



CAFL Administrative Matters

Supplemental Reading

*CAFL Appellate
Certification Training*

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**COMMITTEE FOR PUBLIC COUNSEL SERVICES
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 staff and private counsel assigned pursuant to G.L. c. 211D. With respect to staff, the term “relevant Director” used below refers to the Director of Staff Litigation or her/his designee; with respect to private counsel, the term “relevant Director” refers to the Director of Appellate Panel or his/her designee. The terms “counsel” and “appellate counsel” used below refer to both staff and private counsel unless otherwise specified.

1. Performance Standards and Other Requirements.

- (a) *Performance Standards.* Appellate counsel shall comply with these Performance Standards and with 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.
- (b) *Assigned Counsel Manual.* Appellate counsel shall comply with all requirements set forth in the CPCS Assigned Counsel Manual, including but not limited to continuing education requirements.
- (c) *Mentor Program Requirements.* If private counsel has a mentor, he or she shall comply in all respects with the CAFL Appellate Mentor Program Requirements, which are incorporated in these Performance Standards by reference and may from time to time be revised.
- (d) *Massachusetts Rules of Appellate Procedure.* Appellate counsel shall comply in all respects with the Massachusetts Rules of Appellate Procedure.

2. Role and Duties of Appellate Counsel.

- (a) *Diligence, Zeal and Loyalty.* The role of appellate counsel is to diligently and zealously defend and protect the client’s rights and interests through the appellate process on all matters within the scope of counsel’s assignment. It is counsel’s duty to give the client undivided loyalty free of any conflicts of interest and to maintain the confidentiality of all client communications. Counsel’s commitment to these duties and obligations must remain unaffected by the client’s indigent status, the client’s background or the nature of the case.
- (b) *Representation at Trial and Appellate Levels.*
 - (i) Private Counsel. Private counsel who has represented a parent or child at the trial level and is certified or permitted to take appellate assignments may represent the client on appeal only if that client is an appellee for appellate purposes. In extraordinary circumstances, the CAFL Director of Appellate Panel may permit private counsel, upon written request, to continue to represent a client on appeal who is an appellant for appellate purposes.
 - (ii) Staff Counsel. Staff appellate counsel may represent a parent or child on appeal who was represented at the trial level by staff trial counsel, regardless of whether the client is an appellee or an appellant. However, if the client is an appellant and asks to be represented by private appellate counsel on appeal or raises the issue of ineffective assistance of counsel, staff counsel will contact the CAFL Director of Appellate Panel, who will assign the case to private counsel. In addition, if staff appellate counsel is assigned to represent an appellant and determines, based on his or her independent review

of the record, that staff trial counsel may have ineffectively assisted the client, staff appellate counsel shall contact the CAFL Director of Appellate Panel, who will assign the case to private counsel.

(iii) Children's Change of Position. If private or staff counsel continues to represent a child client on appeal and the child changes his or her position from that advanced at trial, counsel shall contact the relevant Director. If impending deadlines render the assignment of successor counsel impracticable and the relevant Director permits counsel to continue to represent the child client, then the representation shall continue. Otherwise, counsel shall withdraw and the CAFL Director of Appellate Panel shall assign new counsel for the child client.

3. Initial Obligations of Appellate Counsel. Immediately upon 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.

4. Screening Assignments. From time to time, private counsel may receive an assignment outside of the ordinary appellate process, for example, to evaluate the legal merits of a motion for new trial or for relief from judgment on behalf of a client who has not appealed the trial court's judgment. In such cases, counsel shall not file an appearance in the trial court but shall communicate with the client consistent with these Performance Standards, investigate the merits of the action, and submit a brief written report to the Director of Appellate Panel. The Director of Appellate Panel may authorize further action consistent with the report, terminate the assignment, or give appellate counsel other instructions. Counsel shall not file an appearance in the trial court unless authorized by the Director of Appellate Panel as the Chief Counsel's designee.

5. Initial Meeting with Client. Appellate counsel shall make all reasonable efforts to meet with the parent or child client within one week after receipt of the assignment. At such initial meeting, appellate counsel shall determine the client's position and goals in the appeal. 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. Appellate counsel is not bound by a substituted judgment determination of the client's position and goals made by trial counsel. Appellate counsel shall, however, consult trial counsel in this regard in an effort to jointly determine the client's position on appeal. If appellate counsel and trial counsel cannot agree on a substituted judgment position on behalf of the client, they shall together contact and consult the relevant Director. If a private attorney represents the client at trial and a staff attorney represents the client on appeal, or if a staff attorney represents the client at trial and a private attorney represents the client on appeal, together they may contact either Director. The requirement for meeting the client may only be waived with approval of the relevant Director.

6. 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.

7. 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 9 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).

8. Transcripts. Appellate counsel shall ensure that transcripts of the trial and all other necessary court dates have been specified by trial counsel and ordered by the trial court clerk's office consistent with Mass. R. App. P. 8(b)(5). Appellate counsel for an appellant shall review the entire transcript within three weeks after receipt from the transcriber, the court or other counsel. Appellate counsel for an appellant shall, within one week of receipt of the transcripts, provide a photocopy of the transcripts to other appellate counsel, including privately retained appellate counsel (if any) and appellate counsel for the Department of Children and Families, if so requested. All appellate counsel shall ensure that only one copy of the transcripts is ordered from the transcriber. If the clerk is ordering the transcripts, counsel for the appellant shall request that the clerk order only one copy from the transcriber.

9. 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, a stay pending appeal, dismissal of an appeal, or a request for new trial, relief from judgment or other form of post-trial relief relevant to the appeal. Appellate counsel may, with prior authorization from the relevant Director, file and argue other motions. Appellate counsel shall not file a motion for post-trial relief based on changed circumstances of the parties without prior approval of the relevant Director.

10. Issues on Appeal.

(a) *Meritorious Issues.* Appellate counsel shall pursue all meritorious issues for appeal unless there are tactical reasons for not doing so and the client consents.

(b) *Ineffective Assistance/New Trial Motions.* If appellate counsel determines that trial counsel provided ineffective assistance, and that such ineffective assistance should be raised as an issue on appeal, appellate counsel shall determine if a motion for new trial is necessary to preserve the issue for appeal. If such a motion is necessary, appellate counsel shall file a motion

for new trial in the trial court or, if the appeal has already been docketed, seek leave of the single justice to file a motion for new trial in the trial court. Appellate counsel shall send a copy of the motion for new trial to the relevant Director.

(c) Moffett Briefs. If the client insists that appellate counsel brief a contention that, in the judgment of appellate counsel, cannot be supported by any rational argument, appellate counsel shall (a) immediately inform and consult the relevant Director; (b) inform the client of the client's rights with respect to such contention pursuant to Commonwealth v. Moffett, 383 Mass. 201 (1981), and Care and Protection of Valerie, 403 Mass. 317 (1988); (c) provide the client with a copy of the Moffett and Valerie opinions; 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, 383 Mass. at 208-09 & n. 3.

11. Direct Appellate Review. Appellate counsel may, in his or her discretion, seek Direct Appellate Review (DAR) to the Supreme Judicial Court (SJC). Appellate counsel shall provide a copy of the DAR application to the relevant Director.

12. Briefs. Appellate counsel shall file a brief on the client's behalf. The brief of appellate counsel shall be of high quality and shall conform in all respects with the applicable Rules of Appellate Procedure. Appellate counsel may join in the brief of another party with respect to certain arguments without the need for permission. Appellate counsel may join in the brief of another party in full, or may by letter support the brief of another party, only with advanced permission of the relevant Director.

13. Copy of Briefs to Client. Appellate counsel shall send the client, if appropriate for the client's age, one copy of any brief or reply brief filed on the client's behalf. Appellate counsel shall also send the client, if appropriate for the client's age, a letter offering to provide the client with copies of the briefs of other parties and copies of all other substantive documents pertaining to the appellate proceedings. If the client requests copies of these materials, counsel shall provide them forthwith.

14. Copy of Briefs to CAFL Director of Appellate Panel. Private appellate counsel shall send to the Director of Appellate Panel one *unbound* copy of any brief and reply brief filed on the client's behalf.

15. Oral Argument. Appellate counsel shall inform the client, if appropriate for the client's age, of the date, time and place scheduled for oral argument of the appeal as soon as appellate counsel receives notice of the argument from the appellate court. Appellate counsel shall not waive oral argument, either prior to or at the argument, absent the express consent of the client and approval of the relevant Director.

16. 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. Appellate counsel shall send a copy of the decision to the client, if appropriate for the client's age, and to the relevant Director.

17. 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 apply to the SJC for further appellate review (FAR). Unless the client instructs appellate counsel not to do so, appellate counsel shall prepare and timely file the application with the SJC. When the SJC has ruled on the application for FAR, appellate counsel shall promptly inform the client, if appropriate for the client's age, of the ruling by letter.

18. 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. Any letter to the Chief Counsel must (a) set forth the procedural history of the case, the issues in the appeal, and why those issues are appropriate for federal review, and (b) also be sent to the relevant Director. Approval of the Chief Counsel is subject to his or her discretion.

19. 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. If the appeal results in remand for a new trial, in whole or in part, appellate counsel shall not represent the client in the trial proceedings unless (i) the client consents; (ii) appellate counsel is certified for CAFL trial representation; (iii) trial counsel consents, or the new trial is based on trial counsel's ineffective assistance, and trial counsel is permitted by the trial court to withdraw; and (iv) the trial court appoints appellate counsel to represent the client in the trial proceedings. The Director of Appellate Panel may, in his or her discretion, re-open a Notice of Assignment of Counsel for private counsel that has been closed pursuant to this section.

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Children and Family Law Division***

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CAFL APPELLATE MENTOR PROGRAM REQUIREMENTS

1. Attorneys are provisionally certified to take CAFL appellate assignments after completing the CAFL appellate certification requirements. The CAFL Division will assign each provisionally-certified attorney a mentor, and the provisionally-certified attorney (“mentee”) must work with the assigned appellate mentor. All mentees must comply with the requirements of the mentor program set forth below. The CAFL Director of Appellate Panel may remove the provisional certification of any mentee who fails to comply with these requirements.
2. The mentee shall have an initial in-person meeting with the mentor not later than three (3) days after receipt of the first appellate assignment from CAFL. Preferably, such meetings will take place immediately after the mentee is assigned to the mentor.
3. For each appellate assignment, the mentee must:
 - (a) notify the mentor within three (3) days of receipt of the assignment from CAFL.
 - (b) provide the mentor with a full set of transcripts, exhibits and pleadings for all assignments, unless the mentor specifies otherwise.
 - (c) meet with the mentor within fourteen (14) days of receipt of transcripts, or earlier if the mentor so requires, in order to identify appellate issues and research strategy. The mentor may elect to have this discussion by phone.
 - (d) notify the mentor immediately of the date of record assembly and docketing and deadlines for briefing.
 - (d) consult on an ongoing basis with the mentor regarding the issues to be researched and briefed.
 - (e) provide the mentor with:
 - (i) an outline of an appellant brief not later than thirty (30) days prior to the filing deadline, and an outline of an appellee brief not later than twenty (20) days prior to the filing deadline.

- (ii) an initial complete draft of the brief not later than fourteen (14) days prior to the filing deadline, with subsequent drafts of the brief at the schedule established by the mentor, and with the final draft not later than three (3) business days prior to the filing deadline.
 - (iii) an initial draft of a reply brief or application for further appellate review not later than seven (7) days prior to the filing deadline, with subsequent drafts at the schedule established by the mentor, and with the final draft not later than two (2) business days prior to the filing deadline.
 - (iv) drafts of other trial and appellate pleadings at the schedule established by the mentor.
- (f) notify the mentor immediately of the date for oral argument.
- (g) notify the mentor immediately of dismissal of an appeal, settlement, decision by an appellate court, and any other “final” action in an appeal.
4. The mentee must also comply with all reasonable requirements of the mentor regarding the provision of transcripts, record appendix materials, drafts of briefs/motions, and other matters. Mentors are not expected to review briefs, applications and other pleadings on the eve of the filing deadline. The mentor may edit drafts of any brief, application or other pleading prior to submission. The mentor must authorize the filing of the final copy of each red or blue brief.
 5. The mentor will conduct a moot court of the mentee’s oral arguments for at least the first appellee and appellant assignments. The mentee must provide the mentor and any other moot court participants with all briefs in a timely fashion prior to the moot court.
 6. The mentor will attend the mentee’s oral argument for at least the first appellee and appellant assignments, and may attend other arguments. If the mentor cannot attend an argument, the mentor will ensure that another mentor or CAFL staff is able to attend. The mentee will meet with the mentor in a timely fashion after oral argument to discuss the necessity of post-argument letters and to evaluate performance.
 7. The mentor will fill out an evaluation form for each of the mentee’s briefs/arguments and send it to the mentee and the CAFL Director of Appellate Panel.
 8. At any time during the mentor program, the CAFL Director of Appellate Panel may (a) determine not to assign the mentee any further appellate assignments, (b) remove the mentee’s provisional certification to take CAFL appeals, and/or (c) remove one or more assignments from the mentee and re-assign them to other appellate attorneys.
 9. Mentorship will last through the completion of *at least* two appeals (fully briefed and argued). Mentorship will not conclude until the CAFL Director of Appellate Panel

determines, after consultation with the mentor, that the mentee is prepared to graduate from the mentor program and be fully certified.

10. The CAFL Director of Appellate Panel may require that a fully-certified attorney work with a mentor for one or more assignments. That attorney shall comply with, and be bound by, all requirements set forth herein, unless the CAFL Director of Appellate Panel, after consultation with the mentor, determines that the requirements should be modified.
11. The CAFL Director of Appellate Panel may assign a mentor to work with a fully-certified attorney at the request of that attorney on a particular appeal. In such cases, the attorney and mentor may jointly determine the terms of the mentorship.

Please direct any questions regarding the above requirements to Andrew Cohen, CAFL Director of Appellate Panel, at (617) 988-8310.