

**NEW YORK STATE  
OFFICE OF INDIGENT LEGAL SERVICES**

**Standards for Parental Representation in State Intervention Matters**

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**TABLE OF CONTENTS**

	<b>Page</b>
<b>PREAMBLE</b> .....	4
<b>SUMMARY OF STANDARDS</b> .....	5
<b>STANDARDS (with commentary)</b> .....	12
<b><u>QUALIFICATIONS, EXPERIENCE, TRAINING AND OVERSIGHT</u></b>	
<b>A. Basic Qualifications</b> .....	12
<b>B. Experience and Training</b> .....	12
<b>C. Training and Periodic Evaluation</b> .....	12
<b><u>DUTIES OF COUNSEL</u></b>	
<b>D. Basic Duties of Counsel</b> .....	12
<b>D-1. Competence</b> .....	12
<b>D-2. Resources</b> .....	13
<b>E. Protecting the Client’s Interests and Advancing the Client’s Goals</b> .....	14
<b>E-1. Client decision-making rights and obligations</b> .....	14
<b>E-2. Court time management</b> .....	15
<b>E-3. Communication with other professionals</b> .....	15
<b>E-4. Negotiation</b> .....	16
<b>F. Relationship with the Client</b> .....	16
<b>F-1. Client first</b> .....	16
<b>F-2. Race, culture, social, and economic bias</b> .....	17
<b>F-3. Confidentiality</b> .....	17
<b>F-4. Conflicts of interest</b> .....	18
<b>F-5. Regular client communication</b> .....	18
<b>F-6. Maintaining client contact</b> .....	19
<b>F-7. Organization of tasks and events</b> .....	19
<b>F-8. Continuing advice and counsel</b> .....	20
<b>F-9. Strategy and planning</b> .....	20

<b>F-10. Document copies to client</b> .....	21
<b>F-11. Client capacity</b> .....	21
<b>F-12. Locating a client whose whereabouts are unknown</b> .....	22
<b>F-13. Incarcerated or detained clients</b> .....	23
<b>G. Model of Representation – Multidisciplinary Practice</b> .....	24
<b>G-1. Social work advocacy</b> .....	24
<b>G-2. Other professional support</b> .....	24
<b>G-3. Effective collaboration</b> .....	25
<b>H. Breadth of Representation</b> .....	26
<b>H-1. Collateral issues</b> .....	26
<b>H-2. Reasonable efforts</b> .....	26
<b>H-3. Proactive referrals</b> .....	27
<b>I. Representation prior to court intervention</b> .....	28
<b>I-1. Representation during investigation</b> .....	28
<b>I-2. Investigation counseling</b> .....	29
<b>I-3. Investigation advocacy</b> .....	29
<b>I-4. Application for return of a child</b> .....	30
<b>I-5. Assignment as soon as possible</b> .....	30
<b>J. Continuity and Duration of Representation</b> .....	30
<b>J-1. Continuity</b> .....	31
<b>J-2. Duration</b> .....	31
<b>K. Preliminary Court Proceedings</b> .....	31
<b>K-1. Initial meeting</b> .....	31
<b>K-2. Asserting client’s rights</b> .....	32
<b>K-3. Motion practice</b> .....	33
<b>L. Imminent Risk Hearing</b> .....	33
<b>L-1. Right to imminent risk hearing</b> .....	33
<b>L-2. Preliminary litigation conduct</b> .....	34
<b>L-3. Post-hearing tasks</b> .....	35
<b>L-4. Post-hearing motion practice</b> .....	35
<b>L-5. Intermediate appeal</b> .....	35
<b>M. Ongoing Investigation</b> .....	35
<b>M-1. Continuing inquiries</b> .....	35
<b>M-2. Updated client interview</b> .....	36
<b>N. Discovery</b> .....	37
<b>N-1. Agency file review</b> .....	37
<b>N-2. Informal discovery</b> .....	37
<b>N-3. Formal discovery</b> .....	37

- O. Preparation, Planning, and Advocacy** ..... 38
  - O-1. Ongoing social work support** ..... 38
  - O-2. Theory of the case** ..... 39
  - O-3. Out-of-court advocacy** ..... 39
  - O-4. Litigate issues** ..... 40
  - O-5. Client testimony preparation** ..... 40
  - O-6. Witnesses** ..... 41
  - O-7. Expert witnesses** ..... 41
  
- P. Hearings** ..... 42
  - P-1. Court attendance** ..... 42
  - P-2. Contemporaneous advocacy** ..... 42
  - P-3. Statements and arguments** ..... 43
  - P-4. Proposed findings and orders** ..... 43
  - P-5. Closed proceedings** ..... 43
  
- Q. Post-Hearing** ..... 43
  - Q-1. Reviewing court orders** ..... 43
  - Q-2. Counseling client about court orders** ..... 44
  - Q-3. Post-judgment relief counseling** ..... 44
  
- R. Appeal** ..... 45
  - R-1. Preserve client’s right to appeal** ..... 45
  - R-2. Prompt action and expedited appeals** ..... 45
  - R-3. Communicating the results of the appeal** ..... 46

## PREAMBLE

*Parents' fundamental liberty interests in the companionship, care, custody, and control of their children "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State . . . parents retain a vital interest in preventing the irretrievable destruction of their family life." Santosky v. Kramer, 455 U.S. 745, 753 (1982)*

The New York State Office of Indigent Legal Services (ILS), in consultation with the Indigent Legal Services Board, promulgates these standards under the authority conferred by Executive Law § 832 in furtherance of its statutory mandate "to monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law," including services to persons entitled to assigned counsel under Family Court Act §§ 262 and 1120. These *Standards for Parental Representation in State Intervention Matters* seek to improve the quality of representation provided under Family Court Act § 262(i) - (iv) and (ix) (i.e., child protective, foster care, destitute child and termination of parental rights proceedings, collectively referred to in these standards as "state intervention" matters). Given the fundamental liberty interests and due process rights involved, New York State recognizes that persons involved in these matters have a constitutional right to counsel. Family Court Act § 261; *see also In re Ella B.*, 30 N.Y.2d 352 (1972) (finding it fundamentally unfair and a denial of due process and equal protection for the state to seek removal of a child without providing court-appointed counsel to the parent).

These standards are based on existing guidelines, standards, and best practices from around the state and the country, and are meant to define what constitutes meaningful and effective assistance of counsel in state intervention matters. They embody an approach that is client-centered, multi-disciplinary, and holistic, and emphasize timely entry into the case and diligent, zealous advocacy throughout. The goals of this model parallel the stated goals of the child welfare system: prevention of unnecessary and traumatic disruption of families and the parent-child relationship, and promotion of the safety, well-being and stability of children within their families. These standards are to be read in conjunction with the ILS Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest, the ILS Appellate Standards and Best Practices, and the New York State Bar Association Revised Standards for Providing Mandated Representation. The standards apply to all existing and future systems for the delivery of mandated representation in state intervention matters. All ILS standards can be accessed at: <https://www.ils.ny.gov/>.

ILS acknowledges the many attorneys who work diligently and zealously to ensure justice for families throughout the state. Providing high quality representation to clients in state intervention matters is a difficult and challenging endeavor, requiring great skill and dedication. ILS recognizes that the vision of practice embodied in these standards is unattainable without sufficient funding and resources. Therefore, ILS and the ILS Board will continue to work with all interested parties to obtain support for the efforts of counties and court-appointed lawyers to deliver high quality, effective and cost-efficient representation to clients who are financially unable to obtain counsel.

ILS and the ILS Board acknowledge the generous contributions of time, expertise, and wise counsel by the members of the Working Group who came together to achieve a common goal: to improve the quality of representation for clients at risk of losing their children temporarily or permanently to state custody. The list of Working Group members can be accessed here (<https://www.ils.ny.gov/node/55>). ILS plans to review and revise these standards on a regular basis to ensure they continue to comply with New York law and reflect high quality performance, and invites ongoing feedback from clients, the bar, the bench, and other interested stakeholders.

## **SUMMARY OF STANDARDS**

### **QUALIFICATIONS, EXPERIENCE, TRAINING AND EVALUATION**

**A. Basic Qualifications.** Before accepting assignments to represent clients in state intervention matters, counsel must demonstrate competence to handle the assignment.

**B. Experience and Training.** Counsel must possess sufficient experience, training, knowledge, and skills necessary to provide high quality representation to clients in state intervention matters.

**C. Training and Periodic Evaluation.** Counsel must complete initial and continuing training that provides the knowledge and skills necessary for high quality representation of clients in state intervention matters. Counsel must also comply with evaluation requirements established by institutional supervisors or assigned counsel administrators.

### **DUTIES OF COUNSEL**

**D. Basic Duties of Counsel.** Counsel representing clients in state intervention matters must:

**D-1. Competence.** Demonstrate competence in handling state intervention matters before accepting responsibility for representing clients.

**D-2. Resources.** Have available and dedicate sufficient time and resources necessary to provide high quality representation to each client. If at any point counsel is unable to offer high quality representation due to lack of sufficient time and/or resources, counsel must move to withdraw.

**E. Protecting the Client's Interests and Advancing the Client's Goals.** Diligent and zealous advocacy is key to high quality representation. Counsel representing clients in state intervention matters must:

**E-1. Client decision-making rights and obligations.** Be knowledgeable about and protect the client's right to information and decision-making while the child is in foster care.

**E-2. Court time management.** Avoid continuances or adjournments that do not advance clients' interests or objectives, and work to reduce delays in court proceedings except where there is a strategic benefit for a client.

**E-3. Communication with other professionals.** Communicate regularly with other professionals in the case.

**E-4. Negotiation.** Engage in mediation and settlement negotiations in consultation with the client and when appropriate.

**F. Relationship with the Client.** Attorneys must demonstrate respect for and professionalism towards their client. As the client's designated advocate in the system, counsel must:

**F-1. Client first.** Act in accordance with the duty of loyalty owed to the client.

**F-2. Race, culture, social, and economic bias.** Understand the impact of bias stemming from race, culture, and socioeconomic status and develop tools to mitigate its negative impact. Identify and use to the client's advantage his or her individual, familial, cultural, and community strengths.

**F-3. Confidentiality.** Adhere to all laws and ethical obligations concerning confidentiality.

**F-4. Conflicts of interest.** Avoid potential conflicts of interest, including professional and personal situations that may impede the attorney's ability to provide zealous representation.

**F-5. Regular client communication.** Meet and communicate regularly with the client before court proceedings.

**F-6. Maintaining client contact.** Provide the client with contact information in writing and establish a system that allows regular attorney-client contact.

**F-7. Organization of tasks and events.** Help the client develop a calendaring system for important dates and tasks when necessary.

**F-8. Continuing advice and counsel.** Through continued dialogue, assist the client to make informed decisions based on thorough advice and counsel regarding all legal matters related to the case.

**F-9. Strategy and planning.** Actively elicit and advocate for all the client's goals.

**F-10. Document copies to client.** Provide the client with copies of all petitions, court orders, service plans, and other relevant case documents, including reports regarding the child unless expressly prohibited by law, rule, or court order.

**F-11. Client capacity.** Maintain a normal lawyer-client relationship with a client who has limited capacity, to the extent possible.

**F-12. Locating a client whose whereabouts are unknown.** Take diligent steps to locate and communicate with a client whose whereabouts are unknown and decide representation strategies based on that communication.

**F-13. Incarcerated or Detained Clients.** Address the unique issues of clients who are incarcerated or detained.

**G. Model of Representation – Multidisciplinary Practice.** Attorneys must work with professionals trained to understand, analyze, and address non-legal aspects of a client’s life that impact the legal case. To the extent possible, attorneys must:

**G-1. Social work advocacy.** Retain or involve a social worker as part of the legal team.

**G-2. Other professional support.** Include other professionals on the legal team as needed to protect the client's interests and advance the client's goals.

**G-3. Effective collaboration.** Ensure that all members of the legal team know and follow the principles of effective cross-disciplinary collaboration.

**H. Breadth of Representation.** State intervention matters are inherently multi-dimensional, encompassing both legal and non-legal issues. To provide high quality representation, counsel must:

**H-1. Collateral issues.** Advise and counsel clients on basic rights and responsibilities attendant to all legal and non-legal issues impacting the client’s case.

**H-2. Reasonable efforts requirement.** Monitor and take steps to compel the agency’s compliance with the reasonable efforts requirement consistent with the client's interests and goals.

**H-3. Proactive referrals.** Make or obtain an assessment of necessary and appropriate services, and secure or make timely referrals to appropriate service providers.

**I. Representation prior to court intervention.** Representation for clients during child protective service investigations can facilitate better outcomes for families. To obtain optimum results counsel must:

**I-1. Representation during investigation.** Make efforts to represent clients during child protective service (CPS) investigations prior to court intervention.

**I-2. Investigation counseling.** Advise the client about the risks and benefits of cooperating during a CPS investigation.

**I-3. Investigation advocacy.** Ensure that the attorney or other advocate on the defense team accompanies the client to conferences and meetings with the agency prior to the initiation of court action.

**I-4. Application for return of a child.** Advise and counsel the client about the right to file a pre-petition application to the family court for the return of a child who has been removed without a court order pursuant to the agency’s emergency removal power, and file such an application if requested by the client.

**I-5. Assignment as soon as possible.** Secure assignment to represent the client no later than the first court action.

**J. Continuity and Duration of Representation.** Representation by the same attorney until all legal avenues for relief have been exhausted, or replacement counsel begins representing the client, is necessary for high quality representation. Therefore, counsel must:

**J-1. Continuity.** Represent the client throughout the case unless the client's needs require otherwise.

**J-2. Duration.** Continue to represent the client's interest until all ethical and professional responsibilities have been fulfilled.

**K. Preliminary Court Proceedings.** High quality representation includes taking steps for the client in the earliest stages of a case. Counsel must:

**K-1. Initial meeting.** Conduct a face-to-face interview with the client as soon as possible.

**K-2. Asserting client's rights.** Advise the client of and take action to preserve all applicable constitutional, statutory, and regulatory rights of the client, including revoking, as necessary, any waivers of rights or releases for information about the client or the client's child given by the client.

**K-3. Motion practice.** Litigate issues that advance the client's interests and objectives.

**L. Imminent Risk Hearing.** Because of the potential for unwarranted intrusion into the family, the imminent risk hearing is an event of crucial strategic importance in state intervention cases. Due process demands that counsel must:

**L-1. Right to imminent risk hearing.** Assert and protect the client's right to an imminent risk hearing pursuant to Family Court Act 1022, 1027, or 1028, as appropriate, unless the client waives the right upon informed consent.

**L-2. Preliminary litigation conduct.** Thoroughly prepare for and actively participate in the imminent risk hearing, consistent with the client's interests and goals, unless there is a sound tactical reason not to do so.

**L-3. Post-hearing tasks.** Complete all tasks that are appropriate to the case after the imminent risk hearing and before the fact finding hearing, including but not limited to:

1. Obtain a written court order for all necessary services. In the event the court will not issue a written order, request that the agency place on the record a statement of all services it claims are required to prevent a removal or for the child to be returned;

2. Challenge unnecessary supervision and restrictions on visitation and advocate for the least intrusive supervision and most liberal visitation in accordance with the client's wishes;
3. Demand scheduling and notice of the case plan meeting;
4. Obtain the date and time for the fact finding hearing;
5. Monitor enforcement of any orders; and
6. Ensure that agreed upon or court ordered services are being provided by the responsible agencies.

**L-4. Pre-fact finding hearing motion practice.** File all appropriate motions prior to the fact finding hearing, including, but not limited to, motions for:

1. Discovery;
2. Psychological or other Medical Assessments;
3. An Order of Protection;
4. Dismissal of the Petition or to Strike an Allegation;
5. A Change of Placement;
6. Modification of Visitation;
7. Termination of Placement;
8. Court ordered services;
9. A Stay, Modification, Setting Aside or Vacating of an Order; and
10. Any other court ordered relief.

**L-5. Intermediate appeal.** Promptly advise the client of his or her right to an intermediate appeal upon entry of a temporary or preliminary order. If desired by the client, file a notice of appeal with the corresponding certification of eligibility for assigned counsel. *See* Standard R.

**M. Ongoing Investigation.** Investigation is essential to quality representation. Every case is unique and circumstances change during the pendency of the matter. Counsel must:

**M-1. Continuing inquiries.** Conduct a thorough and independent investigation at every stage of the proceeding.

**M-2. Updated client interview.** Interview the client well before each court appearance, in time to use client information for investigation.

**N. Discovery.** To ensure that counsel has all relevant information available to the client's adversary, counsel must:

**N-1. Agency file review.** Review the agency case file periodically throughout the case.

**N-2. Informal discovery.** Obtain, on an ongoing basis, all relevant documentation regarding the case, including information that might shed light on the allegations, the service plan, the child's circumstances, and the client's parenting ability.

**N-3. Formal discovery.** Use formal discovery methods to obtain information not available through informal means.

**O. Preparation, planning, and advocacy.** Strategic planning and zealous advocacy are necessary both in and out of court and at all stages of the case. To ensure high quality representation, counsel must:

**O-1. Ongoing social work support.** Identify and advocate for appropriate services using a multidisciplinary team approach throughout the case.

**O-2. Theory of the case.** Develop a case theory and strategy to follow in all aspects of the representation.

**O-3. Out-of-court advocacy.** Prepare for and actively participate in case-related meetings and conferences.

**O-4. Litigate issues.** Timely file all petitions, motions, responses, objections, and briefs necessary to protect the client's interests and advance the client's goals.

**O-5. Client testimony preparation.** Thoroughly prepare the client to testify.

**O-6. Witnesses.** Identify, locate, and prepare all witnesses.

**O-7. Expert witnesses.** Identify, secure, prepare, and qualify any expert witness. Prepare to cross-examine the opposition's experts, including, when possible, interviewing them.

**P. Hearings.** In addition to the preparation required in preceding Standards, counsel must:

**P-1. Court attendance.** Prepare for and participate in all hearings, including pretrial conferences.

**P-2. Contemporaneous advocacy.** Prepare and make all appropriate motions and evidentiary objections, present and cross-examine witnesses, and prepare and present exhibits.

**P-3. Statements and arguments.** Make opening statements and closing arguments.

**P-4. Proposed findings and orders.** Prepare proposed findings of fact, conclusions of law, a dispositional plan, a permanency plan, and visitation or other orders to assist the court or otherwise benefit the client.

**P-5. Closed proceedings.** Request closed proceedings (or a cleared courtroom) in appropriate cases.

**Q. Post-Hearing.** After each court hearing, counsel must:

**Q-1. Reviewing court orders.** Review any court orders to ensure accuracy and clarity, seek to amend them when needed, and review them with and explain them to the client.

**Q-2. Counseling client about court orders.** Take reasonable steps to ensure the client complies with court orders and to determine whether further court action is necessary.

**Q-3. Post-judgment relief counseling.** Consider and discuss with the client appeals or other alternative avenues of relief.

**R. Appeal.** After an appealable order is entered, counsel must:

**R-1. Preserve client's right to appeal.** File the necessary documents to preserve the client's appellate rights unless the client decides not to appeal.

**R-2. Prompt action and expedited appeals.** Promptly perfect the appeal and seek a preference where it would benefit the client.

**R-3. Communicating the results of the appeal.** Promptly advise the client of the results of the appeal and its implications.

## **STANDARDS**

### **QUALIFICATIONS, EXPERIENCE, TRAINING AND EVALUATION**

**A. Basic Qualifications.** Before accepting assignments to represent clients in state intervention matters, counsel must demonstrate competence to handle the assignment.

#### **Commentary**

Attorneys representing clients in state intervention matters must possess basic qualifications including admission to the New York Bar. Because public defense clients are limited in their ability to choose their attorney, and state intervention proceedings involve intensely personal matters, it is particularly important that counsel avoid actual or potential conflicts of interest that could undermine the client's confidence in the attorney. *See* Standard F-4.

**B. Experience and Training.** Counsel must possess sufficient experience, training, knowledge, and skills necessary to provide high quality representation to clients in state intervention matters.

#### **Commentary**

State intervention practice requires specialized knowledge that even extensive experience in other areas of law does not instill. Attorneys must not accept state intervention cases without training and experience sufficient to provide the necessary knowledge and skills unless they associate with an attorney competent to do so. *See* New York Rules of Professional Conduct Rule 1.1 (b).

**C. Training and Periodic Evaluation.** Counsel must complete initial and continuing training that provides the knowledge and skills necessary for high quality representation of clients in state intervention matters. Attorneys must also comply with evaluation requirements established by their institutional supervisors or assigned counsel administrators.

#### **Commentary**

Experience alone is not sufficient to make or keep an attorney up-to-date on the numerous and often complicated legal and non-legal issues that may arise in state intervention matters. To maintain their ability to provide high quality representation to clients in this dynamic and complex field, attorneys must comply with training requirements established by institutional supervisors or assigned counsel administrators specific to representation in state intervention matters as well as with the continuing legal education requirements necessary to maintain their bar admission in good standing. Similarly, attorneys must comply with any periodic evaluation requirements established by institutional supervisors or assigned counsel administrators.

### **DUTIES OF COUNSEL**

**D. Basic Duties of Counsel.** Counsel representing clients in state intervention matters must:

**D-1. Competence.** Demonstrate competence in handling state intervention matters before accepting responsibility for representing clients.

### **Commentary**

Clients in state intervention matters have uniquely important substantive and due process rights regarding family integrity and parental autonomy. State intervention clients who are parents have constitutionally recognized fundamental liberty interests in the care and custody of their children.

To properly protect those interests, attorneys must have up-to-date working knowledge of all relevant state laws, policies, and procedures, including but not limited to: New York Domestic Relations Law, New York Family Court Act, New York Social Services Law, New York Civil Practice Law and Rules, and relevant New York State regulations, including 18 NYCRR 400 *et. seq.* In addition, the attorney must be familiar with all relevant federal laws. *See* American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases (2006), Standard 2, ([http://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/parent\\_representation/ABA-Parent-Attorney-Standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parent_representation/ABA-Parent-Attorney-Standards.authcheckdam.pdf)).

High quality representation in state intervention matters requires knowledge of a broad range of issues. For example, while the burden of proof is on the agency, in practice the attorney and the client generally must demonstrate to the court that the child will not be at imminent risk of harm in the client's custody. Obstacles to this goal may include criminal charges against the client; immigration status; domestic violence, substance abuse, or physical or mental health issues; confidentiality concerns; permanency timelines; and the specific service issues of the client, the child, and the family. Counsel has to be knowledgeable enough about all relevant laws to vigorously advocate for the client's interests and goals, and to use procedural, evidentiary, and confidentiality laws and rules to protect the client's rights.

In addition, counsel must pursue objectives related both to a favorable settlement of the court case and the expeditious return of the child to the client's custody if that is the client's goal. To effectively pursue the client's goals and objectives, both in and out of court, counsel must be familiar with other important practice issues such as: the services the agency is required to provide and any services that support family integrity; the availability of services in the community and the problems they are designed to address, as well as gaps in the availability of necessary services; the structure and functioning of the New York State Office of Children and Family Services and its regulations and policies, as well as the policies and practices of the local social services agency; and available experts who can provide consultation and testimony on the reasonableness of efforts made to prevent a child's removal from the client or to safely reunify the family and maintain the child in the home.

**D-2. Resources.** Have available and dedicate sufficient time and resources necessary to provide high quality representation to each client. If at any point counsel is unable to offer high quality representation due to lack of sufficient time and/or resources, counsel must move to withdraw.

### **Commentary**

The objective of providing high quality mandated representation cannot be accomplished by even the ablest and most industrious attorneys in the face of excessive workloads. The type of practice the attorney has will also impact the appropriate caseload size, for example, whether the

attorney is part of a multidisciplinary representation team or whether the attorney handles other types of cases or has a private practice. Depending on what the attorney can handle while complying with these standards, the suggested range for a full-time, state intervention practice is no more than 55-65 active cases at any given time.<sup>1</sup>

To provide high quality representation, counsel must have access to necessary clerical, administrative, investigative, and social work support at every stage of the case. Counsel must be able to quickly retain the services of translators and interpreters to assist in communicating with their sign-language and non-English speaking clients and witnesses at all stages of the case. Access to psychiatrists, forensic pathologists, medical and mental health providers, and other professionals is essential not only when preparing for court hearings, but also to obtain analysis and advice regarding the ongoing service needs of clients.

Institutional staff attorneys as well as individual assigned counsel attorneys must use their best professional judgment to determine whether accepting additional cases or continued representation in ongoing cases will cause inadequate representation. If so, they must take steps to remedy this situation. These steps may include declining additional cases, seeking leave to withdraw from existing cases, and seeking funds for additional attorneys or other staff or resources.

**E. Protecting the Client's Interests and Advancing the Client's Goals.** Diligent and zealous advocacy is key to high quality representation. Counsel representing clients in state intervention matters must:

**E-1. Client decision-making rights and obligations.** Be knowledgeable about and protect the client's right to information and decision-making while the child is in foster care.

### **Commentary**

Unless parental rights are terminated, the client who is the child's biological or adoptive parent maintains certain obligations and rights while a child is in foster care. The frequent exercise of parental responsibility is an effective strategy to expedite family reunification. Clients may not understand that they retain the right to make decisions for, or obtain information about, the child while the child is in foster care. Information about the child's developmental and other needs is necessary for the client to make appropriate decisions for the child's care. As part of its reasonable efforts obligations, the agency must inform the client of the child's progress, development, and health. Social Services Law 384-b(f)(4). The attorney must counsel clients about their rights and responsibilities and assist in asserting them, including, at a minimum:

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<sup>1</sup> Caseload studies and recommendations from around the country were reviewed in arriving at this range. There are no generally accepted national standards regarding the number of cases that parents' or children's attorneys should carry at one time. New York provides that "the number of children represented at any given time by an attorney appointed pursuant to section 249 of the Family Court Act shall not exceed 150." Rules of the Chief Administrator of the Courts, §127.5 - Workload of the Attorney for the Child. The recommended equivalent range of 55-65 for adult clients is based on a conservative estimate of an average of 2.5 collateral petitions per adult client in state intervention cases, and taking into consideration relevant factors such as those outlined in Rule §127.5.

1. explaining what decision-making authority remains with the client and what lies with the agency while the child is in foster care;
2. obtaining updates and reports from any service provider working with the child and family, and helping the client obtain information about the child's safety, health, education, and well-being; and
3. assisting the client in exercising his or her rights to continue to make decisions regarding the child's medical, mental health, and educational services.

If necessary, counsel must intervene with the agency, medical and service providers, school authorities, and others to ensure the client has decision-making opportunities. This may include obtaining releases from the client giving the attorney permission to contact the child's service providers, writing letters to educational professionals asserting the client's continuing right to make decisions for the child, and seeking court orders when the client has been denied the right to make important decisions about the child's life.

**E-2. Court time management.** Avoid continuances or adjournments that do not advance clients' interests or objectives, and work to reduce delays in court proceedings except where there is a strategic benefit for a client.

#### **Commentary**

Delays often increase the time a family is separated, and can reduce the likelihood of reunification. If a hearing is adjourned and a resolution of the case is delayed, the client may lose momentum in addressing the issues that led to the child's removal or the client may lose the opportunity to prove compliance with case plan goals. Additionally, the federal Adoption and Safe Families Act (ASFA) timelines continue to run despite delays in court proceedings.

If a continuance is necessary, the attorney should request the continuance in writing as far as possible in advance of the hearing, with notice to all parties. Counsel should request the shortest delay possible, consistent with the client's interests. Where necessary and appropriate, counsel should object to repeated or prolonged continuance requests by other parties.

**E-3. Communication with other professionals.** Communicate regularly with other professionals in the case.

#### **Commentary**

Ongoing communication with the other attorneys, agency caseworker(s), and service providers working with the client and family is essential to ensure that counsel has all relevant information to effectively defend and advocate on behalf of the client. A release rather than a judicial subpoena should be utilized by the attorney to quickly access service providers and their records and avoid the possible prejudice to the client when all counsel have access to records delivered to court. Examples of releases applicable to federally protected records, such as those covered by the Health Insurance Portability and Accountability Act (HIPAA), are available online.

When speaking to a non-attorney professional or a party who is not represented by counsel, attorneys must adhere to rules of ethics governing contact with represented and unrepresented parties. *See* New York Rules of Professional Conduct, Rules 4.2 and 4.3. Counsel should

challenge restrictions on communication with non-parties, for example, caseworkers, that are not based in law.

**E-4. Negotiation.** Engage in mediation and settlement negotiations in consultation with the client and when appropriate.

**Commentary**

While counsel must be prepared to try the case and not compromise solely to avoid trial, attorneys should be trained in mediation and negotiation skills and be comfortable resolving cases outside a courtroom setting when consistent with the client's position. *See* Family Court Act 1018 (court may authorize conferencing or mediation "at any point in the proceedings to further a plan for the child that fosters the child's health, safety, and well-being."). Mediation can resolve a specific conflict in a case, even if it does not result in an agreement about the entire case. Partial negotiated settlements can be very advantageous to the client's objectives by promoting expedited attention to the most difficult impediments to reunification.

With the client's authorization, counsel should share information about services in which the parent is engaged and provide copies of favorable reports from service providers. This information may impact settlement discussions.

It is the client's decision whether to settle. Counsel must communicate all settlement offers to the client sufficiently in advance of court appearances and discuss their advantages and disadvantages so that the client can make a knowing and voluntary decision about whether or not to agree to the terms offered by the agency. The attorney must discuss all aspects of proposed settlements with the client, including all legal effects of admissions or agreements. The client must be advised about the chances of prevailing if the matter proceeds to trial and any potential negative impact associated with contesting the allegations. Counsel must advise the client of the consequences of admitting to neglect or abuse, including placement on the State Central Registry and ramifications for future employment.

A settlement should result in a written, enforceable agreement so that all parties are clear about their rights and obligations. Counsel should ensure that agreements accurately reflect the understandings of the parties, and should schedule a hearing if necessary to enforce a term of the agreement beneficial to the client.

**F. Relationship with the Client.** Attorneys must demonstrate respect for and professionalism towards their client. As the client's designated advocate in the system, counsel must:

**F-1. Client first.** Act in accordance with the duty of loyalty owed to the client.

**Commentary**

While maintaining good working relationships with others in the family court system is part of being an effective advocate, counsel must be vigilant against allowing relationships to interfere with the primary responsibility to the client.

Counsel should scrupulously avoid giving the impression to the client that counsel's relationships with other attorneys or with the judge are more important than the representation the attorney is providing the client. To the extent that judges control assignments of cases to individual attorneys, attorneys must take particular care to avoid even the appearance of seeking to please judges rather than strongly advocating for clients. *See* NYSDA Client Advisory Board Client-Centered Representation Standards (2005), Standard 4  
[http://www.nysda.org/docs/PDFs/Pre2010/05\\_ClientCenteredStandards.pdf](http://www.nysda.org/docs/PDFs/Pre2010/05_ClientCenteredStandards.pdf)

**F-2. Race, culture, social, and economic bias.** Understand the impact of bias stemming from race, culture, and socioeconomic status and develop strategies to mitigate its negative impact. Identify and use to the client's advantage his or her individual, familial, cultural, and community strengths.

### **Commentary**

Individuals represented by public defenders in state intervention cases are, as the US Supreme Court has noted, often "poor, uneducated, or members of minority groups," and, as such, are "often vulnerable to judgments based on cultural or class bias." *Santosky v Kramer*, 755 US 745, 763 (1982). Counsel must be sensitive to the fact that interactions between the client and others during the course of the case are impacted by factors such as a client's race, ethnicity, gender, disability, sexual identification and social and economic position.

Counsel must be vigilant against imposing personal values upon the client; work with the client within the context of his or her culture, social or economic position, and background; and continually assess how these factors may be impacting the client's case. The attorney should strive to understand how racial, cultural, social, and economic differences may impact his or her own interactions with the client.

Taking these factors into account will help counsel better explain the expectations of the court and agency workers to the client, assist the client in developing his or her goals, and help the client identify and access appropriate services.

**F-3. Confidentiality.** Adhere to all laws and ethical obligations concerning confidentiality.

### **Commentary**

Counsel must abide by confidentiality laws and ethical obligations with respect to information obtained from or about the client. *See, e.g.,* New York Rules of Professional Conduct, Rule 1.6. Confidential information contained in a client's child protective records, domestic violence treatment records, substance abuse, mental health, and other medical records, or other types of records is often at issue in child protective cases. Improper disclosure of confidential information early in the proceeding will likely have a negative impact on the manner in which the client is perceived and treated by the other parties and the court. For this reason, it is crucial that counsel advise the client promptly as to the advantages and disadvantages of releasing confidential information, and take steps to protect the client's confidentiality privileges and rights.

Counsel must fully explain to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. Consistent with the

client's interests and goals, the attorney must seek to protect from disclosure confidential information concerning the client, including making motions to partially or completely preclude the disclosure of records protected by law that are irrelevant to the instant proceedings or that are the subject of improper demands for disclosure by the agency.

The attorney must take steps to determine whether a client is a victim, or alleged or potential victim, of domestic violence and ensure the confidentiality of information about the client's location.

**F-4. Conflicts of interest.** Avoid potential conflicts of interest, including professional and personal situations that may impede the attorney's ability to provide zealous representation.

#### **Commentary**

An attorney should never represent more than one party in the same state intervention case. Even in cases in which there is no apparent conflict at the beginning of the case, conflicts may arise as the case proceeds. Other examples of potential conflicts of interest that the attorney should avoid include representing multiple fathers in the same case or representing parties in a separate case who have interests in the state intervention case.

Counsel should be aware that conflicts of interest can arise in unanticipated ways. Although lawyers are not expected to anticipate future unusual or single-case conflicts, they should recognize and avoid possible recurring systemic conflicts likely to arise from personal, non-professional involvement in the child welfare system. One example of such a possible systemic conflict would be a lawyer's status as a foster parent to children in the custody of an entity frequently involved in cases to which the lawyer might be assigned. Such a conflict will not necessarily bar an attorney's representation; but the attorney should be aware of conflict-related ethical rules and bring possible systemic conflicts to the attention of the institutional supervisor or assigned counsel administrator.

**F-5. Regular client communication.** Meet and communicate regularly with the client before court proceedings.

#### **Commentary**

Counsel must be available for in-person meetings, telephone calls, and, if appropriate, email, to answer questions and address the client's concerns. Counsel must communicate regularly with the client and be informed of the client's wishes throughout the case, and particularly before each court appearance or agency meeting or conference. The attorney and client should work together to identify and review short and long-term goals, particularly as circumstances change during the case.

Initially and on an ongoing basis, the attorney must inquire about current and potential family resources, other supports including potential visit hosts (*see* Standard G-1, Commentary), how visits and services are progressing, and about any other concerns the client has regarding the case or his or her children. Counsel should explain any settlement options and determine the client's wishes.

If the client misses an agency meeting or court appearance, the attorney should contact him or her to explain what happened. Counsel should also explain to the client the benefits of bringing issues to counsel's attention rather than letting problems persist, and that counsel is available to intervene when the client's relationship with the agency or a service provider is not working effectively. At a minimum, the attorney should inform the client to let the attorney know if a court order is not being followed, a family visit is missed, or there is ongoing conflict with a foster parent, service provider, or caseworker.

The attorney must ensure access to a competent sign or other language interpreter for all interactions when a communication barrier exists between the client and the attorney or any other person involved in the matter, including service providers. Counsel should not rely on court interpreters for attorney-client communications.

**F-6. Maintaining client contact.** Provide the client with contact information in writing and establish a system that allows regular attorney-client contact.

#### **Commentary**

At the beginning of the representation, the attorney should make sure the client understands how to contact him or her, and discuss the importance of the client staying in contact and keeping the attorney informed of the client's current contact information. As noted above, interpreters and language assistance services should be used when there is a communication barrier between the attorney and client.

The attorney and client should establish a reliable communication system that meets the client's needs and protects the client's confidential information. For example, it may involve telephone contact, email, or communication through a third party at the client's direction. Counsel should explain that even when he or she is unavailable, the client should leave a message. Attorneys must respond to client messages within a reasonable period of time.

**F-7. Organization of tasks and events.** Help the client develop a calendaring system for important dates and tasks when necessary.

#### **Commentary**

At the beginning of the representation, the attorney and client should develop a written timeline containing deadlines and important dates. The timeline should specify what actions the attorney and client will need to take and dates by which they will be completed. The attorney should provide the client with a hard copy of the timeline/calendar which outlines known and prospective court dates, service appointments, deadlines, and critical points of attorney-client contact. The calendar should reflect federal and state law deadlines (e.g., the 15 of 22 month point that would necessitate that the agency file a termination of parental rights case, if exceptions do not apply).

Having a consistent calendaring system can help attorneys manage busy caseloads. It can also help the client keep track of appointments; important dates; calls to and from service providers and caseworkers; and information related to visits. Further, it can help clients focus on the effort

and steps taken to accomplish the service plan goals and meet court-imposed deadlines to ensure reunification.

**F-8. Continuing advice and counsel.** Through continued dialogue, assist the client to make informed decisions based on thorough advice and counsel regarding all legal and non-legal matters related to the case.

**Commentary**

Many factors affect a client's case, including the specific allegations against the client, the service plan, the client's rights in the pending proceeding, any orders entered against (or on behalf of) the client, and the potential consequences of failing to obey court orders or cooperate with service plans. To effectively represent a client's interests, counsel must act beyond the courtroom. The attorney should be a counselor as well as a litigator. The attorney should be in contact with the client not only to prepare for hearings, but also to provide information, advice, and counsel regarding ongoing concerns. An open line of communication helps ensure the client receives answers to questions and the attorney obtains needed information and documentation.

The attorney should be aware of any special issues the client may face relating to his or her ability to benefit from the proposed case plan, and advocate for appropriate accommodations. The attorney and the client should identify barriers to the client engaging in services, such as employment, transportation, and financial issues. The attorney should work with the client, caseworker, and service providers to resolve the barriers. Where needed, the attorneys should engage the services of investigators, social workers, and mental health and other professionals to assist in achieving the client's goals.

**F-9. Strategy and planning.** Actively elicit and advocate for the client's goals.

**Commentary**

Attorneys must understand the client's goals and pursue them vigorously. This includes not only defending against the allegations, but also developing a legal and advocacy strategy to pursue other objectives, such as an expeditious reunification of the family. When necessary, it means bringing motions to secure court orders, including protective orders regarding a client's records sought by the agency. It may mean requesting hearings directed toward parenting time and family visits, services, and placement, as well as hearings to contest any statutorily required ruling by the court that is adverse to the client's interests (*e.g.*, a goal change).

Since many clients distrust the child welfare system, the attorney must take care to distinguish himself or herself from others in the system so the client can see that the attorney serves the client's interests. Clients often feel disempowered in state intervention proceedings; the attorney must take steps to create an environment that encourages the client to express goals and wishes to the attorney without fear of judgment.

The attorney should explain and demonstrate that the attorney's job is to represent the client's interests, and regularly inquire as to the client's goals, including ultimate case goals and interim goals. The attorney should explain all legal aspects of the case and provide comprehensive counsel on the advantages and disadvantages of different options. If necessary, counsel must

retain the services of an expert to assist in understanding the client's goals and developing a strategy to pursue them. At the same time, the attorney should be careful not to usurp the client's authority to decide the case goals. *See* New York Rules of Professional Conduct, Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer.

**F-10. Document copies to client.** Provide the client with copies of all petitions, court orders, service plans, and other relevant case documents, including reports regarding the child unless expressly prohibited by law, rule, or court order.

**Commentary**

An informed client will be better able to assist the attorney with the case and fulfill his or her parental obligations. When there is an order in effect that benefits the client, such as an order for unsupervised visits, the client may need a copy of the order to enforce his or her rights.

The attorney should ensure that the client is reasonably informed about what is happening in the case. *See* New York Rules of Professional Conduct, Rule 1.4 – Communication. The attorney should ensure that the client receives all relevant documents in a timely manner. If there are barriers to the client's understanding of documents, the attorney should take steps to eliminate the effects of those barriers. In all cases, the attorney should be available to discuss and explain the documents to the client.

**F-11. Client capacity.** Maintain a normal lawyer-client relationship with a client who has limited capacity, to the extent possible.

**Commentary**

A client's mental health diagnosis or cognitive condition does not necessarily preclude the client from participating in the representation or from parenting successfully and safely. Whether the client can assist counsel is a different issue from whether the client is able to parent.

An attorney's obligation to treat the client with attention and respect is not diminished by the existence of a client's disability. *See* New York Rules of Professional Conduct, Rule 1.14 – Client with Diminished Capacity, subsection (a).

Counsel should secure the assistance of an expert to learn about a client's current or prior mental health diagnosis and treatment (including any medication taken for the condition). If interactions with the client or other information lead counsel to believe that the client may have a condition limiting the client's capacity, counsel should seek expert assistance in determining what if any disability the client has and how if at all it affects the client's ability to work with counsel and/or parent the child.

Counsel should get consent from the client to review mental health records and to speak with former and current mental health providers and should review such records carefully. The attorney should explain to the client that the information is necessary to understand the client's strengths, history, and needs, as well as the client's capacity to work with the attorney. Counsel should also explain that he or she may seek the assistance of a clinical social worker or some other mental health expert to evaluate the client's ability to assist the attorney.

If the client seems unable to assist counsel, an assessment of the client's capacity should be sought. The ethical rules governing clients with diminished capacity make clear that an attorney should seek other assistance in discerning the client's position and interests, prior to even considering a guardian ad litem (GAL). *See* New York Rules of Professional Conduct, Rule 1.14 – Client with Diminished Capacity. Counsel should seek guidance from service providers, relatives, and others close to the client, as well as a retained or staff social worker or other expert.

Only in the rarest case, if ever, should counsel request a GAL to make decisions for a client. This action clearly communicates to the court that the client's disability is severe and severely undermines the client's position in the litigation with respect to preserving his/her parental rights. Counsel should argue against any application by the agency to assign a GAL for the same reasons. Taking action that undermines the client conflicts with counsel's ethical obligation to advance the client's interests. Furthermore, the court or others can make a GAL application, making it even less likely that counsel should do so.

Seeking withdrawal is “generally seen as the least satisfactory response because doing so leaves the client without assistance when it is most needed.” *See, e.g.,* New York State Bar Association Ethics Opinion 746 (2001).

**F-12. Locating a client whose whereabouts are unknown.** Take diligent steps to locate and communicate with a client whose whereabouts are unknown and decide representation strategies based on that communication.

### **Commentary**

If a client cannot be reached for consultation and notification of court appearances and other appointments, counsel's ability to provide high quality representation will be impaired and the client's objectives may be undermined.

Counsel must take diligent steps to locate a client whose whereabouts are unknown. Diligent steps may include:

1. Send letters by regular and certified mail to the client's last known address;
2. Visit or have someone visit the client's last known address and ask anyone who lives there for information about the client's whereabouts;
3. Speak with the client's relatives, caseworker, foster parent, or other service providers (without violating confidentiality);
4. Contact any state or local agencies that may have and disclose information regarding the client's whereabouts.

If, after diligent steps, counsel is unable to communicate with the client, counsel should assess how best to serve the client's interests. This decision must be made on a case-by-case basis. In some cases, counsel may decide to take a position consistent with the client's last clearly articulated position. In other cases the client's interests may be better served by the attorney declining to participate in the court proceedings in the absence of the client because that may

better protect the client's right to vacate orders made in the client's absence. After a prolonged period without contact with the client, counsel should consider withdrawing from representation.

**F-13. Incarcerated or Detained Clients.** Address the unique issues of clients who are incarcerated or detained.

### **Commentary**

A client may be incarcerated or detained in any one of several types of facilities such as: prison, a local jail, an immigration facility, or a secure psychiatric center. Such clients face unique issues, which will affect some aspects of the client's case. Therefore, counsel must seek to determine what issues are presented in a particular client's situation, and to address them.

Common issues confronting counsel and the client due to the client's incarceration include:

1. **Adoption and Safe Families Act:** The federal Adoption and Safe Families Act regulations have made it much harder for incarcerated clients to maintain their parental rights. Counsel must understand the implications of ASFA and act to mitigate the barriers that it imposes for maintaining family integrity, including the expanded discretion available to agencies in determining whether or not to file a termination of parental rights case.
2. **Access to Services:** Counsel must take steps to compel the agency's compliance with its reasonable efforts obligations, including the obligation to make suitable arrangements with a correctional facility for an incarcerated parent to visit the child within the correctional facility. *See Social Services Law 384-b(7)*. Without delivery of services, a client's chances for reunification with the child following incarceration are greatly diminished. Counsel must learn about available resources and attempt to get the support of the agency and child's attorney.
3. **Communication Barriers:** The attorney must understand that facility regulations will impact attorney-client communication as well as contact between a client and the child. Counsel should take steps to ensure necessary communication occurs. If counsel is handling only the state intervention case, counsel must determine if the client is represented by an attorney in any other matter and discuss with that attorney any interrelated issues.
4. **Appearance in Court:** The client's appearance in court frequently raises issues that require counsel's attention in advance. If the client wants to appear in court, counsel should take steps to ensure the client is produced. If the client does not want to be present, or if having the client present is not possible, counsel should explore other means available to allow the client to participate, such as by telephone or video conference.

**G. Model of Representation – Multidisciplinary Practice.** Attorneys must work with professionals trained to understand, analyze, and address non-legal aspects of a client’s life that impact the legal case. To the extent possible, attorneys must:

**G-1. Social work advocacy.** Retain or involve a social worker as part of the legal team.

**Commentary**

The assistance of a social worker who is knowledgeable about and has experience with the child welfare and family court systems enhances the quality of legal representation in state intervention cases. Involving social workers early in the representation may help to prevent a removal, and ongoing collaboration between the attorney and social worker can increase the family’s chance of reunification and decrease the chances of children re-entering foster care.

Social workers support clients by maintaining ongoing communications, engaging and motivating them to participate in their case plan, and helping them understand their options and make informed decisions. Social workers work with the client and counsel to determine appropriate service plans, to evaluate services or programs suggested for the client or in which the client is participating, and to ensure that the client is not participating in services that are inappropriate and/or are beyond the scope of the case. Social workers accompany and advocate for the client at meetings with child protective/foster care staff, and can serve as liaisons and advocates for clients with service providers and child welfare professionals. In addition, they may engage in community education and outreach that will build support for the attorney’s function and provide the attorney with information about needs of the client community.

Frequent and family-friendly parenting time with the least amount of supervision possible between the client and the child is generally considered to be the most important factor in achieving timely family reunification. *See, e.g.*, Family Visiting for Children in Out- of- Home Care: A Practice Paper, (Informational Letter, NYS Office of Children and Family Services, 2004), accessible at [http://ocfs.ny.gov/main/policies/external/OCFS\\_2004/](http://ocfs.ny.gov/main/policies/external/OCFS_2004/); *see also* Determining the Least Restrictive Level of Supervision Needed During Visits for Families with Children in Foster Care (City of New York, Administration for Children's Services, 2013), Policy and Procedure, #2013/02, accessible at

[http://www.nyc.gov/html/acs/downloads/providers\\_newsletter/march05\\_2013/Visits%20for%20Families%20with%20Children%20in%20FC.pdf](http://www.nyc.gov/html/acs/downloads/providers_newsletter/march05_2013/Visits%20for%20Families%20with%20Children%20in%20FC.pdf).

Social work staff can observe the interactions, make recommendations and/or advocate for more frequent and less restrictive family visits, and can act as a bridge between clients and child welfare professionals regarding any issues related to the visits. The use of trained visit coaches or visit hosts recommended by counsel, in consultation with the client, such as relatives, friends, clergy, community members, or foster parents may be an effective approach to improving the quality and increasing the frequency of family visits.

**G-2. Other Professional Support.** Include other professionals on the legal team as needed to protect the client's interests and advance the client's goals.

### Commentary

The assistance of experts and other ancillary services are among the basic tools needed for high quality representation in state intervention cases. Counsel's collaboration with professionals such as parent or family advocates, family preservation specialists, parenting education experts, psychiatrists, psychologists, forensic pathologists, medical and mental health providers, interpreters, private investigators, and those with expertise in other specific areas relevant to a client's case are often indispensable to counsel's ability to develop and evaluate evidence, advocate for services for the client, and to defend the client against the allegations.

A promising development in parental defense is the use of parent or family advocates. This is a person who has personally experienced the child welfare system, and who, in collaboration with the attorney and the defense team social worker, works closely with the client to provide emotional support, assist with challenging interactions, and help the client improve his or her self-advocacy skills and stay motivated and engaged in services.<sup>2</sup>

Counsel must continually assess the need for such services, and take steps to obtain them, including by *ex parte* motion to the court pursuant to County Law §722-c.<sup>3</sup>

**G-3. Effective Collaboration.** Ensure that all members of the legal team know and follow the principles of effective cross-disciplinary collaboration.

### Commentary

Multidisciplinary practice, in which lawyers work with professionals trained to understand, analyze, and address non-legal aspects of a client's life that impact the legal case, is vital in state intervention matters. To ensure effective cross-disciplinary collaboration, every member of the legal team should:

1. Understand each discipline's training and expertise;
2. Have a common understanding of roles and responsibilities;
3. Have clear and realistic expectations regarding tasks;
4. Have an articulated communication and decision making process;
5. Maintain regular and frequent communication to keep all parties informed and updated;
6. Avoid duplications of efforts; and
7. Present a consistent and aligned message to the client and others involved in the case.

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<sup>2</sup> See e.g., Diane Boyd Rauber, *Working With Parent Partners to Achieve Better Case Outcomes for Families*, Child Law Practice, Vol. 28, no. 11 (American Bar Association, January 2010) (providing parents' attorneys suggestions for working with parent advocates and parents), accessible at [http://www.hunter.cuny.edu/socwork/nrcfcpp/info\\_services/parentpartner2.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/parentpartner2.pdf).

<sup>3</sup> For guidance on obtaining expert funding, see Stephanie Batcheller, Esq., *Defense Practice Tips: Getting the Expert Funds You Need Under County Law §722-c*, (in *Public Defense Center Report*, Volume XXVII Number 4, November-December 2012, New York State Defenders Association (NYSDA), available at [http://www.nysda.org/docs/PDFs/TheReport/2012-Nov-Dec-BackupCenterREPORT-XXVII\\_4.pdf](http://www.nysda.org/docs/PDFs/TheReport/2012-Nov-Dec-BackupCenterREPORT-XXVII_4.pdf)).

**H. Breadth of Representation.** State intervention matters are inherently multi-dimensional, encompassing both legal and non-legal issues. To provide high quality representation, counsel must:

**H-1. Collateral issues.** Advise and counsel clients on basic rights and responsibilities attendant to all legal and non-legal issues impacting the client's case.

### **Commentary**

Matters not specifically arising from the state intervention case can directly affect the client's identified goals in the case. Advising, providing guidance on self-advocacy, representing or obtaining representation, or informally advocating for the client in such matters can assist in attaining the client's goals in the state intervention case. These matters may include, but are not limited to:

1. Child support;
2. Criminal proceedings;
3. Divorce;
4. Domestic violence;
5. Family offenses;
6. Guardianship and kinship guardianship;
7. Housing;
8. Immigration;
9. Mental health proceedings;
10. Paternity;
11. School, education, and special education issues;
12. SSI and other public benefits; and
13. State central registry expunction.

The process of evaluating collateral issues with the client has many benefits. It helps build mutual confidence and respect in the attorney/client relationship, educates the client, assists the client in developing self-advocacy skills, and provides the attorney with insight into the client's goals.

**H-2. Reasonable Efforts.** Monitor and take steps to compel the agency's compliance with the federal reasonable efforts requirement consistent with the client's interests and goals.

### **Commentary**

New York law codifies the federal requirement that agencies make "reasonable efforts" to preserve families. *See, e.g.*, Family Court Act 1022, 1027, 1028, 1052, and 1089. Recognizing that a child's well-being is best served within the child's family, the law provides that "the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home." Social Services Law 384-b(1). "Whether analyzing a removal application under section 1027 or section 1022, or an application for a child's return under section 1028, a court must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal." *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 380 (2004).

The reasonable efforts requirement is an important tool for counsel to prevent unnecessary and inappropriate government intrusion into the lives of families and to obtain appropriate services for the client and the family. The agency's obligation includes, but is not limited to: consultation and cooperation with the parent in developing a plan for appropriate services; making suitable arrangements for visitation, including for an incarcerated parent; provision of services and other assistance to mitigate or resolve the problems preventing the child from remaining in or returning to the client's care; and informing the parents of the child's progress, development, and health. Social Services Law 384-b(7)(f).

Counsel must continually monitor the agency's actions and vigorously advocate for services and resources for the client and the client's family that are available, accessible, and sensitive to the client's cultural and social and economic needs. Counsel must ensure that services offered by the agency or required by the court are relevant to the client's needs and to the issues that brought the family to the agency's attention. Counsel's close and ongoing advocacy with respect to the agency's reasonable efforts mandate is essential to protecting clients' fundamental liberty interests in the integrity of their families and in parental autonomy.

Counsel has a key role in ensuring that the court's determination of whether the agency has satisfied the reasonable efforts requirement is informed, accurate, and well-reasoned. To that end, as necessary to advance the client's interests and goals, throughout the case counsel must prepare and make arguments to the court regarding, among other things:

1. Services proposed by the agency and the relationship of those services to the individual needs and strengths of the family and to the problems cited as the basis for the agency's separation of the family, including what other services the agency might have offered;
2. Steps taken or not taken by agency caseworkers in implementing the agency's case plan for the client, the child, and the family; and
3. Whether services identified were actually available, accessible, culturally appropriate, and delivered on a timely basis to help the family.

Social work staff, including parent or family advocates are often indispensable in identifying appropriate services and assisting the client to successfully engage in and benefit from them. *See* Standards G-1 and H-3.

**H-3. Proactive referrals.** Make or obtain an assessment of necessary and appropriate services, and secure or make timely referrals to appropriate service providers.

### **Commentary**

The ongoing identification and provision of services specifically tailored to ameliorate the conditions which resulted or may result in the need for placement of the child is critically important during a child protective investigation and at all stages of a state intervention case.

Preventive services can prevent removal or lead to speedy reunification of the family. *See generally*, Regulations of the Department of Social Services, 18 NYCRR 423 *et. seq.*<sup>4</sup>

When the child welfare agency is required by law to provide or secure these services pursuant to its reasonable efforts obligation, the attorney must vigorously advocate with the agency and the court to compel the agency's compliance. *See* Standard H-2. The attorney must also independently make timely and appropriate referrals for services so that valuable time for the client to make progress is not wasted, and to support the client's meritorious theories of the case, especially where they are in opposition to the agency's theories.

**I. Representation prior to court intervention.** Representation for clients during child protective service investigations can facilitate better outcomes for families, including the unnecessary break-up of the family unit. To obtain optimum results counsel must:

**I-1. Representation during investigation.** Make efforts to represent clients during child protective services (CPS) investigations prior to court intervention.

### **Commentary**

Legal representation from the start of a child protective investigation, and through the initiation of court action, is associated with better outcomes for children and families. Individual attorneys, institutional supervisors, and assigned counsel administrators should seek to end systemic barriers to legal representation for clients during CPS investigations. Representation of clients during a CPS investigation can prevent the unnecessary removal of children from their families and unnecessary foster care placements; identify resources for children and families more quickly; ensure that clients are engaged as soon as possible in family-strengthening services; and, in some cases, avoid a filing in court altogether.

Therefore, attorneys must have the time, resources, and support staff needed to take all necessary steps, including but not limited to:

1. Receive and process referrals and requests for representation by prospective clients involved in or at risk of being involved in CPS investigations;
2. Explore with the client all available services that might mitigate or eliminate the circumstances and conditions that brought the family to the attention of the agency, and make appropriate referrals;
3. Aggressively gather all relevant discovery and letters of reference to support the client's goals; and
4. Advocate with the agency for services constituting reasonable efforts to avoid removal of the child or the filing of a petition.

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<sup>4</sup> For guidance on using New York State Regulations, see the website of the Center for Family Representation, Inc., Training and Technical Assistance: New York State Regulations at <http://www.cfrny.org/our-work/training-and-technical-assistance/>.

**I-2. Investigation counseling.** Advise the client about the risks and benefits of cooperating during a child protective services investigation.

**Commentary**

Although there may be benefits to the client who cooperates with the agency during its investigation, there are also risks involved. For example, while participation in services offered or recommended by the agency may avoid removal of a child or the filing of a petition for abuse or neglect, clients' statements will be considered as admissions and can be used against them in any court proceeding. When advising the client about cooperating during an investigation, the attorney should take into account whether the child has already been removed, the seriousness of the allegations, the possibility of arrest, and the goals of the client.

The attorney should advise the client that the client retains the following rights during a CPS investigation:

1. The right to refuse agency or police entry into their home without a court order or warrant;
2. The right to refuse to speak to employees of the agency;
3. The right to refuse testing for drug or alcohol use;
4. The right to have an advocate at any conference or meeting with the agency;
5. The right to refuse to sign releases for information about themselves or their children; and
6. The right to refuse to sign a three-day hold under Family Court Act 1021 (temporary removal consent).

**I-3. Investigation advocacy.** Ensure that the attorney or other advocate on the defense team accompanies the client to conferences and meetings with the agency prior to the initiation of court action.

**Commentary**

Clients who attend agency conferences and meetings are often outnumbered by agency staff and may not be made fully aware of their rights or the risks and benefits of cooperating with the agency. The presence of the attorney or a defense team advocate (social worker or parent or family advocate) at these meetings can ensure that clients receive all information necessary to preserve their interest in keeping the family intact, and to make informed decisions about whether it is in the clients' best interest to cooperate and if so, to what extent. Attorneys or defense team advocates can also assist clients in identifying relatives or close family friends who might be able to care for the child and avoid a foster care placement.

Counsel must interview the client prior to the meeting or conference under circumstances where client confidentiality and privilege will attach. The attorney should inquire about the needs of the client's family, and gain an understanding of the client's parenting style and the client's goals regarding the investigation. The attorney or advocate should attend the conference prepared to provide information about the clients' strengths (including family and community supports) and to offer options for eliminating any actual or perceived risk in the home.

**I-4. Application for return of a child.** Advise and counsel the client about the right to file a pre-petition application to the family court for the return of a child who has been removed without a court order pursuant to the agency's emergency removal power, and file such an application if requested by the client.

**Commentary**

A person from whom a child has been removed without a court order pursuant to Family Court Act 1024 must be provided with written notice of the right under Family Court Act 1028 to apply for the return of the child, the right to be represented by counsel, and, if financially eligible, the procedures to follow for obtaining assigned counsel. A pre-petition demand for the return of a child is a valuable tool when the agency has removed a child without the client's consent and has not filed an abuse or neglect petition with the court within 24 hours of the removal. This scenario may arise when the agency has removed a child and placed the child in foster care or the client has been arrested and the agency has placed a child with a relative with the instruction not to allow the client contact with the child. The attorney and client should carefully weigh the benefits and risks of filing this application, which could result in the agency filing a petition that might not have otherwise been filed.

Before filing a pre-petition demand for return of a child, the attorney should determine whether any order of protection exists from any court barring contact between the client and the child, whether there is already an open Family Court case involving the child, and whether the client properly executed a consent under Family Court Act §1022 for the agency to remove the child for three days while it conducts a safety investigation. If any of these circumstances exist, the parent is barred from filing a pre-petition demand for return of the child.

**I-5. Assignment as soon as possible.** Secure assignment to represent the client no later than the first court action.

**Commentary**

Routine entry into state intervention cases as early as possible provides counsel the opportunity to advise clients of their rights and the consequences of failing to participate in the proceedings. Notwithstanding Family Court Act 262's directive that the court advise a person of the right to assigned counsel when the person "first appears in court," representation for the client prior to his or her first court appearance is vital and counsel should take steps to be appointed as far in advance of the first court action as possible.

For example, if the client does not appear at the first scheduled hearing, the attorney can raise objections or questions about whether notice was properly served or, if known, communicate the reason for the client's absence to the court. The attorney should point out that the presence of the attorney in court without the client does not constitute appearance by the client or the client's acceptance of service of the petition.

**J. Continuity and Duration of Representation.** Representation by the same attorney until all legal avenues for relief have been exhausted or replacement counsel begins representing the client is necessary for high quality representation. Therefore, counsel must:

**J-1. Continuity.** Represent the client throughout the case unless the client's needs require otherwise.

**Commentary**

Continuity of representation is critical for establishing the attorney-client relationship and developing the rapport and trust between attorney and client essential to high quality representation. Additionally, continuity of representation decreases delays because the attorney is not required to become familiar with the case every time it is scheduled for an appearance. Finally, an invested attorney can best monitor the case between court hearings.

In rare instances such as emergencies or if a court requires counsel's appearance elsewhere, attorneys may arrange for substitute counsel if it is relatively certain that the substitution will not compromise the client's interests.

**J-2. Duration.** Continue to represent the client's interest until all ethical and professional responsibilities have been fulfilled.

**Commentary**

Representation does not end until:

1. All final orders have been entered and served and the client decides not to appeal; or
2. All final orders have been entered and served, and a notice of appeal has been filed and served along with the application for assignment of appellate counsel and corresponding certification of eligibility for assigned counsel; counsel must comply with any additional relevant rules of court to ensure the assignment of counsel to the client on appeal; or
3. Counsel has been relieved by the court from representing the client.

If the initial assignment includes representation through appeal, then representation ends when there is a final decision on the appeal.

**K. Preliminary Court Proceedings.** High quality representation includes taking steps to establish the attorney-client relationship, protecting the client's interest, and advancing the client's goals at the earliest stages of a case. Counsel must:

**K-1. Initial meeting.** Conduct a face-to-face interview with the client as soon as possible.

**Commentary**

Counsel should meet with the client sufficiently in advance of the first court appearance and regularly thereafter. *See* Standard F-5. Meetings with clients must take place in a confidential setting (not within earshot of opposing parties, counsel or the judge). *See* Standard F-3. At the initial meeting, counsel must:

1. Explain the role of counsel to the client. Thoroughly explain the confidential nature of attorney-client conversations, and instruct the client not to make statements to anyone concerning the case without consulting counsel;
2. Explain the allegations and ascertain the client's understanding of the reason for the agency's actions;
3. If the child has been removed, inquire as to:
  - a. Services and resources provided prior to removal;
  - b. Services and resources the client feels would have avoided removal;
  - c. Alternatives to stranger foster care placements including relative placement, in-home services, or removal of an alleged perpetrator;
  - d. Current agency efforts to reunify the family;
  - e. Family history including identity of prior caretakers of the child;
  - f. Services needed by the child, client, or family;
  - g. The client's concerns about the child's placement; and
  - h. current visitation and the client's desires concerning visitation.
4. Obtain signed releases by the client to allow the attorney access to all relevant records, *see* Standards E-1 and E-3, and advise the client of the potential use of this information and the privileges that attach to this information;
5. Ascertain the client's position and goals; and
6. Advise the client as to the merits of the case, and explain what could happen at the hearing, the potential results of the hearing, and the legal consequences of those results.

A request for a second call or a continuance may be necessary in order to properly consult with the client. The attorney should oppose on the record the conduct of any hearing for which the attorney and client have not had sufficient time and adequate conditions to prepare unless there is a clear strategic benefit in proceeding,

**K-2. Asserting client's rights.** Advise the client of and take action to preserve all applicable constitutional, statutory, and regulatory rights of the client, including revoking, as necessary, any waivers of rights or releases for information about the client or the client's child purportedly given by the client.

### **Commentary**

The constitutional and statutory rights of clients are not self-enforcing, and invocation of certain rights may have deleterious as well as protective effects. Counsel should advise the client of his or her rights, and the relative advantages and disadvantages of asserting each. *See* Standard I-2.

The attorney should review and revoke, as necessary to protect the client, any waivers purportedly given by the client as soon as practicable, and immediately communicate with the agency concerning the client's exercise of his or her rights.

Serious deliberation of case specific factors is required, and the client's informed consent is necessary before waiving any right of the client. Especially during an investigation and

preliminary court proceedings, waiver of rights without the receipt of a real benefit can swiftly and irrevocably bring the client closer to a termination of parental rights proceeding for which there is little or no defense.

**K-3. Motion practice.** Litigate issues to advance the client's interests and objectives.

### **Commentary**

Attorneys must develop legal and advocacy strategies to insure they are well prepared and able to advocate for the full range of the client's objectives. Motion practice and oral applications can advance issues that are critical to the client's objectives, as well as those likely to improve the outcome of the litigation. The attorney must initiate hearings such as those available under Family Court Act 1028 (Application to Return Child Temporarily Removed), Family Court Act 1061 (Staying, Modifying, Setting Aside or Vacating Order), and Family Court Act 1062 (Motion to Terminate Placement). In addition, motions and hearings related to discovery, services, visitation, and placement are valuable tools available to the attorney. Counsel must also respond to, and when appropriate, challenge recommendations, oral applications, and motions made by the agency or the attorney for the child.

Counsel should take immediate action to address agency delay in producing discovery or in referring a client to services, or delays in the progress of parenting time or family visitation, all of which can prejudice a client, as well as make the attorney's job more difficult.

**L. Imminent Risk Hearing.** Because of the potential for unwarranted intrusion into the family, the imminent risk hearing is an event of crucial strategic importance in state intervention cases. Due process demands that counsel must:

**L-1. Right to imminent risk hearing.** Assert and protect the client's right to an imminent risk hearing pursuant to Family Court Act 1022, 1027, or 1028, as appropriate, unless the client waives the right upon informed consent.

### **Commentary**

To ensure the client's due process rights are protected, counsel must be prepared to address impediments to the client's right to an imminent risk hearing such as:

1. **Postponement of the hearing:** If the trial court announces an intention to postpone the imminent risk hearing, and that postponement is inconsistent with the client's interests or goals, counsel should object. If necessary, counsel should consider pursuing the client's rights to a timely hearing by taking an interlocutory appeal.
2. **Time to Prepare:** If it is in the client's interest to postpone the hearing, and if the client consents, counsel should object to the hearing going forward and seek a short continuance. Counsel should argue that the right to counsel includes the right to the effective assistance of counsel and place on the record that counsel cannot be effective without a short continuance to prepare. A request for a

continuance may also benefit the client if the client is unavailable due to illness or some other reason.

3. Denial of right to hearing: If the court denies a client the right to an imminent risk hearing, counsel should consider pursuing the client's right to a hearing by taking an interlocutory appeal if it is in the client's interest.
4. Presence of client. If the client does not appear, counsel must raise the possibility of failure of notice by the court or the agency. If an incarcerated, involuntarily committed or otherwise detained client so desires, counsel must seek transportation for the client to the hearing. If transport is impracticable or a habeas order is unenforceable (as it may be in cases where the client is incarcerated outside the state or in the federal system), counsel must file a motion asking the court to accommodate the client's right to participate in the proceedings through closed circuit television, telephone, or by some other means.

**L-2. Preliminary litigation conduct.** Thoroughly prepare for and actively participate in the imminent risk hearing, consistent with the client's interests and goals, unless there is a sound tactical reason not to do so.

### **Commentary**

Active participation by attorneys in imminent risk hearings is essential to protect clients' rights and interests, and to advance clients' goals. Counsel must take all necessary steps to prepare and actively participate in the imminent risk hearing.

In general, as with any other hearing, counsel must present and cross-examine witnesses, provide evidence in support of the client's position, make all relevant evidentiary objections and offers of proof to preserve the record on appeal, and take all other actions to advocate for the clients' interests and goals. Where appropriate, counsel should present facts and arguments, including but not limited to those relevant to:

1. Jurisdictional sufficiency of the allegations in the petition;
2. Adequacy of notice to parties;
3. Necessity of removal of the child and whether reasonable efforts were or can be made to prevent removal;
4. The balance between the alleged imminent risk of harm to the child from remaining with the client and the harm to the child caused by removal;
5. Alternatives to removal, including but not limited to placement with a non-custodial parent or relative, intensive in-home services, or an order of protection;
6. The child's interests in remaining with the client;
7. Whether the placement proposed is the least disruptive and most family-like setting that meets the needs of the child; and
8. Plan for return of the child if placed out of the home.

If the child is ordered removed from the home, aggressively advocate for regular and frequent parenting time and family visits in a natural setting, and offer potential visit hosts or visit

coaches for the agency and court's consideration, if it is in the client's interest. *See* Standard G-1, Commentary.

**L-3. Post-hearing tasks.** Complete all tasks that are appropriate to the case after the imminent risk hearing and before the fact-finding hearing, including but not limited to:

1. Obtain a written court order for all necessary services. In the event the court will not issue a written order, request that the agency place on the record a statement of all services it claims are required to prevent a removal or for the child to be returned;
2. Challenge unnecessary supervision and restrictions on visitation and advocate for the least intrusive supervision and most liberal visitation in accordance with the client's wishes;
3. Demand scheduling and notice of the case plan meeting;
4. Obtain the date and time for the fact-finding hearing;
5. Monitor enforcement of any orders; and
6. Ensure that agreed upon or court ordered services are being provided by the responsible agencies.

**L-4. Post-hearing motion practice.** File all appropriate pre-trial motions, including, but not limited to, motions for:

1. Discovery;
2. Psychological or other medical assessments;
3. An Order of Protection;
4. Dismissal of the petition or to strike an allegation;
5. A change of placement;
6. Modification of visitation;
7. Termination of placement;
8. Court ordered services;
9. A stay, modification, setting aside or vacating of an order; and
10. Any other court ordered relief.

**L-5. Intermediate appeal.** Promptly advise the client of the availability of an appeal as of right from an intermediate order. If desired by the client, file a notice of appeal with the corresponding certification of eligibility for assigned counsel. *See* Standard R.

**M. Ongoing Investigation.** Investigation is essential to high quality representation. Every case is unique and circumstances change during the pendency of the matter. Counsel must:

**M-1. Continuing inquiries.** Conduct a thorough and independent investigation at every stage of the proceeding.

### **Commentary**

Without a thorough understanding of the facts of the case, counsel cannot provide high quality representation. Counsel must not rely solely on what the agency caseworker reports about the

client. One change of circumstance can radically alter the client's goals and/or counsel's strategy. In addition to continuing contact with the client, counsel must stay abreast of changes by independent investigation throughout the case including prior to pre-trial conferences; motion hearings; the fact-finding hearing; permanency hearings; and the dispositional hearing.

Initially, counsel must immediately:

1. Obtain and examine the application for removal or petition for abuse or neglect, and any supporting documents, including documents that will be submitted in evidence at the hearing;
2. Ascertain the factual allegations, whether removal has occurred or is being contemplated, and whether any related proceedings or investigations are pending;
3. Obtain and thoroughly review the agency case file. Generally, the agency case file is the single most important written record that the attorney needs to review. Determine whether any documents related to the case are not in the file and obtain those records as well;
4. Communicate with the agency case worker to determine the agency view of the case, the client, and the family, and determine what services, if any, have been offered to or engaged in by the family. Discuss the agency's service plan, arrangements for visitation, and the projected date of the child's return;
5. Obtain all other documents critical to the client's defense such as medical and school records. In seeking documents, evaluate whether informal discovery is sufficient or if formal discovery is needed. *See* Standard N. Be prepared to move to obtain a copy of any written report before a preliminary hearing, and to move for a continuance to ensure sufficient time to properly review the report;
6. Determine the circumstances, if any, affecting the client's ability to safely care for the child and that may be relevant to the judge's imminent risk decision; and
7. Identify and obtain admissible evidence supporting the client's goals and interests.

Engaging social workers and/or investigators is crucial at this stage. If necessary, counsel should make an application to the court pursuant to County Law 722-c for funds to hire an investigator and social worker. *See* Standard G.

The investigation should include contact with service providers who work with the client, relatives who can discuss the client's care of the child, the child's teachers, physician, coaches, or other people who can clarify information relevant to the case. The attorney should obtain the names and numbers of all service providers, and have the client execute releases for each service provider permitting the provider to provide information to the attorney.

**M-2. Updated client interview.** Interview the client well before each court appearance, in time to use client information for investigation.

### **Commentary**

The client is usually the best single source of information about the case. Counsel should meet with the client regularly throughout the case. *See* Standard F-5. The meetings should occur well

before the hearing, not at the courthouse just minutes before the case is called. The attorney should conduct follow-up interviews prior to pre-trial conferences; motion hearings; the fact-finding hearing; permanency hearings; and the dispositional hearing.

The attorney must set aside enough time for a thorough interview. When discussion of sensitive or painful information is likely, the attorney must reaffirm to the client the confidential nature of the communication.

**N. Discovery.** To ensure that counsel has all relevant information available to the client's adversary, counsel must:

**N-1. Agency file review.** Review the agency case file periodically throughout the case.

**Commentary**

While an independent investigation is essential, it is also important that counsel determine what information the agency is relying on to further its case. The case file contains information about the family necessary for counsel to prepare for hearings and settlement conferences. If the agency case file is inaccurate, the attorney should seek to correct it.

At the initial appearance, the attorney should ask the court to issue a continuing order directing the agency to provide updated case records, and request updated records at subsequent court appearances before the fact-finding, dispositional, permanency or termination of parental rights hearings.

**N-2. Informal Discovery.** Obtain, on an ongoing basis, all relevant documentation regarding the case, including information that might shed light on the allegations, the service plan, the child's circumstances, and the client's parenting ability.

**Commentary**

Gathering information to contradict the agency's account of the basis of the intervention, verify the client's account, and document the progress the client is making during the case is necessary to provide concrete evidence for the court. Ongoing discovery may also alert counsel to newly arisen issues and allow counsel to intercede with service providers, agency caseworkers, and others.

Discovery should not be limited to information regarding the client, but should include relevant records of third parties including the child, the other parent, stepparent, and relative and non-relative caregivers. The attorney should review all relevant information including social service, court, medical, school, evaluation, and service provider reports and records.

Any of the information that counsel cannot obtain informally must be sought through formal discovery.

**N-3. Formal discovery.** Use formal discovery methods to obtain information not available through informal means.

### **Commentary**

Counsel should know what information is needed to prepare the case and pursue the best methods of obtaining that information. The attorney should become familiar with the pretrial requests and actions used in the jurisdiction and use whatever tools are available to obtain necessary information. *See* Family Court Act 165 (Civil Practice Law and Rules is applicable to Family Court proceedings “where the method of procedure ... is not prescribed” by the Family Court Act or other law giving the court jurisdiction over the proceeding).

Counsel should consider using the following methods of formal discovery: interrogatories (including expert interrogatories), requests for production of documents, requests for admissions, motions for mental or physical examination of a party, and subpoenas and subpoenas *duces tecum*. The attorney must file timely motions for discovery and renew these motions as needed to obtain the most recent records.

Immediately upon appointment, counsel should make a Demand For Inspection and Photocopying of Documents pursuant to Family Court Act 1038 and Civil Practice Law and Rules 3120, and invoke the continuing obligation pursuant to the Demand to provide an opportunity for ongoing photocopying and inspection throughout the proceedings.

The attorney must make a formal demand for a witness list from the agency, attorney for the child, and all opposing counsel, and file a copy with the court as soon as possible after assignment. Curricula vitae and resumes of all experts should be demanded. The attorney must, consistent with the client's interests and goals, take all necessary steps to preserve and protect the client's rights by opposing discovery requests of other parties.

**O. Preparation, Planning and Advocacy.** Strategic planning and zealous advocacy are necessary both in and out of court and at all stages of the case. To ensure high quality representation, counsel must:

**O-1. Ongoing social work support.** Identify and advocate for appropriate services using a multidisciplinary team approach throughout the case.

### **Commentary**

The ongoing identification and provision of services specifically tailored to address the conditions that resulted or may result in removal of a child from the client is critically important at all stages of a state intervention case. Appropriate services can strengthen the family's ability to maintain a child safely at home and lead to timely reunification of the family.

Counsel, in consultation with the client and defense team social work staff, must continually assess the needs of the client, the child, and for other family members consistent with the client's goals and legal interests. *See* Standard G and Standard H. Advocacy for services may be made informally to the agency or treatment providers or by motion to the court. As defined in 18 NYCRR 423.2(b), "preventive services" are "those supportive and rehabilitative services provided to children and their families . . . for the purpose of: averting a disruption of a family which will or could result in placement of a child in foster care; enabling a child who has been placed in foster care to return to his family at an earlier time than would otherwise be possible; or

reducing the likelihood that a child who has been discharged from foster care would return to such care." As set out more fully in section 423.2(b), such services may include, but are not limited to:

1. Case management;
2. Case planning;
3. Family preservation-related prevention or reunification services;
4. Child care;
5. Emergency cash or goods;
6. Emergency shelter;
7. Housing services (including rent subsidies, security deposits; finder's or broker's fees; household moving expenses; exterminator fees; mortgage arrears on client owned property which place the family at imminent risk of losing their home; and/or essential repairs of conditions in rental or client owned property which create a substantial health or safety risk);
8. Domestic violence prevention, intervention, and treatment;
9. Medical and mental health care;
10. Drug and alcohol treatment;
11. Parenting education;
12. Education and job training; and
13. Assistance with transportation to visits and services.

**O-2. Theory of the case.** Develop a case theory and strategy to follow in all aspects of the representation.

#### **Commentary**

During case review, investigation, and preparation for all hearings, counsel should develop and continually reassess a theory of the case that organizes the facts, client objectives and legal basis in support of the client's position.

The theory of the case furnishes the basic position from which counsel determines all preparation and actions in the case. The strategy may change as the facts and circumstances evolve, but the initial theory is important to maintain focus both on the client's wishes and on what is achievable. The theory of the case guides the attorney's continuing investigation and development of evidence, preparation for hearings and arguments to the court, and decisions about steps necessary to attain the client's intermediate and ultimate goals.

**O-3. Out-of-court advocacy.** Prepare for and actively participate in case-related meetings and conferences.

#### **Commentary**

Protection of the client's legal interests and advancement of the client's goals require vigorous advocacy out-of-court as well as in-court. Attendance by counsel, a defense team social worker, or parent or family advocate at case-related meetings, including meetings with service providers, is necessary for proper presentation of the client's perspective, and to gather information necessary to support the theory of the case. *See* Standards G-1 and H.

Counsel's presence is essential at any case-related meeting or conference at which the attorney or client believes legal advice will be needed or at which a major decision about the case will be made. To avoid potential delay or rescheduling of a case-related meeting or conference due to counsel's presence, the attorney should provide advance written notice of his or her intention to attend.

**O-4. Litigate issues.** Timely file all petitions, motions, responses, objections, and briefs necessary to protect the client's interests and advance the client's goals.

**Commentary**

Active litigation of issues is essential to the practical realization of due process of law, and contributes to timely and proper decision-making by the judge and the parties. *See* Family Court Act 261. In addition to filing responsive papers and discovery requests, counsel must proactively seek to obtain and enforce court orders that benefit the client. While negotiation with other parties is sometimes sufficient, counsel must not hesitate to seek court intervention when to do so could benefit the client's case.

Court filings must be thorough, accurate, and timely, and solidly grounded in state and federal law with reference to relevant policy considerations. *See* Standard D-1. Counsel must thoroughly research the issues, and compellingly and convincingly present arguments, whether orally or in writing, to the court. If it would benefit the client's case, counsel must present an unsolicited memorandum of law to the court. Counsel must take necessary steps to preserve issues for appellate review even if the argument is unlikely to prevail at the trial level.

**O-5. Client testimony preparation.** Thoroughly prepare the client to testify.

**Commentary**

For some clients, testifying in court may be empowering or therapeutic, while for others the experience may be traumatic. Counsel must discuss with the client the desirability of the client testifying at trial. Further, counsel must advise the client that an opposing party may call the client as a witness.

Clients retain the right under the 5th Amendment to refuse to answer questions that may incriminate them. If the client chooses to exercise that right, or chooses not to testify on the case in chief, the court is permitted to draw an adverse inference against the client.

Counsel must thoroughly prepare the client for direct and cross-examination. Effective preparation includes discussing and practicing the questions the attorney will ask the client, and advising the client about the types of questions opposing counsel and the attorney for the child may ask. Providing the client with a written list of questions that the attorney will ask may be helpful to the client. The attorney should also consider consulting with a social worker or other mental health professional to help the client prepare for the psychological and emotional experience of testifying.

The client must be informed that the questions and manner of opposing counsel may be upsetting. The attorney must counsel the client on how to present information in a calm and

effective manner. Counsel should also familiarize the client with the court setting, and offer guidance on logistical issues such as getting to court on time and suitable court attire.

**Concurrent criminal matters:** If the client has pending criminal charges, the attorney must consult with criminal defense counsel concerning the ramifications of the client testifying in the state intervention proceeding prior to resolution of the criminal charges. Counsel, in consultation with the client, must weigh the potentially negative consequences of delaying the state intervention proceeding (including the possibility of a termination of parental right petition) against the severity of the punishment in the criminal case, including the stigma of a criminal conviction. If it will benefit the client, counsel should request that the fact-finding hearing be adjourned when related criminal charges are not yet resolved.

**O-6. Witnesses.** Identify, locate, and prepare all witnesses.

### **Commentary**

Witnesses may have direct knowledge of the allegations against the client. They may be service providers working with the client, or individuals from the community who could testify generally about the family's strengths. Counsel, in consultation with the client, must develop a witness list well before any hearing and contact potential witnesses to determine the nature of their testimony.

Counsel must obtain HIPAA releases from the client and other witnesses for whom medical records will be required. Even if a witness that the attorney intends to examine is named on the agency's witness list, the attorney should not assume that the agency will call the witness. The attorney must prepare and serve subpoenas, including judicial subpoenas *duces tecum* for the production of records from a governmental agency; subpoenas *duces tecum* for the productions of records from private individuals and entities; judicial subpoenas *ad testificandum* for witness from governmental agencies; and attorney subpoenas for other witnesses. Counsel should subpoena potential agency employees or agents who have favorable information about the client.

Preparation of witnesses will generally include discussing and practicing specific questions and answers to be asked on direct examination and anticipating questions and answers that might arise on cross-examination. Counsel should provide written questions for those witnesses who need them, and remind the witnesses about the court date.

**O-7. Expert witnesses.** Identify, secure, prepare, and qualify any expert witness. Prepare to cross-examine the opposition's experts, including, when possible, interviewing them.

### **Commentary**

State intervention cases often require multiple experts in different fields, such as physical and mental health, drug and alcohol use, parenting or psychosexual assessments, and others. Experts may be used by either party for ongoing case consultation as well as for providing testimony at trial. *See* Standard G-2.

Counsel must identify necessary experts and, when necessary, seek funds to retain them in a timely manner. To secure court funding, counsel must file an *ex parte* motion setting forth a

particularized showing of necessity.<sup>5</sup> Counsel should take all necessary steps to preserve for appeal any denial of investigative, expert, or interpreter funding, as well as any improper conduct regarding counsel's application.

Effective preparation includes obtaining the names, qualifications, and summaries of expected testimony of any expert witness. Knowing what evidence will be presented against the client and whether the expert has any favorable information that might be elicited on cross-examination will allow counsel to discuss the issues with the client, prepare a defense, and call experts on behalf of the client, if appropriate.

Counsel must conduct an independent investigation of the expert witness. Among the issues to address are the legitimacy and sufficiency of the witness' credentials, and the expert's history of testifying in state intervention cases, including possible bias. If counsel believes the witness is not qualified or the testimony will address a subject matter outside of the witness's expertise, counsel should challenge the witness's qualifications and conduct a *voir dire* of the witness on the record to preserve the issue for possible appellate review.

**P. Hearings.** In addition to the preparation required in preceding Standards, counsel must:

**P-1. Court attendance.** Prepare for and participate in all hearings, including pretrial conferences.

**Commentary**

High quality representation requires that counsel fully participate in any hearing. If an attorney has a conflict with another courtroom appearance, or is otherwise unavailable due to extraordinary circumstances, the attorney must consult with the client, and, if it serves the client's interests, request a short continuance. If both counsel and the client agree, substitute counsel may stand in for that hearing. Counsel should strive to ensure that substitute counsel is familiar with the client, the facts, and the legal theory of the case.

**P-2. Contemporaneous advocacy.** Prepare and make all appropriate motions and evidentiary objections, present and cross-examine witnesses, and prepare and present exhibits.

**Commentary**

To prevent the unwarranted infringement of the client's fundamental right to parent, counsel must zealously and competently represent the client's interests in all hearings.

Counsel must use rules of evidence, court rules, and Family Court procedure to further the client's interests. This includes presenting witnesses, impeaching testimony, and offering documents, photos, and physical objects into evidence. Counsel must make appropriate motions,

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<sup>5</sup> See Batcheller, Getting the Expert Funds You Need Under County Law §722-c, fn. 3.

including motions *in limine*, objections, and arguments, and file briefs in support, to advance the client's interests and preserve legal issues for appeal.

Strong courtroom advocacy takes practice and attention to detail. Counsel at all experience levels should continually develop and refine their trial skills. *See* Standard D-1 Commentary. Complex cases and evidentiary issues may require the most skilled attorneys to consult with other experienced attorneys.

**P-3. Statements and arguments.** Make opening statements and closing arguments.

**Commentary**

Opening and closing remarks using a persuasive narrative are necessary to shape the way the judge views the case. *See* CPLR 4016. Such remarks are an opportunity for counsel to highlight important expert testimony, re-emphasize favorable facts, and reinforce the theory of the case.

**P-4. Proposed findings and orders.** Prepare proposed findings of fact, conclusions of law, a dispositional plan, a permanency plan, and visitation or other orders to assist the court or otherwise benefit the client.

**Commentary**

Preparing proposed findings of fact and conclusions of law frames the case and clarifies desired outcomes before the hearing; filing such documents assists the court's decision and preserves appellate issues. The attorney should offer to provide the proposed findings and orders in electronic format. Counsel must review any proposed findings or orders prepared by other counsel for accuracy before the court signs them.

**P-5. Closed proceedings.** Request closed proceedings (or a cleared courtroom) in appropriate cases.

**Commentary**

Generally, the family court is open to the public. 22 NYCRR 205.4(a). However, the judge may order the exclusion of some or all observers from a proceeding or part of a proceeding after making prior findings that such exclusion is warranted. 22 NYCRR 205.4(b); Family Court Act 1043. Some of the factors the judge may consider include disruptive or potentially disruptive behavior; the objection of any of the parties, the nature of the proceedings, the need for protection of the litigants from harm, and the privacy interests of the parties.

Counsel must consult with the client to determine whether to request exclusion of all observers or a specified individual. The attorney should be aware of whether the case is one in which there is media attention. Confidential or otherwise sensitive information should not be discussed in front of the media without the express permission of the client.

**Q. Post-Hearing.** After each court hearing, counsel must:

**Q-1. Reviewing court orders.** Review any court orders to ensure accuracy and clarity, seek to amend them when needed, and review them with and explain them to the client.

### **Commentary**

Timely explanations and advice from counsel may help counteract the stress and frustration of state intervention proceedings for clients, particularly proceedings that result in unfavorable court orders. Immediately after a hearing or as soon as possible, counsel must discuss the hearing and the outcome with the client. The attorney must counsel the client about all options, including appeal or other post-hearing relief when available. *See* Standard Q-3. Whether or not an appeal will be taken, the attorney should counsel the client about potential consequences of any order, including consequences of not complying with it.

Counsel must immediately review each written order to ensure it reflects what was said on the record. If the order is incorrect, the attorney should take whatever steps are necessary to correct it. Once the order is final, counsel must provide the client with a copy.

**Q-2. Counseling client about court orders.** Take reasonable steps to ensure the client complies with court orders and to determine whether further court action is necessary.

### **Commentary**

Clients often face barriers to compliance with court orders, including lack of information about who to contact with problems in getting to required meetings or services, changes in circumstances affecting the client or the child, and many others. Counsel must actively assist the client to comply with court orders. Counsel must answer any questions the client has about obligations under the order, and regularly check with the client to determine the client's progress, and any difficulties, in complying with the order.

If any other parties are not meeting their responsibilities, counsel must demand compliance on behalf of the client. If necessary, counsel must request court action to address the non-compliance or request review if requirements of the order are unduly burdensome or circumstances hinder the client's ability to comply.

**Q-3. Post-judgment relief counseling.** Consider and discuss with the client appeals or other alternative avenues of relief.

### **Commentary**

Trial counsel must explain the client's right to appeal and counsel the client on the likelihood of success on appeal and potential consequences of an appeal. Trial attorneys without appellate training should consider consulting with an appellate attorney before providing such counseling. *See* Rules of Professional Conduct, Rule 1.1(b) (a lawyer shall not handle a matter when not competent to do so without associating with a lawyer competent to handle it.)

Trial counsel also must consider, and discuss with the client, all possible avenues for relief, including a stay pending appeal, pursuant to Family court Act 1114. Additionally, counsel must consider whether filing a new petition, such as a custody petition or a habeas corpus petition, might provide effective relief for the client.

The attorney must advise the client both the positive and negative effects of each available form of post-judgment relief. For instance, where the findings at trial are partially positive, the intermediate appellate court could exercise de novo review power and alter those positive findings to the detriment of the client. Pursuing an appeal as opposed to a more immediate form of relief could delay the outcome for a long time.

**R. Appeal.** After an appealable order is entered, counsel must:

**R-1. Preserve client's right to appeal.** File a notice of appeal or motion for leave to appeal and the corresponding certification of eligibility for assigned counsel unless the client decides not to appeal.

### **Commentary**

The general rule is that an appeal as of right lies only as to a Family Court order of disposition, that is, the final order in a proceeding; and other appeals must be by permission. However, in the case of Family Court Act Article 10 proceedings, an appeal may be taken as of right from an intermediate order. Consideration should be given to mootness concerns, though, since appeals from intermediate orders are often mooted before the appeal is resolved. In many cases, it will be advisable to await the final order before taking an appeal.

Following entry of an appealable order, counsel must either (1) timely serve and file a notice of appeal or a motion for permission to appeal under Family Court Act 1112 and 1113; or (2) obtain a written waiver of the right to appeal from the client. If the client wishes to appeal, the trial attorney must also ensure the timely filing and service of an application for assignment of appellate counsel and the corresponding certification of eligibility for assigned counsel. Whenever a new attorney is assigned, trial counsel should offer cooperation and insights.

The appellate attorney should have appropriate training in appellate procedure and adhere to relevant standards of representation, including the New York State Office of Indigent Legal Services Appellate Standards and Best Practices. These standards extensively discuss the duties of appellate counsel in mandated representation cases and offer specific guidance as to Family Court appeals.

Trial counsel should file for, or oppose, a stay of enforcement of an order pending appeal when necessary to protect the client's interests. Where the client's trial counsel is not handling the appeal, a delay in the assignment of appellate counsel can delay the filing of a stay application and may harm the chances of obtaining such relief.

Another issue inherent in Family Court appeals is that, while the appeal process is unfolding, the family situation is often evolving. Sometimes it may be appropriate to concurrently make an application for modification of an order during the pendency of an appeal. Trial counsel should maintain contact with appellate counsel to keep him or her informed about any developments in the case that could cause the appeal, or some aspect of it, to become moot.

**R-2. Prompt action and expedited appeals.** Promptly perfect the appeal and seek a preference where it would benefit the client.

**Commentary**

Given the desirability of prompt resolution of state intervention matters, appellant's counsel should perfect the appeal as expeditiously as possible. Family Court Act 1112 provides that such proceedings receive an automatic preference, providing for expedited resolution of the appeal. However, in practice, such appeals often do not proceed promptly due to extensions granted to the parties. Thus, it may be advisable to make a motion pursuant to CPLR 5521 to obtain an expedited briefing schedule.

**R-3. Communicating the results of the appeal.** Promptly advise the client of the results of the appeal and its implications.

**Commentary**

Counsel should communicate the result of the appeal and its implications, and provide the client with a copy of the appellate decision. Counsel should file any motions with the trial court as necessary as a result of the appeal. If the client requests it, the attorney should move for permission to appeal to the Court of Appeals.