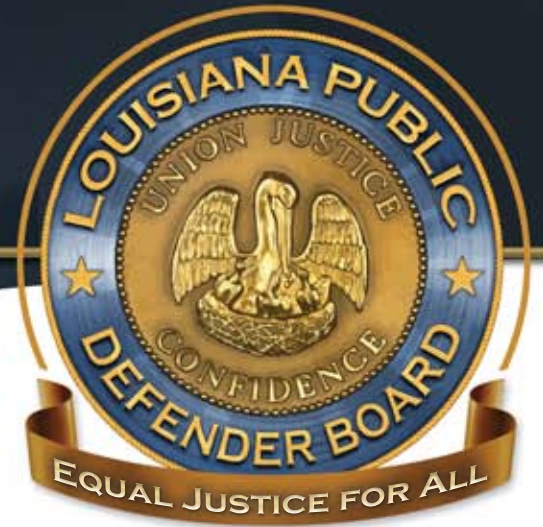


LOUISIANA PUBLIC DEFENDER BOARD

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**Louisiana Public Defender Board  
Trial Court Performance Standards for  
Attorneys Representing Parents in  
Child in Need of Care and Termination  
of Parental Rights Cases**

*Note: All Trial Court Performance Standards for Attorneys Representing Parents in Child in Need of Care and Termination of Parental Rights Cases can be found in Chapter 11, Part XV of Title 22 of the Louisiana Administrative Code, also available online at <http://doa.louisiana.gov/OSR/>*

**Spring 2011**

**Louisiana Public Defender Board**  
500 Laurel Street, Suite 300, Baton Rouge, LA 70801  
(225) 219-9305 (office) (225) 219-9326 (fax)

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Trial Court Performance Standards for  
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**[www.lpdb.la.gov](http://www.lpdb.la.gov)**



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“ . . . [P]arents have a natural, fundamental liberty interest to the continuing companionship, care, custody and management of their children warranting great deference and vigilant protection under the law, and due process requires that a fundamentally fair procedure be followed when the state seeks to terminate the parent-child legal relationship.”

— *Justice Jeannette Theriot Knoll, Louisiana Supreme Court*



## **Mission**

In pursuit of equal justice, the Louisiana Public Defender Board advocates for clients, supports practitioners and protects the public by continually improving the services guaranteed by the constitutional right to counsel.

Through its commitment to performance standards, ethical excellence, data-driven practices and client-centered advocacy, the Louisiana Public Defender Board oversees the delivery of high quality legal services affecting adults, children and families, and supports community well-being across Louisiana.





## **Executive Staff**

Jean M. Faria  
State Public Defender

Julie H. Kilborn  
Deputy Public Defender  
Director of Training

H. Clay Walker  
Deputy Public Defender  
Director of Juvenile Services

Kristy Z. Boxberger  
Juvenile Justice Compliance Officer

John Harvey Craft  
Capital Case Coordinator

John Di Giulio  
Trial-Level Compliance Officer

Laurie Durnin  
Budget Officer

Heather H. Hall  
Special Projects Advisor

Roger W. Harris  
General Counsel

Erik A. Stilling, Ph.D.  
Information Technology & Management Officer

## **4 | Trial Court Performance Standards for Attorneys Representing Parents in Child in Need of Care Cases**

## **Board of Directors**

Frank X. Neuner, Jr., Chairman  
1001 West Pinhook Road, Suite 200  
Lafayette, LA 70503  
Term: 11/03/2008 – 11/02/2012  
Appointed by: Governor

Judge Robert J. Burns (Retired)  
4513 Taft Park  
Metairie, LA 70002  
Term: 01/01/2011 – 12/31/2014  
Appointed by: Chief Justice, Louisiana Supreme Court

Prof. Cleveland R. Coon  
Southern University Law Center  
Post Office Box 9294  
Baton Rouge, LA 70813  
Term: 02/11/2009 - 02/10/2013  
Appointed by: Governor, representing Southern University Law Center

Samuel S. Dalton  
Post Office Box 10501  
New Orleans, LA 70181  
Term: 02/16/2011 - 02/15/2015  
Appointed by: Children's Code Committee - Louisiana State Law Institute

Addison K. Goff, IV  
Post Office Box 2050  
Ruston, LA 71273-2050  
Term: 02/25/2010 – 02/24/2013  
Appointed by: Speaker of the House of Representatives

Leo Hamilton  
1 American Place, Suite 2300  
Post Office Box 3197  
Baton Rouge, 70821  
Term: 02/01/2010 – 01/31/2013  
Appointed by: Governor

Craig F. (Frank) Holthaus  
619 Main Street  
Baton Rouge, LA 70801  
Term: 02/02/2010 – 01/31/2013  
Appointed by: President of the Senate

Rev. Dan Krutz  
527 North Boulevard, 4th Floor  
Baton Rouge, LA 70802  
Term: 01/01/2010 – 12/31/2013  
Appointed by: Executive Director, Louisiana Interchurch Conference

Luceia LeDoux  
400 Poydras Street, Suite 2950  
New Orleans, LA 70130  
Term: 01/01/2010 – 12/31/2013  
Appointed by: Chief Justice, Louisiana Supreme Court

Christine Lipsey  
McGlinchey Stafford, PLLC  
One American Place, 301 Main Street, 14<sup>th</sup> Floor  
Baton Rouge, LA 70825  
Term: 01/22/2011 – 1/21/2015  
Appointed by: President, Louisiana State Bar Association

Thomas L. Lorenzi  
508 Pujot St.  
Lake Charles, LA 70601  
Term: 12/03/2010 – 12/02/2014  
Appointed by: President, Louisiana State Bar Association

Prof. Lucy S. McGough  
Paul M. Hebert School of Law  
Louisiana State University  
Baton Rouge, LA 70803  
Term: 07/01/2008 – 01/30/2012  
Appointed by: Governor, representing Paul M. Hebert Law Center

Prof. Pamela Metzger  
Tulane University School of Law  
6329 Freret Street  
New Orleans, LA 70118  
Term: 08/10/2009 – 08/09/2013  
Appointed by: Governor, representing Tulane University School of Law

Prof. D. Majeeda Snead  
Loyola University School of Law  
7214 St. Charles Avenue, Box 902  
New Orleans, LA 70118  
Term: 03/29/2009 – 03/28/2012  
Appointed by: Governor, representing Loyola University School of Law

Gina Womack  
1600 Oretha Castle Haley Blvd.  
New Orleans, LA 70113  
Term: 06/21/2008 – 06/20/2012  
Appointed by: Louis A. Martinet Society

Judge Robert Brinkman  
3553 Hwy 152  
Opelousas, LA 70570  
Term: Ex Officio  
Appointed by: Louisiana Public Defenders' Association

Rebecca Hudsmith  
102 Versailles Blvd., Suite 816  
Lafayette, LA 70501  
Term: Ex Officio  
Appointed by: Louisiana Association of Criminal Defense Lawyers



## **Trial Court Performance Standards for Attorneys Representing Parents in Child in Need of Care and Termination of Parental Rights Cases**

*Note: The entire Trial Court Performance Standards for Attorneys Representing Parents in Child in Need of Care and Termination of Parental Rights Cases can be found in Chapter 11, Part XV of Title 22 of the Louisiana Administrative Code, also available online at: <http://doa.louisiana.gov/OSR/>*

### **§1101. Purpose**

- A. The standards for parent representation in child in need of care cases are intended to serve several purposes. First and foremost, the standards are intended to encourage district public defenders, assistant public defenders and appointed counsel to perform to a high standard of representation and to promote professionalism in the representation of parents in child in need of care and termination of parental rights cases.
- B. The standards are also intended to alert defense counsel to courses of action which may be necessary, advisable, or appropriate, and thereby to assist attorneys in deciding upon the particular actions to be taken in each case to ensure that the client receives the best representation possible. The standards are further intended to provide a measure by which the performance of district public defenders, assistant public defenders and appointed counsel may be evaluated, including guidelines for proper documentation of files to demonstrate adherence to the Standards, and to assist in training and supervising attorneys.
- C. The language of these standards is general, implying flexibility of action which is appropriate to the situation. In those instances where a particular action is absolutely essential to providing quality representation, the standards use the word “shall.” In those instances where a particular action is usually necessary to providing quality representation, the standards use the word “should.” Even where the standards use the word “shall,” in certain situations, the lawyer’s best informed professional judgment and discretion may indicate otherwise.
- D. These standards are not criteria for the judicial evaluation of alleged misconduct of defense counsel.

### **§1103. Obligations of Defense Counsel**

- A. The primary and most fundamental obligation of an attorney representing a parent in a child in need of care or a termination of parental rights case is to provide zealous and effective representation for his or her client at all stages of the process. The defense attorney’s duty and responsibility is to promote and protect the expressed interests of the client. If personal matters make it impossible for the defense counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client. Attorneys also have an obligation to uphold the ethical standards of the Louisiana Rules of Professional Conduct, to act in accordance with the Louisiana Rules of Court, and to properly document case files to reflect adherence to the standards.



**§1105. General Duties of Defense Counsel**

- A. Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer effective representation to a parent in a child in need of care or termination of parental rights proceeding. If it later appears that counsel is unable to offer effective representation in the case, counsel should move to withdraw.
- B. Counsel shall be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a parent. Counsel shall not represent both parents if their interests differ. The attorney should generally avoid representing both parents when there is even potential for conflict of interest. In situations involving allegations of domestic violence, the attorney shall not represent both parents. When appropriate, counsel may be obliged to seek an advisory opinion from the Office of Disciplinary Counsel on any potential conflicts.
- C. If a conflict is discovered during the course of representation, counsel has a duty to notify the parent and the court in accordance with the Louisiana Rules of Court and in accordance with the Louisiana Rules of Professional Conduct.
- D. Counsel has the obligation to take all reasonable steps to keep the parent informed of the progress of the case.
- E. Counsel has the obligation to ensure that the case file is properly documented to demonstrate adherence to the standards, such as, where relevant, documentation of intake and contact information, client and witness interviews, critical deadlines, motions, and any other relevant information regarding the case. The case file should also contain, where relevant, copies of all pleadings, orders, releases (school, medical, mental health, or other types), discovery, and correspondence associated with the case.
- F. When counsel's caseload is so large that counsel is unable to satisfactorily meet these performance standards, counsel shall inform the district defender for counsel's judicial district and, if applicable, the regional director. If the district defender determines that the caseloads for his entire office are so large that counsel is unable to satisfactorily meet these performance standards, the district defender shall inform the court or courts before whom cases are pending and the state public defender.
- G. Lawyers initially appointed should continue their representation through all stages of the proceedings. Unless otherwise ordered by the court, the attorney of record should continue to represent the client from the point of the initial court proceedings through disposition, post-disposition review hearings, and any other related proceedings until the case is closed.

**§1107. Training and Experience of Defense Counsel Representing a Parent in a Child in Need of Care or Termination of Parental Rights Proceeding**

- A. In order to provide quality legal representation, counsel shall be familiar with the substantive juvenile law and the procedure utilized in child in need of care proceedings, including but not limited to Title VI of the Louisiana Children's Code (La. Ch.C. Articles 601 et seq.), Title X of the Louisiana Children's Code (La. Ch.C. Articles 1001 et seq.) and their applications in the State of Louisiana. Counsel has a continuing obligation to stay abreast of changes and developments in the law.
- B. Prior to agreeing to undertake representation of a parent in a child in need of care or termination of parental rights proceeding, counsel shall have sufficient experience or training to provide effective representation. It is essential for the parent's attorney to read and understand all state laws, policies and procedures regarding child abuse and neglect. In addition, the parent's attorney should be familiar with the following laws to recognize when they are relevant to a case and should be prepared to research them when they are applicable:
  - 1. Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357;
  - 2. Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351;
  - 3. Child Abuse Prevention Treatment Act (CAPTA), P.L.108-36;

4. Indian Child Welfare Act (ICWA) 25 U.S.C. §§ 1901-1963, the ICWA Regulations, 25 C.F.R. Part 23, and the Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979);
5. State Indian Child Welfare Act laws;
6. Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622 (b)(9) (1998), 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. § 1996b (1998);
7. Interstate Compact on Placement of Children (ICPC);
8. Foster Care Independence Act of 1999 (FCIA), P.L. 106-169;
9. Individuals with Disabilities Education Act (IDEA), P.L. 91-230;
10. Family Education Rights Privacy Act (FERPA), 20 U.S.C. § 1232g;
11. Health Insurance Portability and Accountability Act of 1996 (HIPPA), P.L. 104-192 § 264, 42 U.S.C. § 1320d-2 (in relevant part);
12. Public Health Act, 42 U.S.C. Sec. 290dd-2 and 42 C.F.R. Part 2;
13. Louisiana Administrative Code, Title 28, Part XLIII (Bulletin 1706—Regulations for Implementation of the Children with Exceptionalities Act) and Part CI (Bulletin 1508—Pupil Appraisal Handbook).
14. Immigration laws relating to child welfare and child custody;
15. State laws and rules of evidence;
16. State laws and rules of civil procedure;
17. State laws and rules of criminal procedure;
18. State laws concerning privilege and confidentiality, public benefits, education, and disabilities;
19. State laws and rules of professional responsibility or other relevant ethics standards;
20. State laws regarding domestic violence.

### **§1109. Obligations of Counsel Regarding Parent’s Rights**

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

### **§1111. Obligations of Counsel Prior to Filing of Petition**

- A. Counsel, upon notice of appointment, should actively represent a parent prior to the filing of the petition in a case.
  1. The parent’s attorney should counsel the client about the client’s rights in the investigation stage as well as the realistic pros and cons of cooperating with the Office of Children and Family Services (e.g., the parent’s admissions could be used against the client later, but cooperating with services could eliminate a petition filing).
  2. The parent’s attorney should acknowledge that the parent may be justifiably emotional that the agency is

involved with the client's family, and help the client develop strategies so the client does not express that emotion toward the caseworker in ways that may undermine the client's goals.

3. The attorney should discuss available services and help the client enroll in those in which the client wishes to participate.
  4. The attorney should explore conference opportunities with the agency. If it would benefit the client, the attorney should attend any conferences. The attorney should prepare the client for issues that might arise at the conference, such as services and available kinship resources, and discuss with the client the option of bringing a support person to a conference.
  5. The attorney should gather and forward to the agency the names and contact information of any potential temporary placements for the children that the client would like the agency to consider.
  6. The attorney should assess whether the Office of Children and Family Services made the reasonable efforts required before removing the child from the home and the attorney should be prepared to argue a lack of reasonable efforts to the court, whenever appropriate.
- B. Counsel should avoid continuances (or reduce empty adjournments) and work to reduce delays in court proceedings unless there is a strategic benefit for the client.
- C. Counsel should cooperate and proactively communicate regularly with other professionals in the case, including but not limited to all agency (Office of Children and Family Services) personnel.

### **§1113. Counsel's Initial Interview with Client**

#### **A. Preparing for the Initial Interview**

1. Prior to conducting the initial interview the attorney should, where possible:
  - a. be familiar with the allegations against the client;
  - b. obtain copies of any relevant documents which are available, including copies of any reports made by law enforcement, medical personnel or Office of Children and Family Services personnel; and
  - c. determine if any criminal charges have been or are likely to be filed against the client.
2. In addition, where the client is incarcerated, the attorney should:
  - a. be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;
  - b. where applicable, determine if a criminal defense attorney has been appointed regarding the related criminal charges, and develop as soon as is feasible with that attorney a joint strategy for addressing both the criminal charges and the child in need of care proceedings.

#### **B. Conducting the Interview**

1. The purpose of the initial interview is to acquire information from the client concerning the case and the client, and to provide the client with information concerning the case. Counsel should ensure at all interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. In addition, counsel should obtain from the client all release forms necessary to obtain client's medical, psychological, education, military, prison and other records as may be pertinent.
2. Information that should be acquired from the client, such as:
  - a. the facts surrounding the allegations leading to the initiation of a child in need of care proceeding, to the extent the client knows and is willing to discuss these facts;
  - b. where applicable, the client's version of the removal of the child(ren); whether client was interrogated and if so, whether a statement was given; client's physical and mental status at the time the statement was given; whether any samples were provided, such as blood, tissue, hair, DNA, handwriting, etc., and whether any scientific tests were performed on client's body or bodily fluids;
  - c. the name(s) and marital status of all parents of the subject child(ren) and the name of counsel for the other parents (if a conflict has been determined and counsel has been appointed or retained);
  - d. the names and locating information of any witnesses to the alleged abuse and/or neglect; regardless of

- whether these are witnesses for the prosecution or for the defense; the existence of any tangible evidence in the possession of the state and/or Office of Children and Family Services (when appropriate, counsel should take steps to insure this evidence is preserved);
- e. the client's ties to the community, including the length of time he or she has lived at the current and former addresses, any prior names or aliases used, family relationships, immigration status (if applicable), employment record and history, and social security number;
  - f. the client's physical and mental health, educational, vocational and armed services history;
  - g. the client's immediate medical needs, including the need for detoxification programs and/or substance abuse treatment;
  - h. the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; the client's past involvement, if any, with a child in need of care case or the Department of Children and Family Services or, more specifically, the Office of Children and Family Services; counsel should also determine whether the client has any pending charges or outstanding warrants from other jurisdictions or agencies, whether he or she is on probation (including the nature of the probation) or parole, and the client's past or present performance under supervision;
  - i. the names of individuals or other sources that counsel can contact to verify the information provided by the client (counsel should obtain the permission of the client before contacting these individuals); and
  - j. where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the alleged abuse and/or neglect, including releases from the client for any records for treatment or testing for mental health or mental retardation.
3. Information to be provided to the client, includes, but is not limited to:
    - a. taking care to distinguish him or herself from others in the system so the client can see that the attorney serves the client's interests, an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
    - b. a general overview of the procedural progression of the case, the legal issues related to the case, including specific allegations against the client, the case plan, the client's rights in the pending proceeding, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with case plans, as well as the general expectations of the court and the agency, and potential consequences of the client failing to meet those expectations;
    - c. an explanation of the persons involved in a child in need of care case and in any subsequent termination of parental rights proceeding and the role and responsibility each person has;
    - d. contact information in writing and a message system that allows regular attorney-client contact. The attorney should explain that even when the attorney is unavailable, the parent should leave a message. The attorney shall respond to client messages in a reasonable time period; and
    - e. the names of any other persons who may be contacting the client on behalf of counsel.
  4. For clients who are incarcerated:
    - a. communicate with the client on a regular and ongoing basis, including conferring with the client within 72 hours of being appointed and prior to every court appearance;
    - b. where appropriate, explain how the criminal proceedings will relate to the child in need of care and any subsequent termination of parental rights proceedings;
    - c. warn the client of the dangers with regard to the search of client's cell and personal belongings while in custody and the fact that telephone calls, mail, and visitations may be monitored by jail officials; and
    - d. assist client in obtaining services such as substance abuse treatment, parenting skills, or job training while incarcerated.
  5. The parent's attorney and client should discuss timelines that reflect projected deadlines and important dates and a calendar system to remember the dates. The timeline should specify what actions the attorney

and parent will need to take and dates by which they will be completed. The timeline should reflect court deadlines and Office of Children and Family Services deadlines.

6. Counsel should make available to the client copies of all petitions, court orders, service plans, and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule or court order. Counsel should continue throughout the proceedings to provide client all relevant documents. If the client has difficulty reading, the attorney should read the documents to the client. In all cases, the attorney should be available to discuss and explain the documents to the client.

### **§1115. Counsel's Duties Regarding Client Communication**

- A. Counsel shall act in accordance with the duty of loyalty owed to the client. Attorneys representing parents should show respect and professionalism towards their clients. Parents' attorneys should support their clients and be sensitive to the client's individual needs. Attorneys should remember that they may be the client's only advocate in the system and should act accordingly.
- B. Counsel shall adhere to all laws and ethical obligations concerning confidentiality. Attorneys representing parents shall understand confidentiality laws, as well as ethical obligations, and adhere to both with respect to information obtained from or about the client.
- C. Counsel shall meet and communicate regularly with the client well before court proceedings.
- D. Counsel should advocate for the client's goals and empower the client to direct the representation and make informed decisions.
- E. Counsel should identify any potential barriers to the client's cooperation in the proceedings.
  1. The parent's attorney should help the client access information about the child's developmental and other needs by speaking to service providers and reviewing the child's records. The parent needs to understand these issues to make appropriate decisions for the child's care.
  2. The parent's attorney and the client should identify barriers to the client engaging in services, such as employment, transportation, housing and financial issues. The attorney should work with the client, caseworker and service provider to resolve the barriers.
  3. The attorney should be aware of any special issues the parents may have related to participating in the proposed case plan, such as an inability to read or language differences, and advocate with the child welfare agency and court for appropriate accommodations.
- F. Counsel should act with regard to the cultural background and socioeconomic position of the parent throughout all aspects of representation. The parent's attorney should learn about and understand the client's background, and consider how cultural and socioeconomic differences impact interaction with clients.
- G. Counsel should be aware of the client's mental health status and be prepared to assess whether the parent can assist with the case in accordance with Louisiana Rule of Professional Conduct 1.14 (Client with Diminished Capacity). The attorney should be familiar with any mental health diagnosis and treatment that a client has had in the past or is presently undergoing (including any medications for such conditions). The attorney should get consent from the client to review mental health records and to speak with former and current mental health providers. The attorney should explain to the client that the information is necessary to understand the client's capacity to work with the attorney. If the client's situation seems severe, the attorney should also explain that the attorney may seek the assistance of a clinical social worker or some other mental health expert to evaluate the client's ability to assist the attorney.
- H. When appointed as a curator, counsel should undertake diligent efforts to locate a missing parent, including but not limited to investigation and attempts to contact persons who may have information regarding the location of the parent. If the missing parent is found, notify him or her of the pendency and nature of the proceedings. If the missing parent is not found, the defender should stay involved throughout the case, object when necessary to preserve the missing parent's rights, and make periodic attempts to find the parent.

**§1117. Counsel's Duty to Investigate**

- A. Counsel has a duty to conduct a prompt, reasonable and independent investigation at every stage of the proceeding of each case. Counsel should investigate whether the allegations of abuse and/or neglect and disposition are factually and legally correct and the client is aware of potential defenses to the allegations. The parent's attorney cannot rely solely on what the agency caseworker reports about the parent. The attorney could consider contacting service providers who work with the client, relatives who can discuss the parent's care of the child, and the child's teachers or other people who can clarify information relevant to the case.
- B. Counsel should interview the client well before each hearing, in time to use client information for the case investigation. The parent's attorney should meet with the parent regularly throughout the case. The meetings should occur well before the hearing, not just at the courthouse before the case is called before the judge. The attorney should ask the client questions to obtain information to prepare the case and strive to create a comfortable environment so the client can ask the attorney questions. The attorney should use these meetings to prepare for court as well as to counsel the client concerning issues that arise during the course of the case.
- C. Counsel should consider the necessity to interview the potential witnesses, including any adverse to the accused, as well as witnesses favorable to the accused. Interviews of witnesses adverse to the accused should be conducted in a manner that permits counsel to effectively impeach the witness with statements made during the interview, either by having an investigator present or, if that is not possible, by sending the investigator to conduct the interview.
- D. Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless sound tactical reasons exist for not doing so. Counsel should obtain National Crime Information Center or other states' criminal history records for the client and for the prosecution witnesses.
- E. Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should examine any such physical evidence.
- F. Counsel should secure the assistance of experts where it is necessary or appropriate to:
  - 1. the preparation of the defense;
  - 2. adequate understanding of the agency's case; or
  - 3. rebut the agency's case.

**§1119. Informal Discovery**

- A. The parent's attorney should review the child welfare agency case file as early during the course of representation as possible and periodically thereafter.
- B. The parent's attorney should obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the caseworker and providers.

**§1121. Formal Discovery**

- A. The parent's attorney should use formal discovery methods to obtain information and inspect evidence as permitted by La. Ch.C. Art. 652.
- B. Counsel should consider seeking discovery, at a minimum, of the following items:
  - 1. potential exculpatory information;
  - 2. potential mitigating information;
  - 3. the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
  - 4. all oral and/or written statements by the accused, and the details of the circumstances under which the statements were made;
  - 5. the prior criminal record of the accused and any evidence of other misconduct that the government may

intend to use against the accused;

6. all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
7. all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
8. all investigative reports by all law enforcement and other agencies involved in the case; and
9. all records of evidence collected and retained by law enforcement.

### **§1123. Court Preparation**

- A. During investigation and trial preparation, counsel should develop and continually reassess a theory of the case and strategy to follow at hearings and negotiations.
- B. Counsel for parents should engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.
  1. The parent's attorney should know about the social, mental health, substance abuse treatment and other services that are available to parents and families in the jurisdiction in which the attorney practices so the attorney can advocate effectively for the client to receive these services. The attorney should ask the client if the client wishes to engage in services. If so, the attorney should determine whether the client has access to the necessary services to overcome the issues that led to the case.
  2. The attorney should actively engage in case planning, including attending major case meetings and family team conferences, to ensure the client asks for and receives the needed services. The attorney should also ensure the client does not agree to undesired services that are beyond the scope of the case.
  3. Whenever possible, the parent's attorney should engage or involve a social worker as part of the parent's "team" to help determine an appropriate case plan, evaluate social services suggested for the client, and act as a liaison and advocate for the client with the service providers.
- C. Counsel for parents should research applicable legal issues and advance legal arguments when appropriate.
- D. Counsel for parents shall timely file all appropriate pleadings, motions, and briefs.
  1. Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the parent is entitled to relief which the court has discretion to grant.
  2. The decision to file pretrial motions should be made after considering the applicable law in light of the known circumstances of each case.
  3. Among the issues that counsel should consider addressing in a pretrial motion are:
    - a. the constitutionality of the implicated statute or statutes;
    - b. the potential defects in the charging process;
    - c. the sufficiency of the charging documents;
    - d. the discovery obligations of the prosecution/agency and the reciprocal discovery obligations of the defense; and
    - e. access to resources which, or experts, who may be denied to an accused because of his or her indigence.
- E. Counsel for parents should aggressively advocate for regular visitation in a family-friendly setting. Factors to consider in visiting plans include:
  1. frequency;
  2. length;
  3. location;
  4. supervision;
  5. types of activities; and
  6. visit coaching - having someone at the visit who could model effective parenting skills.
- F. With the client's permission, and when appropriate, counsel for parents should engage in settlement

negotiations and mediation to resolve the case. Counsel should adhere to all laws and ethical obligations concerning confidentiality and participate in such proceedings in good faith.

1. Counsel should keep the client fully informed of any continued discussion concerning stipulating and related negotiations and promptly convey to the accused any offers made by the prosecution/agency for a negotiated settlement.
  2. Counsel shall not accept any stipulation agreement without the client's express authorization. Prior to entering any stipulation, counsel should ensure that client understands the potential consequences of certain stipulations, particularly the potential for a subsequent termination of parental rights.
  3. The existence of ongoing tentative stipulation negotiations with the prosecution/agency should not prevent counsel from taking steps necessary to preserve a defense nor should the existence of ongoing stipulation negotiations prevent or delay counsel's investigation into the facts of the case and preparation of the case for further proceedings, including trial.
  4. In order to develop an overall negotiation plan, counsel should be aware of, and make sure the client is aware of:
    - a. the conditions proposed by the Office of Children and Family Services;
    - b. the spectrum of possible outcomes;
    - c. other consequences of adjudication, including but not limited to the impact on any potential criminal investigation or subsequent termination of parental rights proceeding;
    - d. concessions that the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:
      - i. not to proceed to adjudication;
      - ii. decline from asserting or litigating any particular pretrial motions; and
      - iii. an agreement to fulfill specified, written conditions; and
    - e. benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:
      - i. to enter into an informal adjustment agreement;
      - ii. reunification with particular conditions;
      - iii. to dismiss or reduce one or more charged criminal offenses either immediately, or upon completion of a deferred prosecution agreement; and
      - iv. that the respondent will not be subject to further investigation or prosecution for uncharged alleged criminal conduct.
  5. In conducting stipulation negotiations, counsel should be familiar with:
    - a. the advantages and disadvantages of stipulation according to the circumstances of the case; and
    - b. the various types of stipulations that may be agreed to, including but not limited to a stipulation without admitting the allegations.
  6. In conducting negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority, and Office of Children and Family Services personnel which may affect the content and likely results of negotiated agreements.
- G. Counsel for parents should thoroughly prepare the client to testify at the hearing;
- H. Counsel for parents should identify, locate and prepare all witnesses; and
- I. Counsel for parents should identify, secure, prepare and qualify expert witness when needed. When permissible, counsel should interview opposing counsel's experts.

### **§1125. Entering the Negotiated Stipulation before the Court**

- A. Prior to the entry of a stipulation, counsel should:
1. make certain that the client understands the rights he or she will waive by entering the stipulation and that the client's decision to waive those rights is knowing, voluntary and intelligent;



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2. make certain that the client receives a full explanation of the conditions and limits of the stipulation and the potential outcomes and collateral consequences the client will be exposed to by entering a stipulation; and
  3. explain to the client the nature of the stipulation and prepare the client for the role he or she will play in the proceeding, including answering questions of the judge and, where appropriate, providing a statement concerning the allegations.
- B. When entering the stipulation, counsel should make sure that the full content and conditions of the stipulation agreement are placed on the record before the court.

**§1127. Counsel's Duties at Continued Custody Hearing**

- A. At the continued custody hearing, counsel for a parent should take steps to see that the hearing is conducted in a timely fashion pursuant to La. Ch. C. Art. 624, unless there are strategic reasons for not doing so.
- B. In preparing for the continued custody hearing, the attorney should become familiar with:
1. the alleged abuse and/or neglect;
  2. the law of establishing grounds of abuse and neglect (La. Ch. C. Art. 606);
  3. the requirement that the department made reasonable efforts to prevent or eliminate the need for the child(ren)'s removal before taking custody of the child(ren); and
  4. the subpoena process for obtaining compulsory attendance of witnesses at the continued custody hearing and the necessary steps to be taken in order to obtain a proper recordation of the proceedings.
- C. Counsel for a parent should be prepared, in keeping with an overall case strategy, to present reasonable terms of return/reunification of children, with potential conditions, at the continued custody phase.

**§1129. Counsel's Duty of Preparation for Adjudication**

- A. Where appropriate, counsel should have the following materials available at the time of adjudication:
1. copies of all relevant documents filed in the case;
  2. relevant documents prepared by investigators;
  3. cross-examination plans for all possible prosecution witnesses;
  4. direct examination plans for all prospective defense witnesses;
  5. copies of defense subpoenas;
  6. prior statements of all prosecution witnesses (e.g., transcripts, police reports) and counsel should have prepared transcripts of any audio or video taped witness statements;
  7. prior statements of all defense witnesses;
  8. reports from defense experts;
  9. a list of all defense exhibits, and the witnesses through whom they will be introduced;
  10. originals and copies of all documentary exhibits; and
  11. copies of all relevant statutes and cases.
- B. Counsel should be fully informed as to the rules of evidence, court rules, and the law relating to all stages of the adjudication process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise at adjudication.
- C. Counsel should request the opportunity to make opening and closing arguments. When permitted by the judge, counsel should make opening and closing arguments to best present the theory of the case.
- D. Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.
- E. Throughout the adjudication process counsel should endeavor to establish a proper record for appellate

review. Counsel shall be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and should insure that a sufficient record is made to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so.

- F. Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, if necessary, counsel should consider filing pre-trial motions to insure that the client has appropriate clothing.
- G. Counsel should plan with the client the most convenient system for conferring throughout the adjudication hearing. Where necessary, counsel should seek a court order to have the client available for conferences.
- H. Counsel should prepare proposed findings of fact, conclusions of law, and orders when they will be used in the court's decision or may otherwise benefit the client.
- I. Counsel shall take necessary steps to insure full official recordation of all aspects of the court proceeding.

**§1131. Right to Closed Proceedings (or a Cleared Courtroom)**

- A. In accordance with La. Ch.C. Art. 407, the parent's attorney should be aware of who is in the courtroom during a hearing and should request the courtroom be cleared of individuals not related to the case when appropriate.
- B. The attorney should be attuned to the client's comfort level with people outside of the case hearing about the client's family.

**§1133. Preparation for Challenging the Prosecution's/Agency's Case**

- A. Counsel should attempt to anticipate weaknesses in the prosecution's case and consider researching and preparing corresponding motions to dismiss.
- B. Counsel should consider the advantages and disadvantages of entering into factual stipulations concerning the prosecution's case.
- C. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
- D. In preparing for cross-examination, counsel should:
  - 1. consider the need to integrate cross-examination, the theory of the defense and closing argument;
  - 2. consider whether cross-examination of each of the individual witnesses is likely to generate helpful information;
  - 3. anticipate those witnesses the prosecution might call in its case-in-chief or in rebuttal;
  - 4. consider a cross-examination plan for each of the anticipated witnesses;
  - 5. be alert to inconsistencies in a witnesses' testimony;
  - 6. be alert to possible variations in witnesses' testimony;
  - 7. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  - 8. have prepared a transcript of all audio or video tape recorded statements made by the witnesses;
  - 9. where appropriate, review relevant statutes and local police policy and procedure manuals, disciplinary records and department regulations for possible use in cross-examining police witnesses;
  - 10. be alert to issues relating to witnesses' credibility, including bias and motive for testifying; and
  - 11. have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including certified copies of records such as prior convictions of the witnesses or prior sworn testimony of the witnesses.

- E. Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.
- F. Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.
- G. Where appropriate, at the close of the prosecution's case, counsel should move for a finding that the child is not in need of care. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

### **§1135. Presenting the Respondent's Case**

- A. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its burden of proving its case by a preponderance of the evidence.
- B. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should explain to the client the constitutional right to not testify and weigh the value of doing so with the client.
- C. In preparing for presentation of a defense case, counsel should, where appropriate:
  - 1. develop a plan for direct examination of each potential defense witness;
  - 2. determine the implications that the order of witnesses may have on the defense case;
  - 3. determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
  - 4. consider the possible use of character witnesses;
  - 5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
  - 6. review all documentary evidence that must be presented; and
  - 7. review all tangible evidence that must be presented.
- D. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- E. Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
- F. Counsel should conduct redirect examination as appropriate.
- G. At the close of the defense case, counsel should renew the motion for a finding that the child is not in need of care.

### **§1137. Obligations of Counsel at Disposition Hearing**

- A. Counsel for a parent, regarding the disposition process, should:
  - 1. where a respondent chooses not to proceed to adjudication, ensure that a stipulation agreement is negotiated with consideration of the dispositional implications;
  - 2. ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the disposition;

3. ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court; and
4. develop a plan which seeks to achieve the least restrictive and burdensome disposition that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the case.

#### **§1139. Preparation for Disposition**

- A. In preparing for disposition, counsel should consider the need to:
  1. inform the client of the dispositional alternatives, and the likely and possible consequences of those alternatives;
  2. maintain regular contact with the client prior to the disposition hearing, and inform the client of the steps being taken in preparation for same;
  3. obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, financial status, family obligations, and sources through which the information provided can be corroborated;
  4. inform the client of his or her right to testify at the disposition hearing and assist the client in preparing the testimony, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal;
  5. inform the client of the effects that admissions and other statements may have upon an appeal, termination of parental rights proceedings, or other judicial proceedings, such as criminal proceedings; and
  6. collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the disposition hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence.

#### **§1141. The Prosecution's Position at Disposition**

- A. Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution/agency will advocate that a particular disposition be imposed.

#### **§1143. The Disposition Process**

- A. Counsel should be prepared at the disposition hearing to take the steps necessary to advocate fully for the requested disposition and to protect the client's interest.
- B. In the event there will be disputed facts before the court at the disposition hearing, counsel should be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.
- C. Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.
- D. Where appropriate, counsel should prepare the client to personally address the court.

#### **§1145. Termination of Parental Rights Proceedings**

- A. Counsel should be aware of and advise the client of the gravity and potential permanent effects of a termination of parental rights petition. A termination of parental rights ruling has a serious impact as the parent can lose

all rights to visitation, custody, and contact with the child. Counsel should treat any termination hearings with the respect, dedication, and commitment such a serious matter deserves.

**B.** Counsel should meet or exceed the standards set forth below.

**1.** Preparation for termination of parental rights hearing:

- a. where appropriate, counsel should have the following materials available at the time of the termination hearing:
    - i. copies of all relevant documents filed in the case;
    - ii. relevant documents prepared by investigators;
    - iii. cross-examination plans for all possible prosecution witnesses;
    - iv. direct examination plans for all prospective defense witnesses;
    - v. copies of defense subpoenas;
    - vi. prior statements of all prosecution witnesses (e.g., transcripts, police reports) and counsel should have prepared transcripts of any audio or video-taped witness statements;
    - vii. prior statements of all defense witnesses;
    - viii. reports from defense experts;
    - ix. a list of all defense exhibits, and the witnesses through whom they will be introduced;
    - x. originals and copies of all documentary exhibits; and
    - xi. copies of all relevant statutes and cases;
  - b. counsel should be fully informed as to the rules of evidence, court rules, and the law relating to all stages of the termination process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise at termination hearings;
  - c. counsel should request the opportunity to make opening and closing arguments. When permitted by the judge, counsel should make opening and closing arguments to best present the theory of the case;
  - d. counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings;
  - e. throughout the termination hearing process, counsel should endeavor to establish a proper record for appellate review. Counsel shall be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and should insure that a sufficient record is made to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so;
  - f. where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, if necessary, counsel should consider filing pre-trial motions to insure that the client has appropriate clothing;
  - g. counsel should plan with the client the most convenient system for conferring throughout the termination hearing. Where necessary, counsel should seek a court order to have the client available for conferences;
  - h. counsel should prepare proposed findings of fact, conclusions of law, and orders when they will be used in the court's decision or may otherwise benefit the client;
  - i. counsel shall take necessary steps to insure full official recordation of all aspects of the court proceeding.
- 2.** Right to Closed Proceedings (or a Cleared Courtroom)
- a. In accordance with La. Ch.C. Art. 407, the parent's attorney should be aware of who is in the courtroom during a hearing and should request the courtroom be cleared of individuals not related to the case when appropriate.
  - b. The attorney should be attuned to the client's comfort level with people outside of the case hearing about the client's family.
- 3.** Preparation for Challenging the Prosecution's/Agency's Case

- a. Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment denying termination of parental rights.
  - b. Counsel should consider the advantages and disadvantages of entering into factual stipulations concerning the prosecution's case.
  - c. In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
  - d. In preparing for cross-examination, counsel should:
    - i. consider the need to integrate cross-examination, the theory of the defense and closing argument;
    - ii. consider whether cross-examination of each of the individual witnesses is likely to generate helpful information;
    - iii. anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;
    - iv. consider a cross-examination plan for each of the anticipated witnesses;
    - v. be alert to inconsistencies in witness testimony;
    - vi. be alert to possible variations in witness testimony;
    - vii. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
    - viii. have prepared a transcript of all audio or video tape recorded statements made by the witnesses;
    - ix. where appropriate, review relevant statutes and local police policy and procedure manuals, disciplinary records and department regulations for possible use in cross-examining police witnesses;
    - x. be alert to issues relating to witness credibility, including bias and motive for testifying; and
    - xi. have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including certified copies of records such as prior convictions of the witness or prior sworn testimony of the witness.
  - e. Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.
  - f. Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.
  - g. Where appropriate, at the close of the prosecution's case, counsel should move for a judgment upholding the parental rights of the client. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.
4. Presenting the Respondent's Case
- a. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its burden of proving its case by a preponderance of the evidence.
  - b. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should explain to the client the constitutional right to not testify and weigh the value of doing so with the client.

- c. In preparing for presentation of a defense case, counsel should, where appropriate:
    - i. develop a plan for direct examination of each potential defense witness;
    - ii. determine the implications that the order of witnesses may have on the defense case;
    - iii. determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution's witnesses;
    - iv. consider the possible use of character witnesses;
    - v. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
    - vi. review all documentary evidence that must be presented; and
    - vii. review all tangible evidence that must be presented.
  - d. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
  - e. Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
  - f. Counsel should conduct redirect examination as appropriate.
  - g. At the close of the defense case, counsel should renew the motion for a judgment upholding the parental rights of the client.
- C. Whenever appropriate, counsel should consider an appeal of an unfavorable verdict.

**§1147. Review Court Orders to Ensure Accuracy and Clarity and Review with Client**

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

**§1149. Motion for Rehearing**

- A. Counsel should be familiar with the procedures available to request a rehearing including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.
- B. When the court has adjudicated the subject child(ren) a child in need of care or has ordered a termination of parental rights, counsel should consider whether it is appropriate to file a motion for rehearing with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:
  - 1. the likelihood of success of the motion, given the nature of the error or errors that can be raised; and
  - 2. the effect that such a motion might have upon the respondent's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the respondent's right to raise on appeal the issues that might be raised in the new trial motion.

**§1151. Take Reasonable Steps to Ensure the Client Complies with Court Orders**

- A. The parent's attorney should answer the parent's questions about obligations under the order and periodically check with the client to determine the client's progress in implementing the order.

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

**§1153. Consider and Discuss the Possibility of Appeal with the Client**

- A. The parent's attorney should consider and discuss with the client the possibility of appeal when a court's ruling is contrary to the client's position or interests.
- B. The attorney should counsel the client on the likelihood of success on appeal and potential consequences of an appeal.
- C. The attorney shall also comply with all ethical rules and rules of courts of appeal concerning the attorney's determination that there is a reasonable basis for the appeal.
- D. Depending on rules in the attorney's jurisdiction, the attorney should also consider filing an extraordinary writ or motions for other post-hearing relief.

**§1155. Appeals**

- A. If the client decides to appeal, counsel should timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the jurisdiction's rules of appellate procedure.
- B. The appellate brief should be clear, concise, and comprehensive and also timely filed. The brief should reflect all relevant case law and present the best legal arguments available in state and federal law for the client's position. The brief should include novel legal arguments if there is a chance of developing favorable law in support of the parent's position.
- C. If oral arguments are scheduled, the attorney should be prepared, organized, and direct. Appellate counsel should inform the client of the date, time and place scheduled for oral argument of the appeal upon receiving notice from the appellate court. Oral argument of the appeal on behalf of the client should not be waived, absent the express approval of the client, unless doing so would benefit the client.

**§1157. Expedited Appeals**

- A. The attorney should request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending.
- B. The attorney should provide information about why the case should be expedited, such as any special characteristics about the child and why delay would harm the relationship between the parent and child.

**§1159. Communication with Client Pending and After Appeal**

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



*Trial Court Performance Standards for Attorneys Representing Parents in Child in Need of Care and Termination of Parental Rights Cases* were promulgated in accordance with La. R.S. 15:148.

*Trial Court Performance Standards for Attorneys Representing Parents in Child in Need of Care and Termination of Parental Rights Cases* were promulgated in the Louisiana Register 37:321 (January 2011).

**Louisiana Public Defender Board**

500 Laurel Street, Suite 300, Baton Rouge, LA 70801

(225) 219-9305 (office) (225) 219-9326 (fax)

**[www.lpdb.la.gov](http://www.lpdb.la.gov)**

Through its performance standards and commitment to data-driven policies, the Louisiana Public Defender Board will be accountable to the policy makers who supported the vision of fair public defense for all, to the tax payers who fund our programs, to the defenders who keep the system running, to the clients who depend on us to protect and defend their rights, and to the Louisiana community, who will be safer and stronger because we exist.

*The Louisiana State Constitution guarantees that “... at each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment...It is the responsibility of the legislature to provide for a uniform system for securing and compensating qualified counsel for indigents.”*

— Louisiana State Constitution, 1974, Article I, §13