

**a. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION
OF CLIENTS IN CIVIL COMMITMENT CASES**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

These standards generally describe the steps which should be taken by an attorney who is assigned pursuant to M.G.L. ch. 123, sec. 5, to represent a person in a civil commitment case who risks a six-month or one year civil commitment in a mental health facility. [See also standards for authority to treat proceedings which follow this section.]

1. The role of the attorney in a commitment case is to act as an advocate for the respondent, in opposition to the petition and to insure that the respondent is afforded all of his/her due process and other rights. At a minimum, counsel must insure that the petitioning facility is made to meet its burden of proving, beyond a reasonable doubt, that the respondent meets the criteria for commitment.
2. Immediately upon receipt of the assignment of a case the attorney shall: (a) file an appearance in court; (b) communicate with the client to inform the client of the assignment; (c) arrange to meet with the client (if the attorney's schedule does not permit him/her to meet with the client no later than the next business day and promptly begin to work on the case, the attorney shall decline the assignment); and (d) shall not agree to a continuance of the case without first consulting with the client and obtaining his/her consent.
3. The attorney shall meet with the client as soon as possible, but in no event later than the next business day following the assignment. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, to explain the commitment law and procedures to the client, to discuss the alternatives to continued hospitalization available to the client, to determine the client's version of the facts which led to the filing of the petition, and to determine the client's wishes regarding the litigation. While not required, the attorney should seek to obtain from his/her client written authorization to examine the client's medical record or, where the client is unable or unwilling to provide such authorization, a court order authorizing such examination. Finally, the attorney shall discuss the possibility of an independent evaluation.
4. If the attorney believes an independent examination will aid the client, and the client agrees to such an evaluation, the attorney shall file a motion for funds for an independent examination by a clinician of the client's choice and at the Commonwealth's expense. The client should be advised that such an examination will take time and may cause delay.
5. The attorney shall contact the independent clinician if a motion for funds is allowed. The attorney shall remind the doctor that his/her report is the property of the client and should be sent to the attorney, and that the report is not to be filed with the court or disclosed to the hospital attorney or staff

without the permission of the patient's attorney. See *Commonwealth v. Thompson*, 386 Mass. 811 (1982). The attorney should also remind the doctor that the purpose of the examination is to evaluate: (i) the client's current mental state; (ii) the likelihood of serious harm if the client were to be discharged; (iii) the client's ability to care for himself outside of the hospital; (iv) the feasibility of any less restrictive alternatives to hospitalization; and (v), if commitment to Bridgewater State Hospital is sought, the need for "strict security."

6. The attorney shall thoroughly investigate the facts. This investigation shall include reading the complete medical records and interviewing the hospital staff, including the doctors, nurses, social workers and other staff. The attorney should also speak to other patients on the ward, friends and family members of the client, and staff of any other programs familiar with the client.

7. The attorney shall use formal discovery mechanisms if indicated and tactically advisable.

8. After reviewing the medical record and the commitment petition the attorney shall determine if any procedural defenses can be raised and, if appropriate, file appropriate motions with supporting memoranda. (Procedural defenses can be raised, for example, if the hospital failed to file the petition at the appropriate time or if the hearing has not been commenced within the four- or fourteen-day time period required by the statute, or if the petition fails to set forth facts in support of the petition. See *Hashimi v. Kalil*, 388 Mass. 607 (1983) and M.G.L. c.123, §7(c)).

9. After developing a thorough knowledge of the law and facts of the case, the attorney shall meet again with his/her client for the purpose of discussing strategy and alternatives to commitment. The attorney shall discuss with the client any available alternatives to commitment. These may include the participation in an out-patient psychotherapy and counseling program, a community support program, a day treatment program, or placement in a less restrictive environment such as a half-way house, a group residence, or an apartment program. The attorney should make it clear to the client that the ultimate decision regarding the proposal of alternatives to commitment must be made by the client. The attorney should reassure the client that the attorney will stand behind the client's decision and forcefully advocate the client's position.

10. After this client meeting, and if appropriate, the attorney shall enter into negotiations with relevant persons concerning the case (e.g. discussions with the treating physician(s) regarding alternatives to hospitalization; discussions with social workers and DMH area office officials or other providers regarding the availability of alternative placements).

11. If the attorney and the hospital can agree to a negotiated settlement the attorney shall meet with her/his client to explain the terms of the agreement and obtain the client's consent to the settlement. Should the client decline the settlement offer, the attorney shall be prepared to try the civil commitment case.

12. Prior to the hearing the attorney shall identify potential witnesses who will testify in support of the client. Where necessary, witnesses should be subpoenaed. The attorney shall meet with the witnesses in advance of the trial in order to prepare them for direct and cross-examination. The

attorney shall review the medical record and identify those parts of the record which should not be admitted into evidence. The attorney should determine the identity of the hospital's witnesses in advance of the hearing, and make an effort, if tactically indicated, to interview them on the record and prepare appropriate cross-examination. The attorney shall discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney shall thoroughly prepare the client for direct and cross-examination.

13. During the hearing the attorney shall act as a zealous advocate for the client, insuring that the proper procedures are followed and that the client's interests are well represented.

14. After the hearing, the attorney shall meet with the client to explain the court's decision. If the client is committed, the attorney shall explain the client's right to appeal pursuant to M.G.L. ch.123, §9(a) and the client's right to file a petition for discharge in the superior court under M.G.L. ch.123, §9(b), and shall assist the client in doing so. (Where an appeal is filed the attorney shall, without delay, notify CPCS' Mental Health Litigation Unit in order that appellate counsel may be assigned). The attorney shall review the evidence which was presented at the hearing in order to advise the client about any steps the client can take during the commitment period in order to be discharged from the hospital.

**b. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF
INDIGENT ADULTS
IN GUARDIANSHIP PROCEEDINGS UNDER G.L. c. 190B
(INCLUDING "SUBSTITUTED JUDGMENT" MATTERS)
AND IN AUTHORIZATION TO TREAT PROCEEDINGS UNDER G.L. c. 123**

These standards describe the steps which must, at a minimum, be taken by an attorney who has been assigned to represent an adult client in the Probate Court Department against whom has been initiated a guardianship proceeding, pursuant to G.L. c. 190B, or a client in the District Court Department against whom a petition seeking the authority to administer antipsychotic medication or other medical treatment for mental illness has been filed, pursuant to G.L. c. 123, § 8B. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct, as well as all applicable CPCS policies and procedures.

1. The role of counsel is to diligently and zealously advocate on behalf of his or her client, within the scope of the assignment, to ensure that the client is afforded all of his or her due process and other rights. To that end, only in exceptional circumstances may counsel stipulate to the client's incapacity; provided, however, that in proceedings in which a substituted judgment determination is required, counsel must oppose the petition and present "all reasonable alternatives" to the proffered treatment for the court's consideration. *See In the*

Matter of Moe, 385 Mass. 555, 567 (1982); *Superintendent of Belchertown State School. v. Saikewicz*, 373 Mass. 728, 757 (1977).

Further, under G.L. c. 190B, upon a finding of incapacity, the probate court is required to

exercise [its] authority . . . so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure.

G.L. c. 190B, § 5-306(a). Thus, full or plenary guardianship is to be the exception, rather than the rule. To that end, counsel must ensure that, in those cases in which his or her client is found to be incapacitated, the guardian's authority is strictly tailored to the specific decision-making needs of the client.

2. Immediately upon receipt of the assignment, the attorney shall (a) file an appearance with the court; (b) notify petitioner's counsel of the assignment; and, (c) obtain a copy of the petition, the medical certificate or clinical team report, and any affidavit(s), documents or other pleadings that were filed with the petition.

3. Also immediately upon assignment, the attorney shall contact the client to inform him or her of the assignment and to schedule an initial meeting. The attorney shall meet with the client as soon as possible thereafter, but in no event later than one week prior to the return date set by the court; provided, however, that the attorney shall meet with the client no later than the next business day following the assignment whenever a petition for the appointment of a temporary guardian or for a substituted judgment determination is filed, or whenever an expedited hearing or other proceeding is sought or scheduled.¹ If the attorney is unable to meet with the client in accordance with this section and to promptly begin working on the case, or if the attorney is unable to appear in court on the assigned date, he or she shall decline the appointment.

At this initial meeting the attorney shall, at a minimum, explain to the client the purpose of and procedures involved in the impending guardianship proceeding, the client's rights and options in respect to the proceeding, and ascertain the client's wishes and perspectives as to the matters

¹ As a general rule, the attorney should not agree to a continuance sought by petitioner without first consulting with the client. After such consultation, and unless the attorney determines that the client's legal or clinical interests would be adversely affected, he or she may agree to the continuance.

that will be at issue.² The attorney shall explain his or her role and those of the other participants in the proceeding.^{3,4} While not required, the attorney should seek to obtain from

² Rule 1.14 of the Massachusetts Rules of Professional Conduct affords attorneys guidance as to their ethical responsibilities in dealing with clients “under a disability.” The rule provides that, as with other clients, attorneys generally should follow the wishes of their cognitively, emotionally, or otherwise impaired clients, and provides suggestions as to steps that might be taken when an attorney has serious doubts as to his or her client’s ability to competently direct litigation or other legal matters. The rule recognizes, however, that in some circumstances, mental health proceedings specifically noted among them, such a course of action may be impermissible:

Such circumstances arise in the representation of clients who are competent to stand trial in criminal, delinquency and youthful offender, civil commitment and similar matters. Counsel should follow the client’s expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.

Mass. R. Prof. C. 1.14, cmt. 7 (taking protective action).

While the “default” position of adhering to the client’s expressed (albeit inadequately considered) decisions may seem reasonable, the imposition of guardianship (i.e., the removal of a client’s fundamental right to make his or her own decisions) or treatment with those modalities requiring a substituted judgment determination absent the true informed consent of the client is a substantial deprivation of liberty and, therefore, most certainly “pos[es] a risk of substantial harm to the client.”

³ If the client refuses legal representation, the court must determine whether his or her waiver is “competent.” SJC Rule 3:10, § 3. If he or she is not competent to waive counsel or is “otherwise unable effectively to exercise [his or her] rights at a hearing,” standby counsel must be appointed. SJC Rule 3:10, § 3. If the client objects to a particular attorney despite that attorney’s best efforts to establish an effective professional relationship, the attorney should move the court to permit him or her to withdraw, and move that successor counsel be assigned. In doing so, of course, counsel must be careful to avoid divulging any confidential information or other information that could be harmful to the client’s interests. The court should determine whether the person’s objections are reasonable. If so, the motions should be allowed and successor counsel appointed. If not, the motion to withdraw should be denied and the attorney should continue as counsel or be directed to serve as “standby counsel.” SJC Rule 3:10, §§ 3, 6.

⁴ Where counsel has been assigned but prior to the commencement of a hearing the court determines that the client is not indigent, the court may dismiss assigned counsel and advise the client to retain private counsel. However,

if the interests of justice so require [], the judge shall authorize the continued services of appointed counsel at public [i.e., CPCS] expense. The interests of justice may require such appointment if, for example, the party is incompetent to obtain counsel, incapable of obtaining access to funds, or incapable of locating or contracting with a lawyer.

SJC Rule 3:10, § 5. If the client is advised to retain private counsel, the attorney who had been previously assigned may be retained, provided that he or she fully explains to the client that such representation may create “the appearance of impropriety, solicitation, or overreaching.” If the client nevertheless wishes to retain the attorney, the attorney must obtain a written statement signed by the client stating the client’s understanding of his or her right to seek other counsel for the private case. *CPCS Assigned Counsel Manual*, Part V, § 3(A)(2).

the client written authorization to examine and copy the client's medical records or, where the client is unable or unwilling to provide such authorization, a court order authorizing same.

4. The attorney shall thoroughly investigate the facts. This investigation shall include at a minimum (a) a review of the medical certificate, or the clinical team report, filed with the petition, and an interview of the clinician(s) who conducted the examination(s) upon which the certificate or report is based; (b) for a client who is or has been residing in a mental health, developmental disability or nursing facility, a review of (i) facility records, including medication history, (ii) treatment review notes, including diagnoses, treatment history, and comments regarding the client's capacity, (iii) unit and nursing notes, for notations as to the client's relationship and cooperation with staff and treatment programs, and (iv) the client's Individual Service Plan or similar document;⁵ (c) an interview of the petitioner, current treatment providers, staff (including doctors, nurses, and social workers) of current residential programs, if applicable, and of former providers and program staff if reasonably accessible; and (d) other persons familiar with the client, such as friends and family. The attorney shall also determine whether the client has executed, or is capable of executing, a health care proxy, durable power of attorney, or similar instrument delegating authority to a surrogate decision-maker, that would obviate the need for the appointment of a guardian.

5. In most instances, independent psychiatric or psychological expertise will be of assistance in the preparation and defense of the proceeding, particularly in the assessment of a client's capacity.⁶ In most cases in which the authority to administer antipsychotic medication is sought by means of a substituted judgment determination, the expert assistance of a psychiatrist should be sought, and such assistance must be sought whenever such medications are proposed to be administered for the first time to a particular client. After meeting with the client and investigating the facts, as described above in ¶ 4, the attorney shall determine whether expert assistance will be of value and, if so, he or she shall move for funds therefor, pursuant to the

⁵ Of particular significance will be information as to treatment and services that are, or can be made, available that will assist the client in "meeting the essential requirements for physical health, safety or self-care," despite his or her alleged disabilities. See definition of "incapacity" at n. 6, below.

⁶ The appointment of a guardian, or the authority to administer or withhold "extraordinary treatment," is warranted upon a finding that a client is "incapacitated." An "incapacitated person" is defined as:

an individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

Indigent Court Costs Act. G.L. c. 261, §§ 27A-G. *See Guardianship of a Mentally Ill Person*, Mass.App.Ct., No. 85-0018 Civ. (Dreben, J.).⁷

6. Upon allowance of the motion for funds, the attorney shall contact the independent clinician and instruct him or her as to the purpose and parameters of his or her role and responsibilities. To the extent appropriate, the attorney should share with the clinician all pertinent information obtained pursuant to ¶ 4, above. The attorney shall remind the clinician that all information gleaned and opinions formed by the clinician shall remain confidential and may be shared only with the client and the attorney, and that such information and opinions may not be divulged to the court, petitioner, or petitioner's attorney without the permission of the client's attorney.

After the clinician examines the client, reviews the records and speaks with staff and others, as appropriate, he or she and the attorney shall meet to discuss the clinician's findings and opinions. Of particular concern should the clinician opine that the client may indeed be incapacitated to some extent, will be the identification of those areas of decision-making in which the client is not incapacitated and those areas of decision-making in which the client, although perhaps having difficulty, is able to care for him- or herself with assistance, in order that the court may tailor its order to the specific decision-making needs of the client.

The attorney shall determine whether and to what extent the clinician's services shall be of further use. If the clinician will be called to testify at a hearing, the attorney shall fully prepare him or her for direct- and cross-examination.

The attorney also should inform the clinician as to the amount of funds that have been allowed and instruct him or her to refrain from performing any services or incurring any expenses in excess of such amount unless and until a supplemental motion for funds has been allowed.

7. The attorney shall use formal discovery processes if indicated and tactically advisable. The attorney shall confer with potential witnesses, including but not limited to the petitioner, personally or through counsel, treating psychiatrists and psychologists, nursing and any other staff familiar with the client's care and treatment, the prospective guardian, if one has been nominated, and other possible witnesses suggested by the client. The attorney should also confer with other involved parties, for example, family members. Where necessary, witnesses should be subpoenaed. The attorney should meet with the witnesses in advance of the trial in

⁷ Sample Motions, Affidavits and other material are available on the Mental Health Litigation Unit's website: http://www.publiccounsel.net/Practice_Areas/Mental_Health/practice_aids/practice_aids_motions.html. The decision as to whether to retain the services of a clinician is the attorney's. He or she must, of course, discuss the purpose, parameters and confidential nature of the clinician's examination with the client.

order to prepare them for direct- and cross-examination. The attorney shall review the medical record to identify those parts of the record that may be inadmissible and, therefore, whose admission should be objected to if proffered at trial. The attorney should identify the petitioner's witnesses and make an effort, if tactically indicated, to interview them on the record and prepare cross-examination.

8. The attorney should meet again, and as often as necessary, with the client to discuss the upcoming hearing, and should keep him or her informed of the progress of case preparation. The attorney should inform the client of the witnesses expected to be called and any other evidence he or she intends to present. The attorney also should discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney should thoroughly prepare the client for direct- and cross-examination.

9. The attorney should establish a record of: (a) the nature, type, and extent of the client's specific cognitive and functional abilities and limitations; (b) evaluations of the client's mental and physical condition and, if appropriate, his or her educational potential, adaptive behavior, and social skills; (c) the prognosis for improvement and any available recommendations as to appropriate treatment or habilitation plans;⁸ (d) the client's experience, if any, with the specific treatment proposed, including side effects; (e) the client's history of participation in inpatient and outpatient treatment; (f) the relative success of previous treatment plans; (g) the current treatment plan, if any; (h) the client's criminal history, if any; (i) his or her employment record; (j) his or her home and familial situation, and (i) the client's religious beliefs, if they would be pertinent.

10. After reviewing the petition and the pleadings, the attorney shall determine if any procedural defenses can be raised, and file appropriate motions with supporting memoranda.

If it appears likely that the client will be found to be incapacitated, the attorney shall negotiate with petitioner's counsel as to the scope of the guardian's authority. If the parties are able to agree on a proposed guardianship order that is appropriately tailored to the specific decision-making needs of the client, the attorney may stipulate thereto at the hearing.

11. Prior to the hearing, the attorney shall (a) prepare any pretrial motions, memoranda, and requests for rulings; (b) prepare consistent direct- and cross-examination questions; and (c) prepare an opening argument. If required or requested by the court, or as otherwise deemed appropriate by the attorney, he or she shall prepare requests for findings of fact and law to be presented at the close of evidence.

⁸ See n. 5, above.

12. During the hearing the attorney shall act as a zealous advocate for the client, insuring that proper procedures are followed and that the client's interests are well represented. To that end, the attorney shall: (a) file any and all appropriate motions and legal memoranda, including but not limited to motions regarding the assertion of privileges and confidential relationships, and the admission, exclusion or limitation of evidence; (b) present and cross-examine witnesses, and provide evidence in support of the client's position; (c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and (d) take any and all other necessary and appropriate actions to advocate for the client's interests.

13. If the court finds the client to be incapacitated, the attorney shall ensure that (i) the court tailors the guardian's authority to the specific decision-making needs of the client,⁹ (ii) the guardianship order clearly delineates such limited authority, and (iii) the guardian's obligation to periodically report to the court is noted. If a temporary guardianship order issues, the attorney shall ensure that (i) the temporary guardian's authority is limited to decision-making pertinent to the exigent circumstances that warranted the appointment and (ii) the expiration date of the appointment is specified. Where treatment pursuant to a substituted judgment determination is authorized, the attorney shall ensure that (i) periodic reviews and an expiration date are incorporated into the court's decree, (ii) a treatment plan is approved by the court, and (iii) a monitor is appointed to oversee the implementation of the treatment plan.

14. After the hearing the attorney shall meet with the client to explain the court's decision and, if a guardianship or substituted judgment order has issued, the client's appellate rights. If the client wishes to exercise such appellate rights, the attorney shall file a timely notice of appeal with the trial court. Where an appeal is filed, the attorney shall, without delay, notify CPCS's Mental Health Litigation Unit in order that appellate counsel may be assigned.

15. As directed by the Administrative Office of the Probate and Family Court, in guardianship proceedings that do not involve a substituted judgment determination, the attorney's representation shall terminate upon the issuance of the court's decree, unless otherwise ordered by the court. In proceedings in which a substituted judgment determination has been made to authorize treatment, the attorney will continue to represent the client for purposes of periodic reviews and extensions of the substituted judgment order and treatment plan.

16. Whenever counsel's representation continues beyond the issuance of the initial guardianship or substituted judgment order, as described in ¶ 15, counsel is not to assume

⁹ "The court shall exercise [its] authority . . . so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's limitations or other conditions warranting the procedure." G.L. c. 190B, § 5-306(a).

oversight responsibility for his or her client's ongoing treatment or living arrangements (*e.g.*, the attorney is not expected to attend his or her client's treatment team meetings). That is a monitor's responsibility as to substituted judgment matters and is a guardian's responsibility as to other issues. Rather, the attorney's role is to advocate on behalf of his or her client in respect to judicial proceedings.

Such proceedings will come about in either of two ways: (i) regularly scheduled periodic reviews and/or extensions of substituted judgment orders, or (ii) petitions or motions for termination or modification of guardianship orders, both of which will require counsel to meet with his or her client, review monitor or guardian reports, review records, review pleadings, etc., as necessary, and in accordance with these standards, to prepare for the impending hearing.

June 16, 2009

**c. COMMITTEE FOR PUBLIC COUNSEL SERVICES STANDARDS
FOR REPRESENTATION OF CLIENTS BY
MENTAL HEALTH APPELLATE COUNSEL**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel

assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

1. Immediately upon receipt of the assignment of a case to an appellate counsel, appellate counsel shall: (a) file an appearance in the appropriate court; (b) communicate with the client to inform the client of the assignment; and (c) determine whether a stay of a judgment or order of the lower court should be sought pending appeal. In the event a stay should be sought, counsel shall immediately seek one in accordance with Mass. R. App. Proc. 6. If appellate counsel would like the assistance of a mentor, s/he should request a mentor assignment.

2. Within five days of receipt of the assignment of an appeal, appellate counsel shall determine whether the provisions of Mass. R. App. Proc. 8 and 9(b) and (c) have been complied with, and if they have not, shall immediately take the steps required to comply including filing any necessary motions for extension of time.

3. Within three weeks after the assignment of a case to an appellate counsel, or, in the event that the transcript has not been completed at the time of the assignment, within three weeks after the receipt of the transcript, appellate counsel shall read the entire transcript and review the entire record of the case. Appellate counsel should at this time determine whether the record is accurate and complete and take such steps as may be necessary under Rule 8(c)-(e) to correct any errors. Appellate counsel shall also confer with any mentor assigned and with the appropriate Director about issues of law that may be raised on the client's appeal.

4. Appellate counsel shall keep the client and appropriate Director informed of all significant developments in the client's case. Appellate counsel shall respond in a timely manner to all correspondence from the client, provided that such correspondence is of a reasonable volume and at a reasonable interval. Appellate counsel shall inform the client and appropriate Director of the date, time and place scheduled for oral argument of the appeal as soon as the appellate counsel receives notice thereof from the appellate court.

5. Upon receiving notice of the assembly of the record, appellate counsel shall take the steps necessary to ensure the timely docketing of the appeal in accordance with Mass. R. Civ. Proc. 10(a)(1) and (3) and shall, where necessary, file appropriate motions for leave to proceed in forma pauperis pursuant to Mass. R. App. Proc. 12 or for payment or waiver of fees and costs, as necessary under G.L. ch. 261, §§27A through 27G.

6. After reading the transcript, appellate counsel shall confer with the client and with the trial counsel, if appropriate, about the issues which may be raised on the client's appeal. Appellate counsel should pay particular attention to whether a claim as to ineffective assistance of trial counsel may form the basis of an appeal. See, Care and Protection of Stephen, 401 Mass. 144 (1987).

7. If at any time the client insists on having briefed on his or her appeal a contention which, in the judgment of the appellate counsel, cannot be supported by any rational argument, the appellate counsel shall (a) immediately inform and consult with the relevant Director and if the Director concurs, (b) inform the client of the client's right with respect to such contention pursuant to Commonwealth v. Moffett, 383 Mass. 201, 203-209 (1981); (c) supply the client with a copy of the Moffett opinion; and (d) if the client thereafter wishes to invoke his or her Moffett rights with respect to such contention, comply in all respects with the guidelines of the Moffett case set forth id. at 208-209 and n. 3. Care and Protection of Valerie, 403 Mass. 317 (1988).

8. Appellate counsel shall timely file in the appropriate court all motions necessary or advisable to preserve and perfect the client's appellate rights, including, where necessary, motions pursuant to Rule 14(b) of the Massachusetts Rules of Appellate Procedure to enlarge the time for filing the brief on behalf of the client, and motions pursuant to Rule 8 of the Massachusetts Rules of Appellate Procedure to correct or expand the record.

9. The brief filed by appellate counsel on behalf of the client shall conform in all respects with Rules 16, 18 and 20 of the Massachusetts Rules of Appellate Procedure, and shall be of high quality.

10. Appellate counsel shall transmit to the client and the appropriate Director a copy of the brief filed on the client's behalf, and shall also transmit to the client a copy of the brief for the Commonwealth and copies of all other substantive documents pertaining to the appellate proceedings.

11. Oral argument of the appeal on behalf of the client should not, absent unusual circumstances and with the approval of the client and the appropriate Director, be waived with respect to any case.

12. The appellate counsel shall inform the client by letter of the decision of the appellate court in the client's case on the date the decision is delivered to the appellate counsel and shall transmit to the client and the appropriate Director a copy of the decision.

13. If the decision of the Appeals Court is adverse to the client, appellate counsel shall promptly inform the client of the client's right pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure to make application to the Supreme Judicial Court for further appellate review of the case; and, if the client requests that such application be made, the appellate counsel shall prepare and file on the client's behalf such application within the time prescribed by said Rule 27.1.

14. In the event that the client's appeal is unsuccessful, appellate counsel shall have the discretion, upon the request of the client and subject to the approval of the appropriate Director, to seek relief when in the best judgment of the appellate counsel there exists a reasonable likelihood that such relief may be obtained, by appeal or petition in the federal courts.

d. CPCS PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CLIENTS IN “SEXUALLY DANGEROUS PERSON” PROCEEDINGS

These standards generally describe the steps which should be taken by an attorney who is assigned pursuant to G.L. c. 123A, § 9 or § 12 to represent a person facing commitment to or continued confinement at the Massachusetts Treatment Center for Sexually Dangerous Persons (Treatment Center) in Bridgewater as a “sexually dangerous person.”

1. The role of the attorney in a SDP commitment case is to act as an advocate for the client, and to insure that the client is afforded all of his/her due process and other rights. *Cf. In the Matter of the Mental Health of KGF*, 306 Mont. 1; 29 P.3d 485 (2001). At a minimum, counsel must do his or her best to insure that the Commonwealth is made to sustain its burden of proving, beyond a reasonable doubt, that the client meets the criteria for commitment.

2. Immediately upon receipt of the assignment of a case the attorney shall: (a) file an appearance in court; (b) communicate with the client to inform the client of the assignment; (c) arrange to meet with the client as soon as possible (see also ¶ 3, below), and (d) promptly begin work on the case. If the attorney's schedule does not permit him/her to fulfill these requirements, the attorney shall decline the assignment absent special arrangements with the CPCS Mental Health Litigation Director or Sexually Dangerous Persons Litigation Coordinator. The attorney shall not agree to a continuance of the case without first consulting with the client and obtaining his/her express agreement.

3. In proceedings under § 12, the attorney shall meet with the client at the Treatment Center at the earliest possible opportunity prior to the probable cause hearing; absent serious and unavoidable scheduling conflicts, this meeting shall take place within ten days of the attorney's appointment. In proceedings under § 9, the attorney shall meet with the client as soon as practicable. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, to explain the SDP law and procedures to the client, to determine the client's version of the pertinent facts, and to determine the client's wishes regarding the litigation. The attorney should seek to obtain from his/her client written authorization to examine the client's Department of Correction (DOC), medical, and treatment records or, where the client is unable or unwilling to provide such authorization, a court order authorizing such examination. Finally, the attorney shall inform the client of his/her right to independent evaluations, and shall discuss hiring independent evaluators at the expense of the Commonwealth.

4. During all hearings and throughout his/her representation of the client, the attorney shall act as a zealous advocate for the client, insuring that the proper procedures are followed, and that the client's interests are well represented.

5. Except as described herein, the attorney shall file a motion for funds for an independent examination at the Commonwealth's expense as soon as practicable. The client should be advised that such an examination will take time and may cause delay. While it is usually advisable to delay the probable cause hearing until such time as a defense expert is retained and sufficiently prepared, counsel need not retain an expert where the client, after being fully informed of his/her rights by the

attorney, decides that s/he would rather proceed to the probable cause hearing as quickly as possible than take the time necessary for the expert to be retained and prepare for the hearing.

6. Upon the allowance of his/her motion for funds, the attorney shall retain the services of one or more capable independent forensic or clinical evaluators in sufficient time for them to prepare for and testify at the probable cause hearing or § 9 hearing. The attorney shall make a determination, based upon the circumstances of the particular case (*e.g.*, the risk assessment methodology relied upon by the Commonwealth's expert), as to which independent evaluators likely would be of most assistance to the attorney and client. If the attorney is unfamiliar with the different schools of sex offender risk assessment and their adherents, s/he shall contact the CPCS SDP Litigation Coordinator to discuss the matter. The attorney shall make an informed decision concerning whether it is wiser to have the evaluator(s) examine the client or concentrate solely on challenging the conclusions of the Commonwealth's experts. Such decision shall be based on caselaw (*see, e.g., Commonwealth v. Reese*, 438 Mass. 519 (2003)) and the strengths and weaknesses of both the client's and the Commonwealth's case.

7. The attorney shall inform the evaluators in writing that their reports, and any information gleaned in the process of conducting their examinations, are the property of the client and should be sent or divulged only to the attorney, and that the report is not to be filed with the court or disclosed to the Commonwealth or to the Treatment Center attorney or staff without the permission of the attorney. *See Commonwealth v. Thompson*, 386 Mass. 811 (1982). Except where the evaluator is hired solely to challenge the methodology of the Commonwealth's experts, the attorney shall remind the evaluator(s) that the purpose of the examination is to evaluate: (i) whether the client currently suffers from a mental abnormality or personality disorder; (ii) if so, whether the mental abnormality or personality disorder makes the client likely to engage in sexual offenses if not confined to a secure facility; and (iii) whether the client suffers from impaired volitional control.

8. At the probable cause hearing, except where a Commonwealth's expert concludes that the client is not a sexually dangerous person, the attorney shall move to exclude such expert's opinion concerning the client's risk of reoffense and/or other conclusions as unreliable pursuant to Commonwealth v. Lanigan, 419 Mass. 15, 24-27 (1994), and for any other viable ground. A model Lanigan motion is available from the CPCS SDP Litigation Coordinator.

9. Counsel shall file a Motion for Release from Temporary Commitment pursuant to G.L. c. 123A, § 12(e) whenever the pendency of the SDP proceeding prevents the client's release from custody following the expiration of his/her underlying sentence.

10. The attorney shall provide informed advice to the client as to whether, and if so when, he/she should participate in any evaluations sought to be conducted by the Commonwealth's experts.

11. The attorney shall request transcripts of the probable cause hearing in all cases where probable cause is found and forward a copy thereof to the CPCS SDP Litigation Coordinator.

12. Upon a finding of probable cause, the attorney shall move for funds sufficient to retain the services of at least two independent forensic or clinical evaluators to evaluate the client, to assess the

conclusions of the Commonwealth's experts and the reliability and foundation thereof, to otherwise assist counsel in preparation for trial, and to testify at trial. The attorney shall otherwise follow the standards regarding expert witnesses outlined in paragraphs 6 and 7, *supra*.

13. The attorney shall thoroughly investigate the facts. This investigation shall include reading the complete records provided by the DOC and the Commonwealth, including police reports and all other records from the client's past criminal offenses, and interviewing institutional staff at DOC institutions, including the Treatment Center, prior therapists or other evaluators or treatment providers, family members, friends, and other persons who might provide evidence about the client. If the attorney is unable to perform such investigation him/herself, s/he shall file a motion with the trial court requesting funds to hire an investigator to perform these tasks. The attorney shall familiarize him/herself with the scientific literature regarding sexual disorders and recidivism risk assessment sufficiently to undertake, with the assistance of the defense experts, a searching review of the Commonwealth's experts' reports to determine the factual and scientific legitimacy of their findings.

14. The attorney shall use formal discovery mechanisms to the extent permitted by the trial court. The attorney shall subpoena all of the Commonwealth's experts' files regarding the client, and, if permitted by the court, shall depose all Commonwealth's experts.

15. After reviewing the medical record and the Commonwealth's pleadings the attorney shall determine if any procedural defenses or objections can be raised and, if appropriate, file appropriate motions with supporting memoranda. [Procedural defenses can be raised, for example, if the client has completed his/her sentence for a sexual crime and has subsequently been re-incarcerated for a non-sexual offense (*See Commonwealth v. McLeod*, 437 Mass. 286 (2002)); if the Court failed to schedule a timely probable cause hearing (*See Commonwealth v. Bruno*, 432 Mass. 489, 513 (2000)); if the Commonwealth fails to petition for trial within 14 days of the filing of the qualified examiners' reports (*See Commonwealth v. Kennedy*, 435 Mass. 527 (2001)); or if the Commonwealth fails to bring the respondent to trial within sixty days of the conclusion of the probable cause hearing (*See Kennedy*, *supra*; *Commonwealth v. Gagnon* 439 Mass. 826 (2003)).] As at the probable cause hearing, the attorney shall move for the exclusion of the Commonwealth's expert witnesses' opinions concerning the client's risk of reoffense and/or other conclusions as unreliable pursuant to *Commonwealth v. Lanigan*, 419 Mass. 15, 24-27 (1994), except where a particular Commonwealth's expert concludes that the client is not a sexually dangerous person. The attorney shall move to preclude the Commonwealth's experts or any other Commonwealth witness from testifying to inadmissible information (e.g., hearsay or privileged communications, *See Commonwealth v. Markvart*, 37 Mass. 331 (2002)), or from offering an opinion which does not comport with the evidentiary requirements of *Markvart* and *Department of Youth Servs. v. A Juvenile*, 398 Mass. 516, 531 (1986). If motions to exclude testimony are denied, the attorney shall renew objections to all such testimony when offered at trial or hearing. *See Commonwealth v. DiGiacomo*, 57 Mass. App. Ct. 312 (2003); *Commonwealth v. Gabbidon*, 398 Mass. 1, 7 (1986).

16. After developing a thorough knowledge of the law and facts of the case, the attorney shall meet again with his/her client for the purpose of discussing strategy for the trial or § 9 hearing.

17. Prior to trial or § 9 hearing, the attorney shall identify and subpoena potential witnesses who will testify in support of the client. The attorney shall meet with the witnesses in advance of trial in order to prepare them for direct and cross-examination. The attorney shall review the record and identify those parts of the record which should not be admitted into evidence. The attorney shall determine the identity of the Commonwealth's witnesses in advance of trial, and, should the court deny the attorney's motion to depose such witnesses, shall attempt to interview them. The attorney shall prepare appropriate cross-examination. The attorney shall discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney shall thoroughly prepare the client for direct and cross-examination.

18. In proceedings under § 9, or upon the filing by the commonwealth of a petition for trial pursuant to G.L. c. 123A, § 14(a), the attorney shall enter a jury demand, and shall prepare for trial on the presumption that the case will be tried to a jury. Thereafter, the jury demand shall be withdrawn only upon the informed decision of the client.

19. Absent compelling circumstances, the attorney shall move for individual voir dire of all members of the jury panel.

Post-trial

20. After trial or § 9 hearing, the attorney shall meet with the client to explain the court's decision. If the client is committed or ordered to remain at the Treatment Center, the attorney shall explain the client's right to appeal. Absent specific and knowing instructions from the client to the contrary, the attorney shall file a timely notice of appeal, a request for a cassette (or, if available, an electronic) copy of the proceedings, and a motion for funds for the transcription thereof. Where an appeal is filed the attorney shall, without delay, notify CPCS' Mental Health Litigation Unit in order that appellate counsel may be assigned. The attorney shall cooperate fully with appellate counsel. If the client is newly committed to the Treatment Center, the attorney shall also explain to the client his/her right to file a petition for discharge in the superior court under G.L. c. 123A, § 9.

Section 9 Proceedings

21. If the attorney is appointed to represent the client pursuant to a petition for discharge under G.L. c. 123A, § 9, the attorney shall follow all of the steps outlined above except for those pertaining to probable cause hearings. In addition, the attorney shall move the court for a speedy hearing on statutory and constitutional grounds. The attorney may obtain a model motion for a speedy hearing from the CPCS SDP Litigation Coordinator.

2. PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CHILDREN AND PARENTS IN CHILD WELFARE CASES¹

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¹ These Performance Standards apply to the representation of children and parents in care and protection proceedings, proceedings under G.L. c. 119, § 23C and proceedings to dispense with consent, as well as divorce, custody, guardianship and other proceedings in which a right to counsel exists. These standards do not apply to the representation of children in Children in Need of Services (CHINS) proceedings, pursuant to G.L. c. 119, § 39G.

6. TRIAL PREPARATION AND CONDUCT

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8.3 CESSATION OF REPRESENTATION

1. GENERAL PRINCIPLES OF REPRESENTATION

1.1 Role of Counsel.

(a) The role of counsel in these cases is to be an advocate for the client within the scope of counsel's appointment. Counsel shall diligently and zealously protect and advance the client's interests, rights and goals in the proceedings. This involves explaining the nature of all legal and administrative proceedings to the extent possible given the client's age and ability, determining the client's position and goals, and vigorously advocating such position and goals. The role of counsel is also to ensure that the client is afforded due process and other rights and that the client's interests are protected.

(b) The role of counsel also is to be an advisor and counselor. This involves explaining the likelihood of achieving the client's goals and, where appropriate, identifying alternatives for the client's consideration. In addition, counsel should explain the risks, if any, inherent in the client's position.

(c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation to the client.

(d) Counsel for a child owes the same duties of undivided loyalty, confidentiality, zealous advocacy and competent representation to the child as is due an adult client, consistent with the Massachusetts Rules of Professional Conduct.

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

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

1.2 Appointment of Counsel.

(a) Immediately upon acceptance of an appointment to represent a party, counsel shall, where required, file a notice of appearance with copies to all counsel and, where necessary or strategically important, an objection to the petition on the client's behalf.

(b) Counsel shall decline the assignment if (i) counsel is unable to afford the client prompt, diligent representation, (ii) acceptance of the assignment will create a conflict or potential conflict of interest, or (iii) counsel believes that he or she will not be able to comply with these Performance Standards. If counsel declines an assignment, counsel shall give proper notice to the court.

Commentary: Counsel cannot provide prompt, diligent representation of a client if (a) counsel is unable to begin working on the case promptly or (b) counsel is unable to appear in court on an assigned date and cannot arrange a continuance that is consistent with the client's interests. It is counsel's responsibility to be aware of the caseload limits of the Committee for Public Counsel Services ("CPCS") found in the CPCS Manual for Assigned Counsel (2003). Counsel should not accept any assignment which will cause him or her to exceed these limits.

1.3 Scope of Representation.

(a) Duration of representation in general. Except as provided in par. (b), an assignment at the trial level concludes upon the earliest of the following:

1. The child is adopted.
2. The only subject child, or the client, has died.
3. Counsel has withdrawn for all purposes (not for purposes of obtaining appellate counsel).
4. The court has stricken counsel's appearance or the appearance of the client, and no appeal has been filed regarding such action.
5. The case is dismissed, and no appeal has been filed.
6. The court appoints a permanent guardian for the child, and no appeal has been filed.
7. The court grants permanent custody of the child to a person other than DCF, and no appeal has been filed.
8. If the client is a parent, a petition to terminate the client's parental rights has been allowed, and no appeal has been filed; however, if the client requests assistance to enforce any post-termination (but not post-adoption) agreement or order, or to defend against another party's request to modify or vacate such agreement or order, counsel shall provide such service.
9. The court enters an order not specified above that is intended by the court as a final disposition of the matter, and no appeal has been filed.
10. An appeal of an order under 4 through 9 above reaches its conclusion.

(b) Guardianship and permanent custody decrees and other orders disposing of a case. In *Care and Protection of Thomasina*, 75 Mass. App. Ct. 563 (2009), the Appeals Court ruled that, unless the court enters an order terminating parental rights altogether, a child's parents retain certain rights in a care and protection case after the appointment of a permanent guardian for the child, including the right to

review and redetermination and the right to counsel. If an order is entered under par. (a)6, (a)7, or (a)9, counsel for a parent or a child should:

1. Keep his or her Notice of Assignment of Counsel ("NAC") open if there is another court date scheduled or future litigation anticipated.
2. Close his or her NAC if there is no other court date scheduled and no future litigation anticipated. Before closing the NAC, counsel shall inform the client in writing of the rights that the client retains under *Thomasina*.

(c) Resumption of representation.

1. If, after a NAC is closed under par. (b)2, counsel learns that the former client's residual rights under *Thomasina* are being compromised or challenged or are subject to further litigation, or that the former client wants to request further court review, counsel shall request that the NAC be reopened and shall resume representing the former client, unless subpar. 2 applies.
2. If counsel is no longer certified to represent CAFL clients or is otherwise unavailable to resume his or her representation of the former client, counsel shall promptly notify the court in writing and ask that certified counsel be appointed for the former client.

Commentary. Counsel should also be aware that a case is not considered concluded solely because there has been no recent court activity on the case.

Forms for requesting the reopening of a NAC are available on the CAFL website.

Counsel withdrawing from a case should follow the rules set forth in Standard 8.3.

(d) Appointment of Appellate Counsel. The appointment of appellate counsel on behalf of a client shall not terminate trial counsel's ongoing responsibilities to the client in proceedings before the trial court.

(e) Collateral Representation. Clients occasionally require legal assistance in proceedings before the Probate and Family Court, District Court or Juvenile Court on matters other than, but integrally related to, that for which counsel was appointed. Such proceedings, which may arise prior or subsequent to the commencement of the proceeding for which counsel was appointed, include, but are not limited to, divorce, custody, guardianship and paternity proceedings. Counsel appointed to represent a client in one proceeding may, with CAFL written permission, bill CPCS for representation of a client in these types of collateral proceedings that (a) directly affect the resolution of an open proceeding for which counsel was appointed, and (b) concern the custody of child(ren) that is the subject(s) of the proceeding for which counsel was appointed. Counsel may, without notice to CAFL, represent a client at a Fair Hearing of the Department of Social Services which (a) directly affects the resolution of an open proceeding for which counsel was appointed, and (b) concerns the child(ren) that is the subject(s) of the proceeding for which counsel was appointed. CPCS reserves the right to deny payment for work done on collateral matters where permission was not requested or was refused.

Authorization for any collateral representation set forth herein ends at the earlier of (a) final judgment in the collateral matter, or (b) the occurrence of any event set forth in paragraph (a) "Duration" above. In no event will authorization be given for collateral representation in any matter which requires CPCS certification not held by counsel.

Commentary: In care and protection and § 23C proceedings, both children and parents are entitled to continued representation in post-trial matters, including foster care reviews, permanency hearings and review and redetermination proceedings. In actions to dispense with consent, the child is entitled to continued representation so long as he or she remains in the custody of DSS. Upon adoption or guardianship finalization, counsel's representation ends. There is no right to counsel in proceedings which are solely disputes between private parties, such as disagreements between birth parents and adoptive parents or guardians over post-adoption or post-guardianship visitation.

In the appropriate circumstance and upon a written request, CPCS will re-open a Notice of Assignment of Counsel ("NAC") to permit counsel to bill CPCS for representation of a client after the NAC has been closed. For example, counsel may file a motion seeking relief from judgment where sufficient grounds exist. Forms for requesting re-opening of a NAC are available on the CPCS CAFL website.

1.4 Conflicts of Interest.

Counsel must be alert to and avoid all potential and actual conflicts of interest that would impair the ability to represent a client. Particularly when appointed to represent multiple clients, counsel must be alert to the potential for conflicts of interest. The presence of a conflict may require counsel to withdraw from representing one, some or all of the clients. In such event, counsel shall request that the court appoint new counsel.

Commentary: Conflicts arise when an attorney is appointed to represent multiple siblings who have different positions (e.g., one child supports the petition and another child opposes the petition). Even though a court may find a parent fit as to one child but not another, counsel cannot, consistent with the ethical rules, simultaneously advocate a parent's fitness as to one child and unfitness as to another.

A conflict also may arise where an attorney is appointed to represent more than one parent. In situations where there are allegations of domestic violence, counsel should not represent both parents. Even in a case where multiple clients share the same position, a conflict may arise if counsel receives a confidence from one client that the client wishes not be disclosed, but disclosure would advance the interests of the other client. See Mass. R. Prof. C. 1.7, Comment 12C.

Counsel must be alert to the potential for conflict not only at the time of appointment but throughout the representation. A client's position may change as time passes, resulting in a conflict where none existed previously.

The Rules of Professional Conduct permit a lawyer to represent multiple clients, notwithstanding a conflict, if the lawyer reasonably believes to do so would not adversely affect the representation and if each client consents. See Mass. R. Prof. C. 1.7 and Comments. Rarely, if ever, would a situation arise where all the children are competent to consent and, therefore, as a general rule, counsel should always seek to withdraw from representing one or more child clients if a conflict exists among them. Counsel should be mindful of the conflict in continuing to represent any of the multiple clients when counsel holds confidences from some or all of the clients.

Counsel should also be cautious of the potential for conflict of interest in cases where the interests of the client are closely aligned with another, unrepresented person, (e.g., between a preadoptive parent or relative caretaker). Counsel should never agree to represent such other person. Child's counsel should also be aware of the conflict inherent in accepting any role other than counsel; for example, counsel should not act as a parent proxy in signing an Individualized Education Plan.

In accepting assignments, former DSS attorneys should be mindful of the rules regarding conflicts of interest and successive government and private employment. See Mass. R. Prof. C. 1.7-1.11. Lawyers who practice separately in an office-sharing arrangement should similarly be mindful of the conflict of interest rules and other rules set forth in Commonwealth v. Allison, 434 Mass. 670 (2001), and other appellate cases.

1.5 Communications with Client.

In all cases counsel must maintain sufficient contact with the client to establish and maintain an attorney-client relationship that will enable counsel to keep abreast of the client's interests and needs and of the client's position in the action.

(a) Immediately upon receipt of notice of the assignment, counsel shall take appropriate steps to locate his or her client. Counsel shall inform the client of the assignment and meet with the client as soon as practicable. To the extent possible, the initial meeting should take place sufficiently prior to the first court hearing to permit counsel to prepare for such hearing. As soon as practicable, and to the extent possible given the client's age and abilities, counsel shall explain to the client the nature of the court proceedings and applicable law, the role of counsel, and the existence of and limits to privileges covering the client's communications with counsel, therapists, social workers and other relevant individuals. Counsel shall also determine the client's interests, goals and position in the proceeding.

(b) At a minimum, counsel shall meet with a child client on a quarterly basis, except under extraordinary circumstances. Irrespective of a child client's age, counsel shall meet with the child client at his or her placement promptly upon receiving notice of the assignment. Counsel shall meet with the child thereafter as necessary to provide competent representation to the client, to be informed of the child's wishes and circumstances, to inform and advise the client about the proceedings, as appropriate, and to maintain an ongoing attorney-client relationship with the child.

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

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

placed at a distance that makes quarterly meetings impracticable. Counsel should meet with a child client immediately after becoming informed of a change in the child's placement. Counsel should be wary of communicating with child clients through letters or e-mail. Children may not receive such communications, or may not be the only ones to read such communications. This places the attorney's work product and attorney-client privilege at risk.

In order to provide competent representation, child's counsel should meet with the child in the child's environment to understand the child's personal context. The benefits of meeting with an older child who can convey information and express his or her wishes are obvious. However, meeting with younger children, including preverbal children, is equally important. Mass. R. Prof. C. 1.14 recognizes the value of the child client's input and further recognizes that varying degrees of input from children at different developmental stages may occur. In addition, preverbal children can provide valuable information about their needs through their behavior, including their interactions with their caretakers and other children or adults.

(c) Counsel shall remain in communication with the client during the course of the case to discuss, to the extent possible given the client's age and abilities, the progress of the case, trial strategy and preparation, negotiation and settlement strategies, and post-trial goals. Counsel shall inform the parent client of all court hearings and administrative proceedings and inform such client of his or her right and/or obligation to attend such hearings. Where appropriate given the child's age and abilities, counsel should inform the child client of court hearings and administrative proceedings. If the child client expresses a desire to attend a hearing, and such attendance is appropriate given the child's age and abilities and the nature of the proceedings, counsel shall take steps to assure the child's attendance. If the client is involuntarily committed or incarcerated and wishes to attend a hearing, counsel shall make all necessary arrangements for the court to issue a writ of habeas corpus to assure the client's presence at the hearing, and shall, if necessary, ensure service of the writ.

(d) Counsel shall explain the result of all court hearings and administrative proceedings to the client. If a final judgment is adverse to the client, counsel shall explain the client's right to appeal the decision, the appellate process, including the time limits in which a notice of appeal must be filed, and any alternative post-judgment strategy that may be appropriate. Counsel shall also explain the process and availability of post-trial reviews, if applicable. If a final judgment is not adverse to the client, counsel shall ensure that opponents adhere to time limits and discharge other appellate responsibilities until appellate counsel files an appearance. In communicating the results of court hearings and administrative proceedings to a child client, counsel shall provide such information as is appropriate given the child's age, abilities and wish to be so informed.

Commentary: Where counsel is unable to communicate effectively with the client because of either mental disability or language barriers, counsel should take whatever steps are necessary to ensure that he or she is able to communicate with the client and that the client understands the proceedings. Such steps may include obtaining expert assistance or an interpreter.

The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning, implications and consequences of legal proceedings. A client may not understand the legal terminology and, for a variety of reasons, may choose a particular course of action without fully appreciating the implications. With a child the potential for misunderstanding may be even greater. Therefore, the child's attorney has additional obligations

based on the child's age, level of education, and language skills. There is also the possibility that, because of a particular child's developmental limitations, counsel may not completely understand the child's responses. Therefore, child's counsel must learn how to ask developmentally appropriate questions and how to interpret the child's responses. The child's attorney may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

Counsel should contact clients regularly, and should respond promptly to telephone calls, letters and other inquiries from the client.

1.6 Determining and Advocating the Child Client's Position.

(a) Child's counsel should elicit the child's preferences in a developmentally appropriate manner, advise the child and provide guidance.

Commentary: Counsel has a duty to explain to the child in a developmentally appropriate way such information as will assist the child in having maximum input in determining his or her position. Counsel must be adept at asking developmentally appropriate questions and interpreting the child's responses in such a manner as to obtain a clear understanding of the child's preferences.

In eliciting the child's preferences, counsel should be aware of and understand the factors that influence the child's decision-making process. In addition to communicating with the child client as discussed in Standard 1.5 above, counsel should review records and consult with appropriate professionals and others with knowledge of the child. Counsel also may find it helpful to observe the child's interactions with foster parents, birth parents and other significant individuals. This information will help counsel to better understand the child's perspective, priorities and individual needs, and will assist counsel in identifying relevant questions to pose to the child.

Counsel should advise the client of the potential consequences of particular positions. Counsel may express an opinion concerning the likelihood of the court or other parties accepting particular positions. Counsel may inform the child of an expert's recommendations germane to the issue. Counsel should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the child's expressed preferences reflect his or her actual position.

(b) If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel shall represent the child's expressed preferences regarding that matter.

Commentary: Rule 1.2 of the Massachusetts Rules of Professional Conduct requires counsel to "seek the lawful objectives of his or her client." Only if the lawyer determines that the client is incapable of making adequately considered decisions in connection with the representation, may counsel deviate from this requirement, and even then counsel must "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." See Mass. R. Prof. C. 1.14, Client Under a Disability.

A child's ability to determine his or her own position may depend upon the particular matter to be determined or the circumstances involved at the time. Thus, a child may be able to make some decisions and not others. For example, counsel may reasonably determine that the child is capable of deciding that he

or she would like to have visits with a sibling, but is not capable of deciding whether he or she should return home or remain with relatives on a permanent basis. Additionally, as time passes and the child matures, he or she may become more capable of directing the representation.

In determining whether a child is able to make an adequately considered decision, counsel may wish to seek guidance from appropriate professionals and others with knowledge of the child, including the advice of an expert. Counsel may consider the following factors: the child's ability to communicate a preference, whether the child can articulate reasons for the preference, the decision making process used by the child to arrive at the decision (e.g., is it logical, is it consistent with previous positions taken by the child, does the child appear to be influenced by others, etc.); and whether the child appears to understand the consequences of the decision. See Report of the Working Group on Determining the Child's Capacity to Make Decisions, 64 Fordham Law Review 1339 (1996). In assessing the child's ability to make adequately considered decisions, it is the quality of the child's decision-making, not the wisdom of the child's decision, that is determinative. For example, the decision of a thirteen-year-old to return home to a marginally fit parent may not be in the child's best interests, but the child may well be competent to make that decision.

If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel must represent the child's expressed preferences regarding that matter, even if the attorney believes the child's position to be unwise or not in the child's best interest. Requesting the appointment of a guardian ad litem in such cases is contrary to the Rules of Professional Conduct. Of course, the lawyer does have a counseling function and should advise the client of the potential consequences of his or her position. However, the child's attorney should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the decision the child ultimately makes reflects his or her actual position.

(c) If a child client is incapable of verbalizing a preference, counsel shall make a good faith effort to determine the child's wishes and represent the child in accordance with that determination or may request appointment of a guardian ad litem/next friend to direct counsel in the representation.

Commentary: If a child is incapable of verbalizing a preference, counsel may make a substituted judgment determination, i.e., determine what the child would decide if he or she were capable of making an adequately reasoned decision, and represent the child in accordance with that determination. Alternatively, counsel may ask for the appointment of a guardian ad litem to make a substituted judgment determination and to provide direction to counsel concerning the representation. If a guardian ad litem is appointed, counsel should ensure that the role of the guardian ad litem is clearly defined by the court.

In making a substituted judgment determination, counsel may wish to seek guidance from appropriate professionals and others with knowledge of the child, including where necessary, the advice of an expert.

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

(d) If a child can verbalize a preference with respect to a particular matter, but counsel reasonably determines, pursuant to paragraph (b) above, that the child is not able to make an adequately considered decision regarding the matter and if representing the child's expressed preferences does not place the child at risk of substantial harm, then counsel shall represent the child's expressed preferences.

If the child is not able to make an adequately considered decision regarding the matter and if counsel determines that pursuing the child's expressed preferences would place the child at risk of substantial harm, counsel may choose one of the following options:

- (i) represent the child's expressed preferences regarding the matter;
- (ii) represent the child's expressed preferences and request the appointment of a guardian ad litem/investigator to make an independent recommendation to the court with respect to the best interests of the child;
- (iii) inform the court of the child's expressed preferences and request the appointment of a guardian ad litem/next friend to direct counsel in the representation; or
- (iv) inform the court of the child's expressed preferences and determine what the child's preferences would be if he or she was able to make an adequately considered decision regarding the matter and represent the child in accordance with that determination.

Commentary: The most difficult aspect of representing child clients in these cases is determining what position to take when a child can verbalize a preference but counsel believes that the client is not capable of weighing the various options or understanding the consequences of pursuing particular positions.

The Rules of Professional Conduct provide some limited guidance. Rule 1.14(a) provides that where a client is unable to make "adequately considered decisions," the attorney must "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Further, the commentary to the Rule recognizes that there exist "intermediate degrees of competence" and that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Thus, at a minimum, counsel's obligation includes informing the court of the child's expressed preferences.

If the incompetent child's expressed preferences will not subject the child to a risk of substantial harm, counsel is obligated to pursue the child's wishes. Mass. R. Prof. C. 1.14(b) provides that only when the client is incompetent and the attorney believes the client is at risk of substantial harm, may counsel take certain steps to protect the client.

If counsel believes the position chosen by the incompetent child is wholly inappropriate or could result in serious injury to the child, the ethical issues are far more difficult. Of course, the lawyer has a counseling function and should advise the client of the potential consequences of his or her position. However, the child's attorney should recognize that the child may be more susceptible to the lawyer's influence than some adult clients, and should ensure that the decision the child ultimately makes reflects his or her actual position.

If the child cannot be persuaded to change his or her position, paragraph (b) of Mass. R. Prof. C. 1.14 states that when the client is incompetent and the attorney believes the client is at risk of substantial harm, the attorney may take certain steps to protect the client, such as consulting with family members or protective agencies and, if necessary, requesting the appointment of a guardian ad litem. In addition, the commentary to the Rule notes that if a guardian is not appointed, "the lawyer often must act as de facto guardian."

Thus, if counsel believes that advocating the incompetent child's expressed preferences will place him or her at risk of substantial harm, counsel may advocate the child's expressed preferences and request the appointment of a guardian ad litem to make an independent recommendation to the court with respect to the child's best interests. Alternatively, counsel may use a "substituted judgment" standard (i.e., what the child would decide if he or she were competent to do so) to arrive at the child's position, either by making the substituted judgment determination himself or herself, or by asking for the appointment of a guardian ad litem to make that determination and direct counsel accordingly. A substituted judgment determination is not the same as determining the child's best interests. Rather, it involves determining what the child would decide if he or she were able to make an adequately considered decision. If the child is able to verbalize a preference but is not capable of making an adequately considered decision, the child's verbal expressions are an important factor to consider in making a substituted judgment determination.

If the substituted judgment determination and the child's expressed preferences differ, the commentary to Mass. R. Prof. C. 1.14 suggests that counsel must inform the court of both.

1.7 Determining and Advocating an Adult Client's Position.

Counsel shall advocate for an adult client's stated preferences and goals in the proceeding and follow the client's direction throughout the course of the case. Counsel should determine whether the client is "under a disability" pursuant to Rule 1.14 of the Massachusetts Rules of Professional Conduct and shall act accordingly. Nothing herein limits counsel's ability to make strategic legal decisions in the case.

Commentary: Counsel should be very cautious in requesting, or responding to a request for, appointment of a guardian ad litem/next friend for a parent because disclosure of the client's disability can adversely affect the client's interests in the proceeding. If a guardian ad litem/next friend is appointed for a parent client, counsel should ensure that the role of the guardian ad litem/next friend is clearly defined by the court.

1.8 Protection of Confidentiality, Privileged Communications, and Attorney Work Product

Consistent with the client's interests and goals, counsel shall seek to protect from disclosure communications and other information concerning the client that are protected by applicable laws of confidentiality and privilege, including attorney work product. Counsel shall explain fully to the client the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or right to confidentiality. If counsel for a child determines that the child is unable to make an adequately considered decision with respect to waiver, counsel must act with respect to waiver in a manner consistent with and in furtherance of the client's position in the overall litigation. Counsel may request the appointment of a guardian ad litem for the limited purpose of making decisions regarding waiver.

Commentary: Counsel shall take whatever steps are necessary to protect the client's privileges and right to confidentiality promptly following appointment to the case. Counsel should not wait until the time for filing pre-trial motions to address these matters. Improper disclosure of confidential or privileged information early in the proceeding may color and impact the manner in which the parties, the court investigator, and the court perceive the client, the services offered to the client, and the position taken by the parties. In addition, the underlying purpose of the laws of confidentiality and privilege, to protect an individual's interest in keeping private certain information and certain relationships, is an important goal independent of the effect disclosure would have on the proceeding.

If a child is able to make an adequately considered decision with respect to waiver of a privilege or right to confidentiality, counsel shall advocate the child's position and, if necessary, oppose the appointment of a guardian ad litem to substitute his or her judgment for that of the child. If a guardian ad litem is appointed for a child client, counsel should ensure that the role of the guardian ad litem is clearly defined by the court.

If counsel for a child determines that the child is unable to make an adequately considered decision with respect to waiver, counsel must consider whether to request the appointment of a guardian ad litem for the limited purpose of making a substituted judgment determination with respect to the matter. Counsel should ensure that the guardian ad litem considers only those factors that a competent client would consider. Counsel may wish to ensure that the guardian ad litem consider: (1) the child's expressed preferences, if any; (2) the nature of the communications and the effect on the child of disclosure; and (3) the extent to which disclosure advances or hinders the child's position in the proceeding. Counsel should object to the extent the guardian ad litem considers the need of other parties for the information insofar as the role of the guardian ad litem is to make a substituted judgment determination, not to weigh the relative benefits and harms to the child and other parties.

Counsel must be prepared to respond to any attempt by another party to waive or invoke the client's privilege or right to confidentiality.

1.9 Missing Parent Clients.

In the event a client's whereabouts are unknown, counsel shall take a position in court and administrative proceedings consistent with the client's last clearly articulated position or directive. In the absence of such information, or in the event circumstances have changed materially since the client last articulated a position, whether or not to take action on behalf of such client is a matter left to the discretion of counsel consistent with the Massachusetts Rules of Professional Conduct.

Commentary: The whereabouts of a client may, for any number of reasons, become unknown to counsel. If the client's whereabouts become unknown during the course of a case, counsel should take any actions which are consistent with the last clearly articulated position or directives of the client. In the absence of such information, any action taken on behalf of the client is left to counsel's discretion.

Except as otherwise set forth in Commentary to Standard 2.1, if counsel has never had contact with a client or counsel is unable to contact the client after diligent efforts, counsel may either (a) withdraw from the representation, or (b) take no position in the proceedings but take such actions as counsel deems necessary and appropriate to protect other rights and interests of the client, such as rights to confidentiality and the exercise of privileges. See Standard 7.3.

2. TEMPORARY CUSTODY (INCLUDING 72-HOUR) HEARINGS

2.1 Right to Hearing.

Counsel shall assert and protect the client's right to temporary custody (including 72-hour) hearings.

Commentary: Temporary custody hearings (including the so-called "72-hour hearing") is an event of crucial strategic importance in child welfare cases. Because of the potential for serious ramifications to the parent-child relationships and the safety of the child, due process demands that clients receive diligent, zealous representation of counsel at such hearings. This is true whether the client supports or opposes a transfer of temporary custody. If the parents consent to a temporary order of custody to DSS, and if the child's position is to be placed in the temporary custody of a relative or other individual, counsel for the child should assert the child's right to a temporary custody hearing to present evidence in support of his or her position. See Care and Protection of Manuel, 428 Mass. 527 (1998).

The statute governing probate court orders of temporary custody to DSS does not contain all of the procedural safeguards that are mandated in the juvenile court. In probate court proceedings, counsel should assert the client's right to a temporary custody hearing consistent with due process. A client in

the probate court should receive no less procedural protection than that afforded similarly situated clients in the juvenile court. See Adoption of Donald, 44 Mass. App. Ct. 857 (1998).

Postponement by court: The trial court may, due to scheduling difficulties, inform counsel of the need to postpone a temporary custody or 72-hour hearing. If such a continuance is inconsistent with the client's interests or goals, counsel should object to any such postponement. If necessary, counsel should consider pursuing the client's right to a timely hearing by taking an interlocutory appeal.

Requesting continuances: In some instances, counsel may not receive notification of his or her assignment in time to prepare adequately to represent the client at a temporary custody hearing or to summons witnesses or documents. Should this occur, counsel should advise the client of counsel's need for additional time to prepare and, if the client consents, object to proceeding with the hearing and seek a short continuance, provided that the benefit of a continuance outweighs the prejudice of not going forward. Counsel may also need to request a continuance or reserve the client's right to a hearing if the client is unavailable due to illness or some other reason.

Denial of right to hearing: If the court denies a client his or her right to a temporary custody or 72-hour hearing, and such denial is inconsistent with the client's interests and goals, counsel should consider pursuing the client's right to a hearing by taking an interlocutory appeal.

Presence of client: If a parent client is not present as a consequence of failure of notice by the court or DSS, counsel should object to proceeding without the client and seek to preserve the client's right to a 72-hour hearing. If a client is incarcerated or involuntarily committed, counsel should file a habeas corpus petition seeking transportation of the client to court. If such a petition is impracticable or a habeas order unenforceable (as it may be in cases where the client is incarcerated outside the commonwealth 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. If a child client wishes to attend a hearing, and such attendance is appropriate given the child's age and abilities and the nature of the proceedings, counsel should assure the child's attendance.

Counsel without direction from client: If counsel is without direction from a client as to his or her goals at the hearing, counsel should seek to protect and preserve the client's due process rights. Counsel should, depending on the circumstances, request a continuance of the hearing or take such other steps as are necessary to preserve the client's right to a temporary custody hearing.

2.2 Preparation for Hearing.

In preparation for the temporary custody (including 72-hour) hearing,

- (a) counsel shall:

(i) conduct an initial interview with his or her client, determine the client's position, advise the client as to the merits of the case, and develop a strategy for preparing for and conducting the hearing;

(ii) discuss with the client his or her right to refuse to give certain testimony under the 5th Amendment of the U.S. Constitution and Article XII of the Massachusetts Declaration of Rights; and

(iii) review all pleadings filed in the case, any reports of suspected abuse or neglect filed pursuant to G.L. c. 119, § 51A or 51B regarding the incident(s) which led DSS to petition the court for legal custody, and all documents to be submitted as evidence at the hearing.

(b) counsel shall, if applicable and to the extent practicable:

(i) review other portions of the client's DSS file, any pleadings filed in other child welfare cases involving the client, and any other relevant records;

(ii) if consistent with the client's interests and goals, identify relatives, family friends, or other persons who are potential placement or custody options, and take such steps as may be necessary to offer such persons to DSS and/or to the court for placement or custody determinations; and

(iii) if consistent with the client's interests and goals, identify and interview potential witnesses, prepare such witnesses for the hearing, and subpoena documents and/or witnesses to appear at court for the hearing.

Commentary: Depending on the client's interests, it may be appropriate to seek a grant of temporary custody by the court to the relative, family friend, or other person identified by the client. This is to be distinguished from a grant of custody to DSS, who can then place the child in foster care with that person. Counsel should advise the client and the placement/custody option on the differences and relative advantages and disadvantages of temporary custody versus foster care, including but not limited to issues such as the authority to make decisions regarding the child's care, eligibility for grantee-relative benefits through the Department of Transitional Assistance and/or foster care payments, eligibility for services offered by DSS, and visitation.

The alternative remedies of a return of custody to the parent and a grant of custody to a relative, family friend, or other identified custody option are not mutually exclusive at the 72-hour hearing. Counsel need not choose between these options, and, if consistent with the client's interests and goals, must be prepared to pursue said alternative remedies at the 72-hour hearing.

2.3 Conduct of Hearing.

To the extent consistent with the client's interests and goals as determined pursuant to these Performance Standards, counsel shall, at the temporary custody (including 72-hour) hearing:

(a) file any and all appropriate motions and legal memoranda, including but not limited to motions regarding (i) placement or custody of children, (ii) visitation, (iii) the assertion of privileges and confidential relationships, and (iv) the admission, exclusion or limitation of evidence;

(b) present and cross examine witnesses, and provide evidence in support of the client's position;

(c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and

(d) take any and all other necessary and appropriate actions to advocate for the client's interests and goals.

Commentary: Counsel must also remain cognizant of the provisions of G.L. c. 119, §§ 24 and 29C obligating the DSS to make reasonable efforts, prior to removing a child from the home, to eliminate the need for said removal. If appropriate, counsel should ask the court to certify that DSS failed to make reasonable efforts to prevent removal. Counsel should be aware that such a certification at this stage of the proceeding may bar a child from receiving certain services or subsidies if placed out of state.

3. INVESTIGATION AND DISCOVERY

To develop and support the client's position, counsel shall conduct a thorough and continuing investigation at every stage of the proceeding which is independent of that of any other party to the proceeding and of any court investigator or guardian ad litem appointed by the court.

Commentary: Thorough, thoughtful and independent investigation is necessary for counsel to develop the client's position and a theory of the case, advise the client and identify potential evidence, whether beneficial or detrimental to the client's position.

3.1 Informal Discovery

(a) Meet with Client. Counsel shall meet with the client and obtain from the client information relevant to the proceeding and the client's position.

Commentary: The client is an important and primary source of information regarding the facts of the case, the family and its history. The client may also assist counsel by identifying sources of information and records which may be relevant to the proceeding. Even with very young children, counsel can obtain valuable information from meeting with the child and viewing the child in his or her environment. (See Standard 1.5, Communications with Client) Counsel should maintain an adequate, contemporaneous record of such client interviews.

(b) Review of DSS Records. DSS records are an integral part of the preparation of a case. Counsel shall obtain the entire social services file. These records may be obtained through a formal or informal process.

Commentary: Counsel may be able to obtain the records informally by a written request to the DSS office. However, counsel should also be aware of the Juvenile Court rules and the Code of Massachusetts Regulations regarding discovery. For Probate and Family Court actions, counsel may need to file appropriate requests for production of documents.

While the Juvenile Court Rules do not define what is meant by the “entire” social services file, a review of the DSS Policies and Procedures Manual provides guidance as to the potential documents which will be generated or obtained by DSS when servicing a family. The records received from DSS may not contain the home finder records or any other records on the foster or pre-adoptive home. Counsel may need to file a motion to obtain those records.

(c) Review of Court Records. Counsel shall review court records for the proceeding in which she or he is appointed on an on-going basis. Such review shall include any court investigator, guardian ad litem, family service or probation officer reports.

(d) Other records. Counsel shall review relevant social service, medical, psychiatric, psychological, substance abuse, law enforcement, CORI and school records, as well as records of other court proceedings, as appropriate, and take the necessary steps to obtain such records.

(e) Interviews. Counsel shall contact and interview, where appropriate, those individuals with information concerning the family, such as parents, relatives, caretakers, neighbors, DSS social workers and other social service personnel, school personnel, day care providers, medical providers, treatment providers, former counsel, probation officers, family service officers as well as those individuals who are suggested by the client or identified through investigation or discovery as potential witnesses.

Commentary: Counsel should be mindful of Rule 4.2 of the Massachusetts Rules of Professional Conduct, which prohibits an attorney from communicating about the subject of the representation with a person known to be represented by another attorney in the matter unless the other attorney consents. When the represented “person” is an organization such as DSS, Rule 4.2 only prohibits ex parte contact with those employees: (1) who exercise managerial responsibility in the matter; (2) who are alleged to have committed the wrongful acts at issue in the litigation; or (3) who have authority on behalf of the organization to make decisions about the course of the litigation. Neither the Rule nor case law speaks to whether, or the circumstances under which, counsel may contact DSS social workers or other DSS employees without the consent of DSS counsel. Counsel should consult Rule 4.2, the commentary thereto, and Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 436 Mass. 347 (2002), for guidance on this issue.

(f) Physical Evidence. To the extent practicable, counsel shall view any relevant physical evidence.

(g) Counsel shall contact opposing counsel to gather information about the case and the positions of the other parties.

(h) Counsel should, if appropriate, necessary and practicable, attend all service planning, treatment and placement meetings, administrative reviews and hearings and other proceedings involving the client. In addition, if counsel represents a child, counsel should, if appropriate, necessary and practicable, attend school conferences.

3.2 Formal Discovery.

Counsel shall, if necessary, conduct formal discovery (a) to develop a more formalized record for trial, (b) to obtain in a timely manner the information necessary to develop and support the client's position and/or (c) to understand an opponent's case. At a minimum, counsel's strategy should include consideration of the following types of formal discovery: depositions, interrogatories (including expert interrogatories), requests for production of documents, requests for admissions, and motions for mental or physical examination of a party.

Counsel shall, consistent with the client's interests and goals, and where appropriate, take all necessary steps to preserve and protect the client's rights through opposition to the discovery requests of other parties. This includes, but is not limited to, invoking applicable privileges and rights to confidentiality, raising objections on the basis of relevance, and seeking appropriate limitations on the discovery requested.

Commentary: Counsel should timely file and seek court action on any motions to permit, compel, assist or oppose discovery as required by the applicable court rules or the Indigent Court Costs Act. In addition, counsel may deem it appropriate to seek sanctions for a party's failure to comply with discovery requests or orders.

4. SEEKING CLIENT OBJECTIVES

4.1 Obtaining Services for the Client and His or Her Family.

Consistent with the client's interests and goals, counsel shall request that DSS provide appropriate services in a timely manner to the client and/or members of his or her family. The attorney shall negotiate with DSS for the development of a service plan that meets the client's interests and needs and advances the client's goals in the litigation. In the event that DSS' proposed service plan does not meet the interests or needs of the client, counsel may, as appropriate, challenge the service plan through available administrative and judicial means. As necessary, counsel should investigate the availability of services or benefits provided by other public or private agencies or organizations and seek such services for the client.

Commentary: Counsel should make an independent determination of what services are necessary to meet the client's needs and to advance the client's interests in the litigation. Counsel should consider any barriers to the client's use of available services including disabilities or transportation, language or cultural barriers and seek to overcome such barriers.

Services may include: family preservation-related prevention or reunification services; sibling and family visitation; domestic violence prevention, intervention and treatment; medical care; mental health services; substance abuse treatment; parent and home health aides; parenting education; respite services; independent living services; specialized or long-term foster care; adoption services; education; recreational or social services; housing; financial assistance; vocational or employment-related services.

Counsel may advocate that services be provided to the client, to another family member, or to the child's substitute caretaker. For example, where the child supports reunification, child's counsel may advocate that the parent receive particular services necessary to enable the parent to care properly for the child. Alternatively, parents' counsel may advocate for the child to receive particular services necessary to permit the child to return home.

Counsel should be aware that the DSS regulations require that, to the greatest extent possible, the service plan be developed jointly with the family. It is important that counsel actively participate in service planning for the client.

Where counsel represents a child for whom the permanent plan is guardianship or adoption, counsel should seek to ensure, prior to the adoption or guardianship finalization, that the child and permanent caretakers will receive all necessary and appropriate post-guardianship or post-adoption services and subsidies for which they may be eligible.

4.2 Visitation.

At each stage of the proceeding, counsel shall assert the client's rights to, or interests in, parent-child, sibling or other visitation.

4.3 Custody and Placement.

At each stage of the proceeding, counsel shall zealously advocate for placement or custodial options consistent with the client's goals and objectives, and should be prepared to present placement alternatives with family members or friends.

4.4 Communicating with the Court Investigator/Guardian ad Litem.

(a) Counsel shall contact the court investigator/guardian ad litem as soon as practicable to inform him or her of the attorney's role and of the client's position.

(b) Counsel shall, if appropriate, revoke all authorizations for the release of confidential information and oppose motions seeking access to such information.

(c) Counsel shall inform the client of the role of the court investigator/guardian ad litem, including the consequences of cooperating or failing to cooperate with the court investigator/guardian ad litem, and prepare the client for the interview.

(d) Counsel shall be present at any interviews of the client by the court investigator/guardian ad litem, unless there are compelling reasons why counsel's presence would be unnecessary.

(e) Counsel shall assist the court investigator/guardian ad litem in obtaining information that supports the client's position.

Commentary: Counsel's presence at the court investigator's or guardian ad litem's interview with the client not only provides support for the client but ensures that the client has the opportunity to fully answer all questions and to present information, including the names of other persons to be interviewed, that is helpful to the client's case. Counsel's presence can be invaluable in preparing future cross examination of the interviewer. It also permits counsel, where appropriate, to advise the client not to answer specific questions posed by the interviewer or not to sign releases in the form submitted.

Many of the standards herein may apply as well to evaluations by other persons evaluating or interviewing the client, such as court appointed special advocates (CASAs), court clinicians, family service officers or probation officers.

4.5 Filing Pleadings.

Prior to trial, counsel shall, as necessary, file petitions, motions, responses or objections to protect the client's rights and interests and to advance the client's position in the case. Relief requested may include, inter alia, temporary custody orders; orders concerning visitation; rulings that DSS has abused its discretion; court-ordered evaluations; funds for experts or other services necessary for representation permitted under the Indigent Court Costs Act; restraining orders; contempt for non-compliance with a court order; protective orders concerning the client's privileges and right to confidentiality; appointment of guardians ad litem; or dismissal of petitions or motions.

4.6 Interlocutory Appeals

(a) Petition to Single Justice. Trial counsel shall, where appropriate, seek interlocutory relief from an order of the trial court by filing a petition to a single justice or through other appellate means. Counsel shall provide CAFL administrative staff with a copy of the petition and any supporting memoranda.

Commentary: As a general rule CPCS does not assign certified appellate counsel to represent clients in interlocutory matters before the single justice sessions of the appellate courts, and trial counsel remains responsible for such representation. Regional Coordinators and CAFL staff are available to provide advice on interlocutory matters on a case by case basis. In certain circumstances, CAFL staff

may be able to assign a mentor to counsel to assist with the filing of the petition or even assign certified appellate counsel.

(b) Appeal of Single Justice Order. Trial counsel shall, where appropriate, appeal an adverse order by the single justice to the full appellate court. In the event counsel elects to appeal an order of a single justice, or if the single justice reports his or her decision to the full appellate court, counsel shall promptly (i) contact CAFL for the assignment of certified appellate counsel to work on the appeal, and (ii) provide CAFL with copies of all papers filed in the appellate court that were not already provided under section (a) above.

4.7 Experts

(a) Counsel shall retain an expert where reasonably necessary to assist counsel in preparing or presenting the case.

(b) If counsel determines that expert assistance is necessary, counsel shall file a motion under the Indigent Court Costs Act to obtain the necessary funds for hiring an expert. If the motion is denied in whole or in part, counsel shall consider filing a notice of appeal in accordance with G.L. c. 261, § 27D.

(c) Counsel shall protect the confidentiality of all expert-related information including as necessary: filing motions for costs on an ex parte basis; requesting impoundment of the motion for costs; and informing the expert about the attorney-client privilege and attorney work-product protection.

Commentary: Otherwise discoverable documents enjoy a qualified immunity from discovery if they are attorney work product pursuant to Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure. Work by an expert retained by counsel is similarly protected. Counsel should take steps to safeguard the expert's work product, including filing the motion for costs ex parte and seeking impoundment of the motion. Counsel should send the expert an engagement letter that explains the expert's role in assisting counsel, and directs the expert to speak to no one about his or her work without counsel's permission. In the event counsel makes a strategic decision to share the results of the expert's work, counsel should convey such results him- or herself; counsel should not allow another attorney to speak directly to the expert. If counsel fails to take adequate precautions, he or she may inadvertently waive the work product protection. See Adoption of Sherry, 435 Mass. 331 (2001).

(d) Counsel shall be familiar with the foundational requirements for the admission of expert testimony.

Commentary: Counsel may hire a "testimonial expert" to provide testimony in a hearing or trial, or a "preparatory expert" to provide assistance to counsel in preparing the case. The need for expert assistance should be considered throughout the case, for example at the temporary custody hearing, an abuse of discretion hearing, trial or permanency hearing. More than one expert may be needed in a particular case.

For testimonial experts, adequate preparation is essential. Adequate preparation is also essential if counsel is opposing admission of expert testimony. Counsel should be aware that expert opinion comes not just from hired experts. Fact witnesses, such as social workers, guardians ad litem, court investigators and treatment providers may also offer expert opinion. Counsel should be prepared to satisfy or challenge the foundational requirements of such opinions.

5. PERMANENCY HEARINGS

Counsel shall assert and protect the client's right to a hearing on the permanency plan for th

5.1 Right to Hearing e child.

Commentary: The court may choose to conduct a permanency hearing in conjunction with an adjudicatory hearing on the merits of the petition. Counsel should object if this is prejudicial to the client. Counsel should zealously advocate for the client in the permanency hearing in addition to any obligation he or she may have in the adjudicatory hearing.

In the event that the court denies or improperly limits the client's right to a permanency hearing, counsel should consider pursuit of any available avenues for relief, including but not limited to interlocutory appeal, or appeal under G.L. c. 119, § 29B. Counsel should ensure that the appellate record is preserved by making detailed and specific offers of proof through, among other methods, affidavits or oral or written proffers.

5.2 Preparation for Hearing

In preparation for the permanency hearing, consistent with the client's interests and goals, counsel shall:

- (a) obtain and review the permanency plan for the child filed by the petitioner, and determine the extent to which the plan is consistent with the client's position;
- (b) if the proposed plan is inconsistent with the client's position, file a timely objection;
- (c) conduct any necessary discovery;
- (d) determine what evidence to present;
- (e) prepare for the direct and cross examinations of witnesses; and
- (f) take all necessary and appropriate steps to ensure the availability and presentation of evidence at the hearing, including but not limited to the issuance of

subpoenas and the filing of motions.

Commentary: Counsel should be familiar with Trial Court Rule VI, Uniform Rules for Permanency Hearings. Counsel should seek a continuance of the permanency hearing when the petitioner has not complied with Trial Court Rule VI, unless a continuance is inconsistent with the client's position.

5.3 Conduct of Hearing

During the hearing, counsel shall act as a zealous advocate. To the extent consistent with the client's interests and goals, counsel shall:

- (a) file all appropriate written objections, motions, and/or legal memoranda;
- (b) present and cross examine witnesses;
- (c) make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal;
- (d) consistent with the client's goals, advocate for a finding as to reasonable efforts; and
- (e) prepare requested findings of fact, conclusions of law, and proposed orders.

Commentary: Because the issues to be litigated at a permanency hearing often overlap with those to be litigated at a trial, the court may be inclined to limit the scope of the evidence to be presented at the permanency hearing. Consistent with the client's position, counsel should object to any limitations placed on the client's ability to present evidence.

There may be situations in which it is strategically advantageous to not fully litigate at the permanency hearing. Counsel must consider whether it better serves the client's interests to wait until the trial or other stage of the proceeding to present and/or object to evidence.

Where appropriate, counsel should seek to secure specific orders at the permanency hearing, as a means for expediting permanency for the child.

For guidance regarding the client's participation at the permanency hearing, see Standards 1.9, 2.1 and 6.1(h) and commentary thereto, concerning the presence of the client and the client's direction to counsel.

5.4 Appeal

If the client wishes to appeal the permanency hearing decision, counsel shall file a timely appeal and follow the rules set forth in Standard 8.1.

6. TRIAL PREPARATION AND CONDUCT

6.1 Trial Preparation

Counsel shall take all necessary and appropriate steps to fully prepare, defend and present the client's position at trial.

Commentary: In order to effectively prepare and defend the client's case, counsel should have a theory of the case, i.e., a cogent statement of a position that justifies the outcome. Throughout trial preparation, counsel needs to consider the theory of the case and how each piece of evidence affects the theory.

(a) Pretrial motions. Counsel shall prepare and file pretrial motions that advance the client's interests and seek to have such motions heard expeditiously by the court.

Commentary: Counsel should consider the full range of pre-trial motions available to advance the client's position at trial. Such motions may include, inter alia, discovery motions; motions in limine to exclude evidence; motions to strike; motions for speedy trial and consecutive days of trial; motions for visitation; motions to bifurcate proceedings; and motions for stenographic record and for the allowance of funds pursuant to the Indigent Court Costs Act, G..L. c. 261, §§ 27A-G.

(b) Counsel shall determine what evidence will be submitted to the court.

Commentary: Counsel shall identify all lay and expert witnesses as well as all documentary, demonstrative and physical evidence that he or she will seek to introduce into evidence in the client's behalf. In addition, counsel shall be prepared, when necessary, to cross-examine all witnesses called by other parties and object to, or file appropriate limiting motions as to, documentary evidence proffered by other counsel.

(c) Pretrial conference. Counsel shall notify the client of the pretrial conference date in writing and shall prepare for the pretrial conference. Counsel shall seek to discuss with other counsel and/or pro se litigants contested and uncontested facts and issues. Such preparation may also include the drafting and filing of motions in limine and pretrial memoranda in accordance with the pretrial orders, rules or practices of the court.

Commentary: The purpose of the pretrial conference is to determine contested and uncontested facts, simplify issues for trial, explore settlement opportunities and to estimate accurately the necessary trial time for the court.

Counsel should request that the court establish a deadline for outstanding discovery requests and the exchange of final witness and exhibit lists prior to trial. Counsel may also consider seeking

consecutive trial dates or the sequestration of witnesses. Counsel should endeavor to take all steps to advance the clients position including, where possible entering into stipulations of uncontested facts or stipulations to testimony.

Counsel should be aware that Juvenile Court Rule 8 requires counsel to submit any motions in limine relative to the court investigator's report at the time of the pretrial conference. Failure to submit such motion in accordance with the rules may prohibit counsel from submitting it at a later date, thereby precluding counsel from objecting to such evidence.

(d) Scheduling of Trial. Where consistent with the client's interests, counsel shall take all steps necessary to assert the client's right to a prompt trial, which may include objecting to continuances or moving for protective orders, sequential trial dates, or for a speedy trial.

Commentary: There are a number of issues that can result in trial delays, such as the need for a foreign language or sign language interpreter, stenographer, or audio-visual equipment to permit an incarcerated client to participate in the proceedings. Counsel must consider these issues in his or her trial preparation.

(e) Counsel shall take all necessary and appropriate steps to assure the availability and submission of evidence at trial.

Commentary: Counsel should provide written notification of the trial date to the client and all witnesses. Counsel should determine the availability and willingness of witnesses to appear and testify at trial. If witnesses are unavailable on the date that the trial is scheduled, counsel should consider the necessity of seeking a continuance of the trial if the testimony is crucial to the client's position or, in the alternative, explore other methods of introducing the testimony into evidence. If the appearance of a witness or party necessitates the issuance of a subpoena or writ of habeas corpus, counsel should seek the issuance of such process and take steps to assure the payment of any fees associated with such process.

Counsel should take all necessary action to assure that documentary evidence is available for introduction into evidence. Counsel should consider utilizing various statutory remedies, including the issuance of subpoenas duces tecum in this regard. In conjunction with all counsel, counsel should consider preparing an exhibit book containing stipulated and contested documentary evidence for the convenience and benefit of the court.

Counsel should consider assembling a trial notebook which contains, inter alia, witness testimony, exhibits, pretrial orders, pleadings, evidentiary memoranda, statutory and decisional law, timeline, genogram, family history, etc. to assist counsel's organization during trial. Counsel shall, as appropriate or where requested by the court, prepare evidentiary memoranda, requests for rulings and findings of fact and rulings of law consistent with the client's position and the anticipated evidence.

(f) Preparation of witnesses. Counsel shall prepare his or her own witnesses for direct and cross examination in advance of trial.

(g) Participation of parent client: Counsel shall fully prepare the parent client to testify and shall discuss with him or her the desirability of the client testifying at trial and the adverse inferences which may be drawn by the court in the event that a parent client does not testify. Further, counsel shall advise the parent client that an opposing party may call the parent client as a witness. Counsel shall discuss with the parent client his or her right to refuse to give certain testimony under the 5th Amendment of the U.S. Constitution and Article XII of the Massachusetts Declaration of Rights.

Commentary: The parent client's testimony can be the most helpful or damaging evidence to the client's case, depending on preparation. Such preparation should include multiple meetings with the client to explain the testimonial process and to participate in mock direct and cross-examinations of the client.

If the parent client is incarcerated counsel must visit the client to ensure proper preparation. Counsel shall seek to ensure an incarcerated client's presence at trial by petition for habeas corpus. If the client's presence cannot be secured, counsel shall seek to preserve the client's right to participate in the proceedings by filing a motion for some other form of accommodation such as closed circuit television or telephone. See also Standard 2.1 Commentary.

(h) Participation of child client: Counsel for a child client should accommodate the expressed wishes of a competent child client to be present during trial. In determining whether to call the child client as a witness, counsel shall consider the child's competency to testify, the need for the testimony, the harm that such testimony may cause the child and the child's expressed wishes. Counsel shall prepare the child to testify and seek appropriate accommodation for the child from the court to minimize any anticipated trauma. Where appropriate, counsel shall oppose the efforts of other parties to call the child as a witness.

Commentary: Counsel should prepare the child in an age appropriate manner to testify at trial. Counsel may wish to consult persons familiar with the child or retain an expert to assist in such preparation.

If the child does not wish to testify, but counsel determines that the child's testimony would further the child's position, counsel should explore whether there are alternative means for the court to admit any statements of the child which may be relevant to the proceeding, such as exceptions to the hearsay rule or the inclusion of such statements in any report of the court investigator and/or guardian ad litem. In addition, counsel should examine whether evidence which the child might give the court is available from other witnesses.

If the child does not wish to testify, but is subpoenaed to testify, and testifying could be harmful to the child, counsel should seek to quash the subpoena through the presentation of evidence as to said harm to the child. Alternatively, counsel should determine if the evidence can be admitted through any of the other means described in the preceding paragraph.

If the child must testify, counsel should seek to minimize any harm to the child by requesting special accommodations for the child's testimony, such as altering the location of the testimony, allowing the child to testify informally and in a developmentally sensitive manner outside the presence of other parties to the proceeding, using leading questions, or limiting the scope of cross examination. See Adoption of Roni, 56 Mass. App. Ct. 52 (2002).

The child may wish to be present during trial. While counsel should assure that the child is brought to court, he or she should also counsel the child that the judge may nevertheless exclude the child from the courtroom in an effort to shield the child from potential trauma.

6.2 Trial Conduct.

During trial, counsel shall act as a zealous advocate for the client by ensuring that proper procedures are followed and that the client's interests are represented. To the extent consistent with the client's interests and goals, counsel shall:

- (a) File all appropriate motions and legal memoranda, which may include motions regarding (i) post-termination and/or post-adoption contact, (ii) sibling visitation, (iii) the assertion of privileges and confidential relationships, (iv) the admission, exclusion or limitation of evidence to be presented, i.e., motions in limine; or (v) the sequestration of witnesses;
- (b) Present and cross examine witnesses and provide evidence in support of the client's position;
- (c) Make any and all appropriate evidentiary objections and offers of proof, so as to preserve the record on appeal; and
- (d) Prepare proposed findings of fact and conclusions of law.

Commentary: Although a client's position may be consistent with that of another party, counsel for that client remains responsible for presenting evidence and witnesses. Counsel should also make all necessary evidentiary objections, because an objection by one attorney to evidence or testimony protects only that attorney's client.

Proposed findings and conclusions are a crucial opportunity to marshal evidence supporting the client's position. They may also help to preserve issues for appeal. Proposed findings of fact must reference the evidentiary source(s). The Supreme Judicial Court has issued guidelines for proposed findings for these cases that are available on the CPCS website.

7. SETTLEMENT

Counsel should participate in settlement negotiations to seek the best result possible for the client consistent with the client's interests and directions to counsel. Counsel should consider utilizing available settlement resources, including mediation, to narrow contested issues or reach global

resolution. Prior to entering into any negotiations, counsel shall have sufficient knowledge of the strengths and weaknesses of the client's case, or of the issue under negotiation, to enable counsel to advise the client of the risks and benefits of settlement.

Commentary: From the time of appointment, and at every stage of the proceeding, counsel should be aware of the possibility of settlement opportunity and should discuss such opportunity with the client. Counsel should, consistent with the client's interests and direction, and at strategically appropriate times, proffer and respond to settlement offers without compromising the client's position in the proceeding. Counsel should participate in the settlement process for or with the client to the extent that the client wishes or that it is advisable to protect the client's interests. Counsel must, however, continue to move the litigation forward for the benefit of the client in the event that settlement fails.

Counsel for a child client should keep in mind that a negotiated resolution of these proceedings often serves the child's needs for finality, security and family contact, and should encourage settlement whenever such resolution is consistent with the child's interests and goals.

8. POST-JUDGMENT REPRESENTATION

Counsel shall inform the client of the court's decision and act in accordance with Standard 1.5. Counsel shall discuss with the client his or her post-judgment and appellate options regarding an adverse decision from the court. Counsel shall continue to represent the client in accordance with Standard 1.3.

Commentary: A child's position may change after trial. It is critical for child's counsel to inform the child of the court's decision and determine whether the child's position requires counsel to challenge all or part of the judgment.

8.1 Appeals.

(a) If the client elects to appeal, counsel shall file a timely appeal, order cassettes or transcripts or ensure that they have been ordered and seek assignment of CAFL appellate counsel in accordance with the Rules of Appellate Procedure. For parent clients, counsel shall take such steps as are necessary to obtain the client's signature on the notice of appeal. If appropriate, counsel shall also request a stay of the judgment pending appeal. Counsel for the appellee shall monitor appellant's compliance with appellate deadlines.

(b) Counsel shall submit necessary documentation to CAFL for the assignment of appellate counsel immediately upon the filing of the appeal, even if counsel is appellate certified. If counsel is appellate certified and wishes to keep a case on appeal, counsel must seek the permission of CAFL administrative staff.

(c) Counsel shall represent the client on all appellate matters until appellate counsel files an appearance.

(d) Counsel shall cooperate with the client's appellate counsel and provide appellate counsel with copies of exhibits, motions, and other pleadings. Counsel shall provide appellate counsel with other papers, including the case file and/or trial notes, upon request.

8.2 Post-Judgment Hearings, Reviews and Motions.

Following issuance of the judgment, counsel shall continue to represent the client in accordance with Standards 1.3 and 1.5. Counsel shall also continue to represent the client (except for parents where parental rights have been terminated) at all appropriate administrative and foster care reviews. Where appellate counsel has been assigned, trial counsel shall notify appellate counsel of any activity in the trial court and any other significant event.

Commentary: Counsel continues to represent the client in the trial court when an appeal is taken. Counsel should not withdraw from the case just because an appeal is filed. After the appeal has been docketed in the Appeals Court, trial counsel may not file certain pleadings in the trial court which seek to affect the judgment absent leave of the appellate court. Counsel should notify appellate counsel of the need to proceed in the trial court and request that appellate counsel seek the appropriate leave of court.

8.3 Cessation of Representation

(a) Conclusion of case. In the event the case concludes by the occurrence of one of the events described in Standard 1.3(a) above, counsel shall notify the client and explain the meaning and ramifications of case conclusion.

(b) Withdrawal from case. In the event counsel seeks to withdraw from a case, counsel shall move the court for successor counsel for the client. Counsel shall provide the client with a copy of the motion to withdraw and notice of the hearing. Counsel shall, to the extent practicable, avoid disclosing confidential information and information adverse to the client in any motion to withdraw or hearing thereon. If successor counsel is named, counsel shall cooperate with successor counsel. In the event the court determines not to appoint successor counsel, counsel should advise the court and opposing counsel of the client's address, unless otherwise directed by the client.

Commentary: In situations where counsel is withdrawing at the client's request, counsel should advise the client that the court may decline to appoint substitute counsel unless the client can demonstrate good cause. See Adoption of Olivia, 53 Mass. App. Ct. 670, 673-675 (2001).

It is very important that pro se clients receive the same pleadings and notices as are served on counsel. If counsel is withdrawing from a case involving domestic violence or presenting other safety concerns for the client, counsel may not wish to disclose the client's address to other counsel or other pro se litigants. In such circumstances, counsel should, contemporaneously with the motion to withdraw and (if possible) after discussion with the client, (a) file a motion to impound the client's address and (b), unless the client provides the court with the completed appointment of agent form, ask the court and remaining counsel to provide the client with notices of any hearings scheduled and copies of any pleadings filed or orders entered.

(c) Striking counsel's appearance. In the event the court strikes counsel's appearance and no successor counsel is appointed, counsel should advise the court and opposing counsel of the client's address, unless otherwise directed by the client.

Commentary: Counsel should follow the commentary set forth in Standard 8.3(b) above.

PERFORMANCE STANDARDS GOVERNING THE REPRESENTATION OF CLIENTS IN CHILD WELFARE APPEALS

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

Appellate counsel in child welfare appeals are bound by the within Performance Standards and also by all applicable Performance Standards Governing Representation of Children and Parents in Child Welfare Cases (Trial Standards) as set forth in the CPCS Assigned Counsel Manual (1999), which are fully incorporated herein.

Compliance with Massachusetts Rules of Appellate Procedure. Appellate counsel shall comply in all respects with the Massachusetts Rules of Appellate Procedure.

Work with a Mentor. Appellate counsel assigned to work with a mentor shall work with such mentor as required by the CAFL Co-Director overseeing the appellate panel. Appellate counsel shall abide by the terms and conditions of the mentor program as may, from time to time, be issued by such CAFL Co-Director.

Initial Obligations of Appellate Counsel. Immediately upon receipt of the notice of assignment, appellate counsel shall: (a) file an appearance in the appropriate court; (b) communicate with the client, if appropriate for the client's age, to inform the client of the assignment; (c) communicate with trial counsel to inform him or her of the assignment, provide him or her with copies of appellate counsel's appearance and request information and materials necessary for the appeal; and (d) determine whether a stay of the judgment or decree of the trial court should be sought pending appeal. In the event a stay should be sought, counsel shall immediately seek one in accordance with Mass. R. App. P. 6.

Initial Meeting with Client. Appellate counsel shall, as soon as practicable after the assignment, meet with the client. At such initial meeting, appellate counsel shall determine the client's position and goals in the appeal. Appellate counsel is not bound by the determinations of the client's position and goals made by trial counsel. Appellate counsel shall independently determine his or her client's position and goals on appeal as set forth in Trial Standards 1.6 and 1.7, and should be aware of the potential for conflicts as set forth in Trial Standard 1.4.

Ongoing Communications with Client. Appellate counsel shall confer with the client, if appropriate for the client's age, and with trial counsel, if appropriate, about the issues that may be raised in the client's appeal. Appellate counsel shall keep the client informed of all significant developments in the client's case. Appellate counsel shall respond in a timely manner to all communications from the client, provided that such communications are of a reasonable volume and at reasonable intervals. Where the client is a child, appellate counsel shall communicate with the child to the extent necessary to maintain a normal attorney-client relationship with the child. See Trial Standards 1.5 and 1.6.

Communications with Trial Counsel. Appellate counsel shall inform the client's trial counsel of all significant developments in the case, including proposed settlement of the case, trial motions (as set forth in section 7 below), dismissal of the appeal, docketing of the appeal in the appellate court and the resolution of the appeal. Appellate counsel shall cooperate with trial counsel in furtherance of the client's position and goals in the proceeding. See Trial Standard 7.1(d).

Motions. Appellate counsel shall timely file in the appropriate court all motions necessary or advisable to preserve and perfect the client's appellate rights. Appellate counsel who are not assigned to represent the client in the trial court shall not engage in motion practice in the trial court unless such motion practice relates to assembly of the record on appeal, a stay pending appeal, dismissal of an appeal, or a request for new trial or relief from judgment. Appellate counsel may, with prior authorization from the CAFL Co-Director, file and argue other motions.

Issues on Appeal. Appellate counsel should pursue all appropriate issues for appeal. Appellate counsel should pay particular attention to whether a claim as to ineffective assistance of trial counsel may form the basis of an appeal. If the client insists on having appellate counsel brief a contention that, in the judgment of appellate counsel, cannot be supported by a rational argument, appellate counsel shall (a) immediately inform and consult with the CAFL Co-Director and, if the Co-Director concurs, (b) inform the client of the client's rights with respect to such contention pursuant to *Commonwealth v. Moffett*, 383 Mass. 201, 203-09 (1981); (c) provide the client with a copy of the *Moffett* opinion; and (d) if the client thereafter wishes to invoke his or her *Moffett* rights with respect to such contention, comply in all respects with the guidelines set forth in *Moffett*. See *Care and Protection of Valerie*, 403 Mass. 317 (1988).

Briefs. Appellate counsel, whether representing an appellant or appellee, shall file a brief on behalf of his or her client. The brief of appellate counsel shall be of high quality and shall conform in all respects with the applicable Rules of the Massachusetts Rules of Appellate Procedure. Appellate counsel may join in the brief of another party, in part or in full, to the extent the client and such other party have an identity of issues on appeal; provided, however, that appellate counsel shall be responsible for ensuring the timely filing of any brief in which counsel has joined.

Copy of Brief to Client and Co-Director. Appellate counsel shall transmit to the client, if appropriate for the client's age, and the CAFL Co-Director a copy of the brief filed on the client's behalf. Appellate counsel shall also transmit to the client, if appropriate for the client's age, a copy of the brief(s) of other parties and copies of all other substantive documents pertaining to the appellate proceedings.

Oral Argument. Appellate counsel shall inform the client, if appropriate for the client's age, and CAFL Co-Director of the date, time and place scheduled for oral argument of the appeal as soon as the appellate counsel receives notice thereof from the appellate court. Oral argument of the appeal on behalf of the client shall not, absent the express approval of the client and the CAFL Co-Director, be waived with respect to any case.

Decision of Appellate Court. Appellate counsel shall promptly inform the client, if appropriate for the client's age, of the decision of the appellate court in the client's case and shall transmit to the client, if appropriate for the client's age, and the CAFL Co-Director a copy of the decision.

Further Appellate Review. If the decision of the Appeals Court is adverse to the client, appellate counsel shall promptly inform the client, if appropriate for the client's age, of his or her right to make application to

the Supreme Judicial Court for further appellate review of the case. If the client requests that such application be made, appellate counsel shall prepare and timely file on the client's behalf such application.

Federal Appellate Review. Appellate counsel must obtain the approval of the client and the CPCS Chief Counsel before seeking appellate review in the federal appellate courts. Whether or not to seek the approval of the Chief Counsel for federal appellate review is reserved to counsel's discretion. Approval of the Chief Counsel is subject to his or her discretion.

Conclusion of Representation. Appellate counsel's representation of the client ends as of the earlier of (a) withdrawal of the appeal, (b) dismissal of the appeal, absent appeal from such dismissal, (c) entry of an order striking appellate counsel's appearance, absent appeal from such order, or (d) final resolution of the appeal, including remand for a new trial. The CAFL Co-Director may, at his or her discretion, subsequently re-open a Notice of Assignment of Counsel that has been closed pursuant to this section.

**3. PERFORMANCE STANDARDS GOVERNING
MINORS SEEKING JUDICIAL CONSENT FOR ABORTION
M.G.L. ch.112. sec.12S**

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

These standards describe the steps which should be taken by an attorney assigned to represent a minor petitioning for authorization for an abortion pursuant to M.G.L. c.112, sec.12S. They must be utilized in association with the training manual prepared by the Judicial Consent for Minors Lawyer Referral Panel and the Committee for Public Counsel Services and the required training program, which describe in detail the law and procedure governing hearings under this statute.

1. The role of the attorney in a Massachusetts G.L. c.112, sec.12S hearing is to act as legal counsel for the minor petitioner in seeking approval of the petition, and to insure the petitioner is afforded all her due process, privacy and other rights.
2. Immediately upon request to represent a petitioner, the attorney shall make any arrangements necessary to communicate with or to allow the client to communicate with him/her, including leaving with the person assigning the case and with the attorney's office staff, if any, directions on how and when the attorney can be best reached. The attorney shall also determine the earliest practicable time when a hearing may take place, taking into account all information supplied by the person assigning the case as to the client's availability for said hearing. If the attorney's own schedule does not permit her/him to promptly handle the matter the attorney shall decline to represent the petitioner. In all cases the attorney shall notify the referring agency of her/his inability to handle the matter as soon as possible.
3. The attorney should make all efforts to communicate with the petitioner as soon as possible, but at least within forty-eight (48) hours of accepting the case. The attorney must carefully follow any instructions given by the person or agency referring the case as to how to safely contact the petitioner (i.e. times to call, whether or not to leave any message). In the majority of cases, the attorney may not be able to initiate contact with the client, and must therefore make all efforts to be available when the client initiates communication, including leaving with the person or agency assigning the case and with the attorney's office staff, if any, directions on how and when the attorney can best be reached; giving permission for office staff to accept collect calls; and providing alternative methods by which

the attorney could be reached, including cell phone numbers, and, if the attorney is willing, home telephone numbers.

If the attorney is unable to contact the petitioner or is not contacted by the petitioner within forty-eight (48) hours of accepting the case, the attorney must contact the person or agency who referred the case to determine if there has been any further contact by the petitioner and/or if there is any new information concerning how to contact the petitioner.

4. At the initial consultation, which initiates the lawyer-client relationship, the attorney shall:
 - a. explain the M.G.L. c.112, sec. 12S (judicial consent law) and legal procedures to the client,
 - b. determine the reasons for seeking judicial consent,
 - c. determine those factors which indicate or illuminate the minor's maturity and/or the minor's best interest,
 - d. determine how the client knows of her pregnancy and what the length of her pregnancy is, and
 - e. determine the client's understanding of the nature of the legal proceeding and medical proceeding.
5. If a hearing has not been scheduled at the time of the initial contact, or if the petitioner cannot attend the scheduled hearing, the attorney should immediately reschedule the hearing, preferably while the client is still immediately accessible. Should the attorney be unable to obtain a hearing within seventy-two (72) hours (other than by request of the client) the attorney shall contact the Office of the Chief Justice of the Superior Court to make arrangements for a hearing.
6. The attorney shall thoroughly investigate the relevant facts through a complete discussion with the client. Contact with any other person should be made only at the request of or with the permission of the client.
7. The attorney shall make certain that the client is aware of the exact location of the court where the hearing is to be held, and the exact place that the attorney and client will meet, giving directions, if needed. If there is any question as to the client's understanding of either location, the attorney shall request that the client describe to the attorney her understanding of the location. The attorney shall make sure that s/he and the client have appropriate information so that they can identify one another. The attorney shall also make certain the client has some form of transportation to the court.

8. The attorney shall determine from the clerk assigning the hearing whether any particular information or documents are required by the judge for the hearing (e.g., written pregnancy test results, ultrasound) and shall take all steps necessary to obtain the information.
9. The attorney shall determine that the client has received appropriate counseling as to the relevant abortion procedures and risks. If the attorney feels that the client has not received this counseling s/he shall provide the client with information on where such counseling can be obtained.
10. At or before the hearing the attorney shall prepare the necessary court papers and take all steps to insure the client's privacy.
11. At all times the attorney shall do everything necessary to protect the confidentiality of the client.
12. At the hearing the attorney shall act as a zealous advocate for the client, insuring that the proper procedures are followed and that all information concerning maturity, and if necessary, best interest, is placed on the record.
13. After the hearing the attorney shall make sure the client has all necessary papers so that an abortion can be performed and that the client knows how to contact the attorney if any problems arise.
14. Should the petition be denied the attorney shall immediately file a notice of appeal and take all steps to expedite an appeal within forty-eight (48) hours. The attorney shall also, in any case, immediately contact a member of the Judicial Consent for Minors Lawyer Referral Panel steering committee.
15. If an attorney has accepted a case but cannot attend the hearing because of illness or other serious problems, the attorney shall be responsible for obtaining appropriate substitute counsel trained to represent clients in these cases, appraising substitute counsel of all necessary information and, if possible, contacting the client with this information. If the attorney is unable to obtain such counsel on his/her own, s/he shall immediately contact the person or agency who referred the case to arrange for such qualified substitute counsel. If this cannot be done because of time constraints or evening hours, counsel shall contact one of the attorneys listed in the front of the Judicial Consent For Minors Training Manual to arrange for appropriate substitute counsel. At no time is it appropriate for the attorney to inform the client that it is her responsibility to arrange for substitute counsel.

C. COMPLAINTS REGARDING THE PERFORMANCE
AND CONDUCT OF ASSIGNED ATTORNEYS

I. PREAMBLE

Section 10 of G.L. c. 211D provides that the Committee for Public Counsel Services (“Committee”) shall “monitor and evaluate compliance with the standards and the performance of counsel in its divisions in order to insure competent representation of defendants in all courts of the commonwealth.” Section 10 also provides that the Committee “shall establish a procedure for the review and disposition of client complaints.” In accordance with these mandates, the Committee has established the following procedures for the investigation and disposition of complaints or other allegations regarding inadequate attorney representation, attorney misconduct, or an attorney’s noncompliance with Committee performance standards, guidelines, policies, and other requirements.

II. SCOPE

These procedures apply to a private attorney who is certified to accept assignments under G.L. c. 211D and who is the subject of any of the following:

- A. A complaint that the attorney has failed to provide competent representation to a client to whom he or she is or was assigned.
- B. An allegation that the attorney has engaged in misconduct.
- C. An allegation that the attorney is unable to or has failed to comply with performance standards, guidelines, policies, or other requirements that are contained in the Assigned Counsel Manual or are otherwise promulgated by the Committee, provided that the allegation relates to the attorney’s representation of or relationship with one or more of his or her Committee clients.

(All such complaints and allegations shall hereafter be referred to collectively as “complaints.”) These procedures are not available to an attorney who is not fully certified, or whose certification is provisional, probationary, or temporary.

Notwithstanding these procedures, service on all panels is at the discretion of the Chief Counsel.

III. INVESTIGATION PROCEDURE

A. Complaint Investigations

The Committee staff shall consider any complaint, regardless of the manner in which or the person (including Committee staff) by whom it is submitted. Complaints shall be investigated to the extent and in the manner deemed appropriate by the Chief Counsel or his or her designee.

Subject to staff availability, complaints alleging that an attorney is rendered unable to provide proper client representation due to illness, physical or mental, or substance abuse, or is charged with a crime or is subject to a decision by the Board of Bar Overseers to impose discipline, will be investigated within 15 days, with investigation beginning on the same day as the complaint, except for extension for good cause.

Complaints alleging neglect by failure to communicate with the client will be investigated within 15 days, except for extension for good cause.

All other complaints will be investigated within 30 days, except for extension for good cause. Extensions may be allowed by the Deputy Chief Counsel or Director of Mental Health Litigation.

Notice shall be provided promptly to any attorney subject to a complaint if it is determined that investigation requires consultation with a third party outside CPCS.

B. Interim Remedial Measures

If, at any time, the Chief Counsel or his or her designee determines that interim remedial measures are warranted to ensure that clients are adequately represented, he or she may take any action under subsection D on a temporary basis pending final resolution of the complaint.

C. Attorney Cooperation

The subject attorney shall cooperate fully with requests and inquiries from the Chief Counsel or his or her designee regarding the investigation.

1. If the attorney fails to respond to the complaint, the Chief Counsel or his or her designee may treat such non-response as a voluntary resignation from any panel of which the attorney is a member.
2. If the attorney fails to cooperate fully with the investigation, the Chief Counsel or his or her designee may take any action under subsection D.

D. Complaint Dispositions

Following the complaint investigation, the Chief Counsel or his or her designee may do any of the following:

1. Conclude that no further action is warranted, in which case the matter shall be closed and shall remain confidential.
2. Require remedial action, including but not limited to requiring the attorney to work with a mentor, requiring the attorney to attend continuing legal education programs, or limiting the attorney's caseload or the types of cases to which the attorney can be assigned.
3. Suspend the attorney for a term or remove the attorney from one or more panels, while permitting the attorney to retain some or all of his or her current cases.
4. Suspend the attorney for a term or remove the attorney from one or more panels and reassign some or all of the attorney's cases to other counsel.

The Chief Counsel or his or her designee may not finally dispose of a matter under paragraphs 2, 3, or 4 without first providing the attorney the opportunity to respond to the complaint and notice, under subsection E, of the proposed disposition. This requirement does not apply to interim remedial measures under subsection B.

E. Notice

1. Within two business days after any decision under subsection C1, the Chief Counsel or his or her designee shall notify the attorney of the decision and the basis for the decision.

2. Within 14 days after the any decision under subsection D2, the Chief Counsel or his or her designee shall notify the attorney of the decision and the basis for the decision.
3. Within two business days after any decision under subsection D3 or D4, the Chief Counsel or his or her designee shall notify the attorney of the decision and the basis for the decision. If the decision is one that may be reviewed under subsection F2, the notice shall also include a copy of these procedures.
4. Any notice required under this subsection shall be by certified mail and e-mail.

F. Scope of Review

1. A decision under subsection C1, C2, or D2 is final and is not subject to review.
2. Except for suspensions or removals under subsection C2, an attorney who is the subject of a suspension or removal under subsection D3 or D4 may request that the suspension or removal be reviewed by the Training and Qualifications Subcommittee (“Subcommittee”) under section IV.

IV. SUBCOMMITTEE REVIEW

A. Review Process

The following procedures govern matters subject to review under section III, subsection F2:

1. In order to obtain a review of a decision, the attorney must send a letter (“Review Request”) to the Chief Counsel requesting that the Subcommittee review the decision. The Review Request must be sent by certified mail and be postmarked within 20 days after the date of mailing of the notice under section III, subsection E3.
2. Within 20 days after receiving the Review Request, the Chief Counsel or his or her designee shall e-mail the attorney a written summary of the investigation (“Investigation Report”). The Investigation Report shall include the information that formed the

basis of the decision under section III, subsection D3 or D4, including any documentary information.

3. Within 20 days after the date on which the Investigation Report is e-mailed, the attorney shall provide the Chief Counsel or his or her designee a written response (“Attorney Response”) to the Investigation Report. The Attorney Response must state the bases for the attorney’s disagreement with the findings and recommendations of the Investigation Report. The Attorney Response may include any relevant documents. The attorney’s failure to provide a timely Attorney Response shall result in dismissal of the attorney’s Review Request.
4. The Chief Counsel or his or her designee may prepare a Supplemental Report to address issues raised in the Attorney Response. This Supplemental Report shall be e-mailed to the attorney at least ten days before the matter is considered by the Subcommittee.
5. All matters shall be decided by the Subcommittee on the papers described in this section, unless the Chairperson of the Subcommittee determines that a hearing is warranted. If the Chairperson of the Subcommittee determines that a hearing is warranted, the Chairperson shall notify the Chief Counsel or his or her designee, who shall, after consultation with the attorney and the members of the Subcommittee, schedule a date for hearing.

B. Subcommittee Hearing

1. The attorney may be represented by counsel at a hearing before the Subcommittee.
2. Upon request by the Subcommittee, the Chief Counsel or his or her designee shall orally summarize the complaint and the results of the investigation and state the decision made under section III, subsection D3 or D4.
3. The attorney shall limit his or her oral response to the issues raised in the documents submitted under subsection A.

4. The Chief Counsel or his or her designee shall limit his or her rebuttal to the issues addressed by the attorney in his or her oral response.
5. The attorney and the Chief Counsel or his or her designee, at the discretion of the Subcommittee, may present witnesses whose testimony is relevant to the issues raised in the documents submitted under subsection A. The Subcommittee may exclude any witness or proffer if the testimony would be irrelevant or duplicative. The parties may provide affidavits from witnesses in lieu of live testimony, but only if the affidavits have been submitted to the Subcommittee and the opposing party at least ten days before the hearing.

C. Subcommittee Decision

1. Any decision by the Subcommittee must be made by a majority of the members considering the matter. The Subcommittee shall decide the matter within 20 days after receiving the papers or, if a hearing is held, within 20 days after the hearing.
2. The standard of review to be applied by the Subcommittee to actions of the Chief Counsel or his or her designee shall be whether the action has a reasonable basis. The Subcommittee's decision shall be final.
3. The Subcommittee's decision shall be in writing and provided to the attorney and the Chief Counsel.