3) & D.(D)(2))

Request specific findings and orders that advance the client's position (services, education, visitation) (Perf. Std. App. C.(D)(4) & D.(D)(3))

Regular communication before hearings or when a significant change of circumstances or significant event occurs (Lawyer for Child Perf. Std. 2A., Lawyer for Parent Perf. Std. 2A.)

Review order with client to discuss statutory time-lines, rights and obligations (Perf. Std. App. D.(D)(4))

DHS Family Decision/Youth Decision/ Oregon Family Decision- Making Meetings

As needed - Ongoing

Lawyer Role

Advocate for the client's wishes regarding the safety plan (Lawyer for Child Ref. Std. 4A, Lawyer for Parent Ref. Std. 4A)
Advise and assist the client regarding role of DHS and Juvenile Court process
Cooperate and communicate with professionals to learn about the client's progress and their views of the case (Lawyer for Child Ref. Std. 4C, Lawyer for Parent Ref. Std. 4C)
Advocate for services and visitation as appropriate (Lawyer for Child Ref. Std. 4E, Lawyer for Parent Ref. Std. 4E, 4F)
Identify family members and professionals who may be or become a resource (Lawyer for Parent Ref. Std. 4A)

Lawyer Role

Advocate for the client's wishes regarding the safety plan (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)

Advise and assist the client regarding role of DHS and Juvenile Court process

Cooperate and communicate with professionals to learn about the client's progress and their views of the case (Lawyer for Child Perf. Std. 4C., Lawyer for Parent Perf. Std. 4C.)

Advocate for services and visitation as appropriate (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.-F.)

Identify family members and professionals who may be (or become) a resource (Lawyer for Parent Perf. Std. 4A.)

Citizen Review Board

every 6 months child is in foster care unless
waived in favor of court review

The review board must prepare a written report that addresses: whether efforts to avoid placing the child outside the family, to reunite the family, or to achieve permanency were reasonable

Document other problems, solutions or alternatives recommended by the board

Lawyer Role

Independent investigation: review file, interview witnesses, obtain discovery (Prof. Std. App. C.0202 & C.0203)
Present information supporting child's position and whether further and taking the necessary steps to achieve best outcome plan in a timely fashion (Prof. Std. App. C.0204 & D.0202)
Prepare for and make appropriate motions and arguments (basis for jurisdiction to continue, placement, visitation, services) (Prof. Std. App. C.0205 & D.0202)
Consider submitting a written report (Prof. Std. App. C.0206 & D.0202)
Respond to the findings and actions that advance the child's position (benefits, education, visitation) (Prof. Std. App. C.0204 & D.0202)
Maintain regular client communication before hearings or when significant change of circumstances may apply (Public Defense Services Commission for Child Prof. Std. 3A, Lawyer for Parent Prof. Std. 3A)
Represent with respect to the child's best interests, rights and obligations (Prof. Std. App. D.0204)

Lawyer Role

Independent investigation: review file, interview witnesses, obtain discovery (Perf. Std. App. C.(D)(2) & D.(D)(1))

Present information supporting client's position and whether parties are taking the necessary steps to achieve the chosen plan in a timely fashion (Perf. Std. App. C.(D)(3) & D.(D)(2))

Prepare for and make appropriate motions and arguments (basis for jurisdiction to continue, placement, visitation, services) (Perf. Std. App. C.(D)(3) & D.(D)(2))

Consider submitting a written report (Perf. Std. App. C.(D)(3) & D.(D)(2))

Request specific findings and orders that advance the client's position (services, education, visitation) (Perf. Std. App. C.(D)(4) & D.(D)(3))

Maintain regular client communication before hearings or when a significant change of circumstances or significant event occurs (Lawyer for Child Perf. Std. 2A., Lawyer for Parent Perf. Std. 2A.)

Review order with the client to discuss statutory time-lines, rights and obligations (Perf. Std. App. D.(D)(4))

Lawyer Role

Take particular care in preparing to ensure the lawyer is well acquainted with case history and files involving the family (Perf. Std. App. C.(E) & D.(E))

Conduct an independent investigation (Lawyer for Child Perf. Std. 5, Perf. Std. App. D.(E)(2))

Present evidence on what the permanent plan for the child should be including whether to continue a plan of reunification, a motion to dismiss, or implementation of a permanent plan (Perf. Std. App. C.(E)(3) & D.(E)(3))

Adequately and zealously present the client's position, including witness testimony (Perf. Std. App. C.(E) & D.(E)(3))

Request specific findings and orders that advance the client's position (specific extension of time for reunification if appropriate and services and progress required during that time) (Perf. Std. App. C.(D)(4) & D.(E)(4))

Carefully review the order with the client and discuss the client's option to review including appellate review of any final orders ((Perf. Std. App. C.(D)(5) & D.(E)(5))

Achieve permanent plan: reunification, adoption, guardianship, another planned permanent living arrangement

Lawyer Role

While the government plan is being implemented, the lawyer will:
Actively represent the client in court hearings and CRB reviews (Lawyer for Child Perf. Std. 4A, Lawyer for Parent Perf. Std. 4A.)
Participate in DHS or other service provider meetings and engage in case planning (Lawyer for Child Perf. Std. 4E, Lawyer for Parent Perf. Std. 4E.)
Continue to investigate the case (Lawyer for Child Perf. Std. 5, Lawyer for Parent Perf. Std. 5.)
Continue to have regular, ongoing client contact (Lawyer for Child Perf. Std. 2A, Lawyer for Parent Perf. Std. 2A.)

Lawyer Role

While the permanent plan is being implemented, the lawyer will:

Actively represent the client in court hearings and CRB reviews (Lawyer for Child Perf. Std. 4A., Lawyer for Parent Perf. Std. 4A.)

Participate in DHS or other service provider meetings and engage in case planning (Lawyer for Child Perf. Std. 4E., Lawyer for Parent Perf. Std. 4E.)

Continue to investigate the case (Lawyer for Child Perf. Std. 5, Lawyer for Parent Perf. Std. 5)

Continue to have regular, ongoing client contact (Lawyer for Child Perf. Std. 2A., Lawyer for Parent Perf. Std. 2A.)

Termination of Parental Rights (TPR) Trial

Lawyer Role
Under the rules of professional conduct, a lawyer is required to:
- Represent the client zealously within the bounds of the law.
- Provide candid advice to the client.
- Explain the risks, benefits, and alternatives to the client.
- Keep the client informed of the status of the matter.
- Communicate with the client in a timely manner.
- Avoid conflicts of interest.
- Maintain the confidentiality of the client's information.
- Comply with the rules of professional conduct.
- Uphold the integrity of the profession.
- Promote the best interests of the client.
- Provide competent representation to the client.
- Communicate with the client in a timely manner.
- Keep the client informed of the status of the matter.
- Explain the risks, benefits, and alternatives to the client.
- Provide candid advice to the client.
- Represent the client zealously within the bounds of the law.

Trial to establish that grounds exist for terminating parent rights
Grounds may include: unfitness, extreme conduct, abandonment, and/or neglect
Clear and convincing evidence standard
Rules of evidence apply
A TPR petition may not be filed until the court changes the permanency plan to adoption pursuant to a permanency hearing
A TPR petition must be filed no later than when the child has been in substitute care for 15 of the last 22 months, unless DHS shows compelling reasons not to do so or the court has not changed the permanency plan to adoption

Lawyer Role

Zealous and meticulous investigation and preparation (Perf. Std. App. C.(F)(1) & D.(F)(1))

- Thoroughly review entire record of the case
- Completely investigate the case with an eye toward issues unique to termination such as adoptability of the child and best interests of the child
- Prepare detailed chronology of the case
- Research applicable statutes and case law
- Obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents
- Subpoena and carefully prepare client and witnesses
- Evaluate evidentiary issues and file motions as appropriate

Meet with the client to discuss the petition, consequences and alternatives (Perf. Std. App. C.(F)(2) & D.(F)(2))

Prepare opening and closing statements, trial memorandum, witness cross and direct testimony, responses and offers to stipulations of fact and regarding evidence, issues to preserve for appeal

(Perf. Std. App. C.(F)(3) & D.(F)(4))

Consider and discuss the possibility of an appeal and, if appropriate, timely and thorough facilitation of the appointment of an appellate lawyer (Lawyer for Child Perf. Std. 9A.-B., Lawyer for Parent Perf. Std. 10A.-B.)

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

June 27, 2014

Foreword

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

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

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

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

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



Tom Kranovich
Oregon State Bar President

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

Summary and Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The appendixes begin on page 85.

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

STANDARD 1 - ROLE OF LAWYER FOR THE CHILD

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

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

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

Commentary:

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

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

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

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

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

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

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

Action:

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

Action:

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

Commentary:

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

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

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

Action:

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

Action:

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

Action:

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

Action:

When a child has been injured or suffers from a disability or congenital condition that results in the child having a progressive illness that will be fatal and is in an advanced stage, is in a coma or persistent vegetative state, or is suffering brain death, State ex rel. Juvenile Dept. of Multnomah County v. Smith⁴, provides that the lawyer for the child should consult with the parent if appropriate and consider seeking appointment of a guardian ad litem under the juvenile and probate code in a consolidated case with the authority to consent to medical care, including the provision or withdrawal of life sustaining medical treatment pursuant to ORS 127.505 et seq.

Commentary:

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

³ ORCP 1.14(c).

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

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

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

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

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

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

Commentary:

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

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

STANDARD 2 - RELATIONSHIP WITH THE CHILD CLIENT

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

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

Action:

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

Action:

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

Commentary:

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

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

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Action:

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

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

Action:

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

Commentary:

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

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

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

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

Action:

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

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

Action:

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

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

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

Commentary:

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

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

Action:

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

Action:

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

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

Commentary:

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

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

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

STANDARD 3 - TRAINING REQUIREMENTS FOR COMPETENT REPRESENTATION OF CHILDREN

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

Action:

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

Action:

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

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

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

Action:

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

Action:

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

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

Action:

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

Action:

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

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

Action:

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

Commentary:

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

STANDARD 4 - GENERAL PRINCIPLES GOVERNING CONDUCT OF THE CASE

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

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

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

Commentary:

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

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

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

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Action:

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

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

Commentary:

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

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

STANDARD 5 - INVESTIGATION

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

The lawyer should interview individuals involved with the child.

Action:

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

Action:

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

Commentary:

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

Commentary:

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

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

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

Action:

Potential witnesses to be interviewed may include:

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

Commentary:

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

Action:

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

STANDARD 6 - COURT PREPARATION

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

Action:

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

Commentary:

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

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

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

Appropriate pretrial motions include but are not limited to:

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

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

Action:

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

Commentary:

Examples of such motions include:

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

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Action:

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

Commentary:

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

STANDARD 7 - HEARINGS

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

Action:

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

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

Commentary:

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

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

Action:

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

Action:

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

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

Action:

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

Commentary:

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

STANDARD 8 - POST HEARINGS

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

Commentary:

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

STANDARD 9 - APPEALS ISSUES FOR CHILD'S LAWYER

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

Action:

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

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

Commentary:

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

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

Action:

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

Commentary:

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

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

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

⁵ ORS 419A.150(4).

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

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

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

STANDARD 10 - APPEALS

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

Action:

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

Commentary:

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

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

⁶ ORS 19.270.

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

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

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

Action:

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

Commentary:

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

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

Action:

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

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

Commentary:

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

D. Prosecuting or defending the appeal – Oral Argument.

Action:

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

Commentary:

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

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

Action:

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

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

¹⁰ ORAP 6.05.

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

STANDARD 1 - ROLE OF THE LAWYER FOR PARENTS

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

Action:

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

Commentary:

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

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

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

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

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

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

¹¹ ORCP 1.14(c)

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

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

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

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

STANDARD 2 - RELATIONSHIP WITH THE PARENT CLIENT

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

Action:

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

Action:

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

Action:

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

Commentary:

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

¹⁴ *Id.* at 806.

¹⁵ ORS 419B.234(3)(a).

¹⁶ ORS 419B.234(3)(d).

¹⁷ ORS 419B.234(5).

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

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

Action:

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

Action:

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

Commentary:

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

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

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

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

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

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

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

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

Action:

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

Commentary:

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

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Commentary:

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

¹⁸ Oregon Rules of Professional Conduct, Rule 1.7(a).

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

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

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

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

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

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

Action:

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

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

Commentary:

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

STANDARD 3 - TRAINING REQUIREMENTS FOR COMPETENT REPRESENTATION OF PARENT CLIENTS

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

Action:

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

Action:

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

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

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

Action:

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

Action:

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

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

Action:

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

Commentary:

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

STANDARD 4 - GENERAL PRINCIPLES GOVERNING CONDUCT OF A CASE

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

Action:

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

Action:

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

Action:

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

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

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

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

Commentary:

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

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

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

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

Commentary:

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

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

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

STANDARD 5 - INVESTIGATION

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Commentary:

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

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

Action:

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

Commentary:

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

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

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

Action:

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

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

Action:

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

Action:

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

Commentary:

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

Action:

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

STANDARD 6 - COURT PREPARATION

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

Appropriate pretrial motions include but are not limited to:

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

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

Action:

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

Commentary:

Examples of such motions include:

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

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

Action:

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

Commentary:

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

Action:

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

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

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

Action:

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

Commentary:

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

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

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

Action:

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

Action:

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

Action:

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

Commentary:

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

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

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

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

Action:

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

Action:

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

Commentary:

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

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

STANDARD 7 - HEARINGS

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

Action:

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

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

Action:

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

Action:

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

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

STANDARD 8 - POST HEARING

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

Action:

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

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

Commentary:

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

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

Action:

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

Commentary:

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

STANDARD 9 - MODIFYING OR VACATING AN ORDER

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

Action:

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

Commentary:

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

STANDARD 10 - APPEALS ISSUES FOR TRIAL LAWYER

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

Action:

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

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

Commentary:

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

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

Action:

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

Commentary:

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

²⁰ ORS 419A.150(4)

²¹ See ORS 19.360.

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

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

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

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

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

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

STANDARD 11 - APPEALS ISSUES FOR APPELLATE LAWYER

A. Timely file the notice of appeal

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

Action:

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

Commentary:

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

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

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

Action:

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

Commentary:

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

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

²³ ORS 19.270.

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

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

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

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

C. Prosecuting the appeal

a. Issue Selection and Briefing

Action:

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

Action:

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

Commentary:

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

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

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

b. Oral argument

Action:

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

Commentary:

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

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

Action:

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

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

APPENDIX A –

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

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

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

APPENDIX B –

ADDITIONAL AREAS IN WHICH LAWYERS SHOULD SEEK TRAINING

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

APPENDIX C –

CHECKLISTS FOR SPECIFIC HEARINGS FOR ATTORNEYS FOR CHILDREN:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX D –

CHECKLIST FOR SPECIFIC HEARINGS FOR LAWYERS FOR PARENTS:

A. SHELTER HEARINGS:

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

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

B. JURISDICTION/ADJUDICATION HEARING:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ACTIVITY OR PROGRAM	DESCRIBE REDUCTION	AMOUNT AND FUND TYPE	RANK AND JUSTIFICATION
(WHICH PROGRAM OR ACTIVITY WILL NOT BE UNDERTAKEN)	(DESCRIBE THE EFFECTS OF THIS REDUCTION. INCLUDE POSITIONS AND FTE IN 2015-17 AND 2017-19)	(GF, LF, OF, FF. IDENTIFY REVENUE SOURCE FOR OF, FF)	(RANK THE ACTIVITIES OR PROGRAMS NOT UNDERTAKEN IN ORDER OF LOWEST COST FOR BENEFIT OBTAINED)
1. Appellate representation will be further delayed	REDUCTION OF 5 FTE ATTORNEY POSITIONS AND 1 FTE SUPPORT STAFF POSITIONS WILL AT FIRST EXTEND THE CURRENT DELAY IN FILING AN OPENING BRIEF. OVER TIME AS THE BACKLOG OF CASES GROWS, ALL CASES WILL BE DELAYED MORE THAN 350 DAYS AT WHICH POINT FEDERAL INTERVENTION IS LIKELY.	\$1,518,376 GENERAL FUND	THE AGENCY CANNOT RANK THE RELATIVE IMPORTANCE OF CONSTITUTIONALLY MANDATED SERVICES.
2. Trial-level representation will not be provided during the final 2.5 months of the biennium.	IN THE ABSENCE OF FUNDING FOR LEGAL REPRESENTATION, PROSECUTIONS CANNOT PROCEED.	\$24,659,004 GENERAL FUND \$329,198 OTHER FUNDS	THE AGENCY CANNOT RANK THE RELATIVE IMPORTANCE OF CONSTITUTIONALLY MANDATED SERVICES.
3. Auditing of fee statements and caseload reports.	REDUCTION OF 2.5 FTE WOULD REDUCE AGENCY'S ABILITY TO AUDIT FEE STATEMENTS AND TO VERIFY CONTRACT CREDITS CLAIMED.	\$382,133 GENERAL FUND \$54,178 OTHER FUNDS	IN THE ABSENCE OF AUDITING, IT IS LIKELY THAT THE EXPENDITURES FROM THE PROFESSIONAL SERVICES ACCOUNT WOULD INCREASE.

Reduction Options

Appellate Division

A 10% reduction (\$1.5 million GF) of the agency's current service level for the Appellate Division would require the elimination of 5 attorney positions and one support staff position. The existing backlog of appellate cases would increase and the average length of time an appeal is pending would increase. The Court of Appeals may order the dismissal of pending cases that exceed 350 days from the date the record settles to the filing of the opening brief.

Professional Services Account

A 10% reduction (\$24.6 million GF; \$329,198 OF) of the Professional Services Account represents the level of funding required for two and a half months of public defense services. Unless the 2015 Legislature acts to either decriminalize some behavior or reduce the seriousness level of some offenses and thereby reduce the number and cost of the cases on which counsel must be appointed, or funds this caseload, PDSC will have to cease payment for appointed counsel and related expenses during the last quarter of the 2015-17 biennium. Generally, if counsel is not available, the cases will be dismissed or held in abeyance.

Contract and Business Services

A 10% reduction (\$382,133 GF; \$54,178 OF) of this section's current service level will require the elimination of approximately 2.5 positions (contract analysts and accounting staff), which will result in delays in paying providers and a substantially reduced ability for staff to audit contractor caseload reports, fee statements and expense requests. Delayed payments will impact over 1,800 individual service providers and businesses in Oregon. Failure to adequately review payments will likely result in the inappropriate expenditure of funds.

Vacancy Report - Period Ending 12/31/14

Agency	Authorization	Position	RDC	Pos Type	Anticipated Fill Date	Reason Narrative	Reason Category	XREF	GF	Vac 7-11	Vac 12+
40400	001120220	0014046	000	PP		The agency is currently in the process of restructuring. This position will be used for permanent financing of necessary positions for the new organizational structure.	8	001-01-00-00000	14,003	0	1

POSITION RECLASSIFICATIONS COMPLETED DURING THE 2013-15 BIENNIUM

PFP #	POSITION #	OLD CLASSIFICATION	NEW CLASSIFICATION	OLD TOP STEP	NEW TOP STEP	NOTES
20140401	0004203	Deputy Defender 2	Senior Deputy Defender	8,480.00	9,350.00	reclassification
20140401	0014026	Office Specialist 1	Accounting Technician	2,827.00	3,556.00	reclassification
20131001	0014022	Senior Deputy Defender	Juvenile Appellate Section Chief Deputy	9,167.00	9,487.00	reclassification
20131001	0004158	Contract Analyst	Contracts Manager	6,494.00	7,160.00	reclassification
20131001	0004148	Contract Analyst	Senior Contract Analyst	6,494.00	6,819.00	reclassification

NEW HIRES DURING THE 2013-15 BIENNIUM

POSITION #	HIRE DATE	CLASSIFICATION	STEP	JUSTIFICATION
0002233	11/10/2014	Deputy Defender 1	1	
0014051	12/16/2013	Deputy Defender 1	2	
0004165	10/7/2013	Budget & Finance Manager	6	transfer from another state agency
0002230	2/10/2014	Deputy Defender 1	2	
0014049	2/24/2014	Deputy Defender 2	3	returning employee
0004200	9/23/2013	Human Resource Manager	8	transfer from another state agency
0000234	10/27/2014	Deputy Defender 1	3	administrative priority based on experience
0004167	2/13/2015	Contract Analyst	2	
9002236	11/24/2014	Deputy Defender 1	1	
0002239	5/21/2014	Deputy Defender 2	1	
0002235	11/4/2013	Deputy Defender 1	2	
0004201	1/13/2014	Research & IT Director	8	transfer from another state agency

UPDATED OTHER FUNDS ENDING BALANCES FOR THE 2013-15 & 2015-17 BIENNIA

Agency: Public Defense Services Commission
 Contact Person: Angelique Bowers 503-378-2481

(a) Other Fund Type	(b) Program Area (SCR)	(c) Treasury Fund #/Name	(d) Category/Description	(e) Constitutional and/or Statutory reference	(f) 2013-15 Ending Balance		(g) 2015-17 Ending Balance		(i) Comments
					In LAB	Revised	In CSL	Revised	
Limited	40400-004-00--00-00000	404 01451 Public Defense Services Account	Operations	ORS 151.225	492,214	(599,697)	(778,310)	(1,378,007)	The current projected 2013-15 other funds ending balance has a revenue shortfall of \$599,697, which does include a 3-month reserve of \$376,846. The 2013-15 Legislatively Approved Budget Other Funds Revenue was \$8,415,518. The projected 2013-15 Other Funds Revenue is \$7,504,655. This revenue shortfall is being addressed in the 2015-17 Agency Request Budget with package 070-Revenue Shortfalls and package 107-ACP Revenue Shortfall. If approved, these packages would reduce other funds expenditures that were previously funded with general funds by \$1,200,000 and restore the general funds. In the 2015-17 Agency Request Budget, if package 070 and package 107 are funded the projected ending balance would be \$413,889.