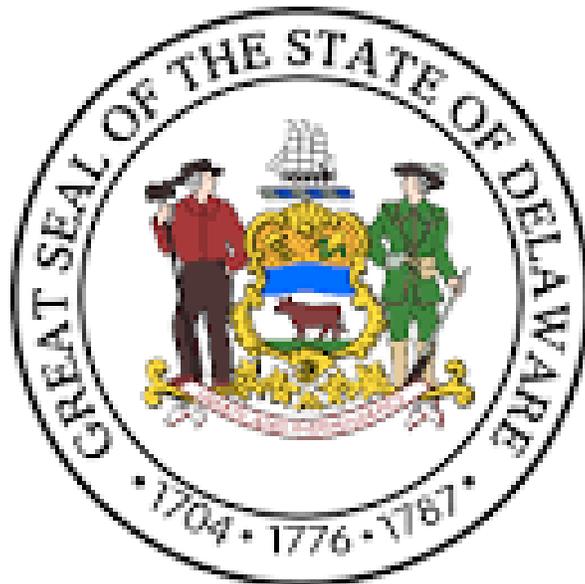


# Delaware Parent Attorney Standards



## **Disclaimer**

The purpose of these Standards is to alert the parent attorney to the various possible courses of action that may be necessary, advisable, or appropriate given the individual facts of each case. These Standards are also meant to assist parent attorneys in making decisions and embarking on particular actions to ensure the client receives the best representation possible.

These Standards are guidelines and are not intended to establish a legal standard of care, support a cause of action, create a presumption of a breach of any legal duty, or form the basis for any civil liability or claim of legal malpractice, nor is the extent to which an attorney adheres to these Standards intended to create the presumption of any violation of the Delaware Lawyers' Rules of Professional Conduct. In any scenario in which the Standards conflict with the Delaware Lawyers' Rules of Professional Conduct, the Rules of Professional Responsibility shall prevail. These Standards, however, may be used to evaluate contracts for legal representation and to determine compensation rates for same.

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## I. GENERAL

### INTRODUCTION

High-quality legal representation is the hallmark of effective advocacy for parents whose children have been removed from their care. This type of representation is necessary to promote a number of goals, including shorter stays in foster care, more meaningful hearings, and a strong attorney-client relationship with frequent and substantive communication. Attorneys tasked with representing a parent through the child welfare process maintain the dual roles of both counselor-at-law and advocate. As such, parent attorneys are a key stakeholder in the court process and have an irreplaceable role in helping achieve what is often the primary permanency plan: reunification.

Further, parent attorneys must always keep in mind the monumental weight of the rights at stake. Representation of parents necessarily invokes deep-rooted constitutional protections, as set forth in the historic case precedents of the U.S. and Delaware Supreme Courts. This representation is not to be undertaken lightly, and the following standards set forth what attorneys should strive to achieve when representing each client whose child has been placed in the custody of the State.

Each case is unique and requires its own independent investigation and case analysis. Oftentimes, parent clients view their attorney as their strongest ally and only advocate, while other times, they view their attorney with distrust stemming from the perception that their appointed attorney is part of the system that removed their children in the first place. Parent attorneys may find it advantageous to engage family members and collateral sources to help engage their clients in order to best achieve a client's case goals.

The goal of these standards is to help attorneys zealously work alongside their client to achieve the client's identified desired outcomes. These standards incorporate the Delaware Rules of Professional Conduct and are meant as a guide to any attorney appointed to represent a parent whose child is in the custody of Department of Services for Children, Youth, and Their Families ("DSCYF"), Division of Family Services ("DFS"). These standards are formatted such that "black letter" guidelines appear followed by commentary, the latter meant to provide attorneys with practical tips depending upon case strategy.

Lastly, these standards are drafted to address a wide range of case situations and client needs. Engaging in these standards will hopefully assist in building a trusting relationship with a client through consistency, demonstrated commitment, and advocacy. It is the intent that attorneys from all ranges of experience level and background will find this resource to be a helpful tool from the initial court appointment until permanency is achieved.

*"The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."*

J. Blackmun, U.S. Supreme Court  
*Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

## **1.1 General Guidelines**

- (a) Parent attorneys shall provide effective and high-quality legal representation and shall advocate for the client's express goals.
- (b) Parent attorneys shall not substitute personal judgment in any case decision that is the responsibility of the client.
- (c) Unless inconsistent with the client's goals, parent attorneys should strive to work collaboratively with all stakeholders involved in the case.
- (d) Parent attorneys should avoid unnecessary continuances, case delays, or empty adjudications whenever possible.

### **COMMENT**

[1] Upon appointment, parent attorneys are under the obligation to provide the parent client with sufficient time, resources, knowledge and experience to properly represent their interests. Parent attorneys must advise and counsel the parent client with candor and clear explanations of the likelihood of achieving the client's stated goals. Parent attorneys should also incorporate any concurrent legal proceedings into the discussion to ensure the client fully understands the impact of his or her decision. Overall, parent attorneys must make certain the client is making fully informed case decisions.

[2] Effective and respectful collaboration is discussed in greater length within these standards, *supra*, and is a powerful tool for parent attorneys to rely upon to achieve resolutions on particular matters outside of the courtroom. Parent attorneys should expect to engage in just as much, if not more, advocacy outside of court than during a court hearing.

[3] Representation of parent clients should be done with a sense of urgency. Parent attorneys should only request continuances if it meets the client's objectives or is necessary to ensure the parent can participate. Moreover, as is discussed in much greater length in later sections, parent attorneys must maximize their court hearings to present as much evidence and legal argument as is necessary to advance the client's interests – avoiding empty adjournments and court orders that do not reflect the client's true progress.

## **1.2 Scope of Representation**

- (a) The duties and obligations of parent attorneys commence upon the Family Court issuing an Order of Appointment.
- (b) The duties and obligations of parent attorneys continue until the earlier of the following:
  - i. The petition is dismissed;
  - ii. The minor child reaches the age of 18;
  - iii. The court has excused the attorney from continued representation;

- iv. The court grants the parent attorney’s Motion to Withdraw from representation;
  - v. The case reaches permanency and no party appeals (reunification, guardianship, permanent guardianship, termination of parental rights, or Another Planned Permanent Living Arrangement (“APPLA”));
  - vi. An appeal of any final order, and any remand thereof, reaches its conclusion.
- (c) Parent attorneys are not automatically appointed to concurrent proceedings (*e.g.* relative guardianship), but are often appointed upon request of the parent.

**COMMENT**

The appointment of counsel procedures may vary from county-to-county depending upon the specific protocols used by the Family Court. In some cases, the parent attorney may be appointed immediately upon the issuance of the *ex parte* order granting DFS the authority to remove the child. In other cases, the court may opt to wait until the parent avails himself/herself to the jurisdiction of the court by making an initial appearance. While the former is the preferred method, parent attorneys should be mindful that beginning advocacy work as soon as possible (even before a formal letter of appointment is issued) will best serve the client and ensure court hearings are meaningful. More detailed guidelines concerning preliminary advocacy work are found in the Case Preparation and Client Contact sections of these Standards.

**1.3 Civility**

Parent attorneys shall at all times practice civility and professional demeanor when working with other stakeholders, service providers, and the tribunal.

**COMMENT**

Parent attorneys must always practice civility in word and deed. Civil communication includes not only speaking to others with respect, but also responding to telephone calls and other communications promptly. While zealous representation is required at all times, so too is the obligation to uphold the proper administration of justice. Harshness, aggressive tonality, profanity, or personal attacks upon adversaries or stakeholders are unacceptable and demean the legal profession as a whole. The parent attorney should also work to ensure that all parties and stakeholders treat their client with the same respect that is required of lawyers. Clients may be understandably angry or upset, but all professionals in the case must show empathy and respect.

**II. CLIENT CONTACT**

**2.1 Communication: General**

- (a) In all cases, regular, ongoing, and meaningful communication necessary to effectively represent the client requires, at a minimum, communication with the client prior to every hearing, upon the filing of, or response to, any substantive motion or pleading, and in the event of major changes in the case.

- (b) Parent attorneys shall be familiar with and comply with the Delaware Lawyers' Rules of Professional Conduct, in particular with regard to communication, Rule 1.4, concerning attorney-client communication.
- (c) Parent attorneys shall take necessary steps to regularly ascertain the client's position on matters that arise during the course of representation.
- (d) Parent attorneys shall clearly communicate with the client when the attorney-client relationship ends.

### COMMENT

[1] *Meaningful communications.* – Often, parents facing placement of a child in DSCYF Custody are confused, emotional, angry and overwhelmed – making conversation difficult. These parents may be labeled as “difficult” or “uncooperative” and present as angry, emotional, malaise, or manic – all of which can create barriers to meaningful communication. Nonetheless, effective communication is essential to successful parent attorney representation. Parent attorneys should employ strategies such as taking breaks or rescheduling meetings with the client when the client's emotional state makes communication impossible or unproductive.

[2] When communicating with the client, the client's level of understanding should be taken into account and concepts should be explained in a way that the client can understand. Checks of understanding (for example, by asking the client to explain the meaning of what she was just told) are advisable when there is a concern that the client might not fully comprehend the communication. Similarly, the parent attorney should make sure the client is literate before utilizing written communication.

[3] *Responsiveness.* - Parent attorneys should endeavor to respond to any communications received from the client within a reasonable period of time. Parent attorneys should have a general discussion with their clients about attorney availability and expectations in terms of receiving responses to client communications. Parent attorneys should encourage clients to leave messages or voicemails if they call so that there is a record of who called and when.

[4] *Overcoming barriers to attorney-client communication.* – It is important for parent attorneys to recognize and acknowledge that parents engaged in these cases often face a number of barriers, including poverty and limited access to resources necessary for ongoing attorney-client communication. At the initial intake interview, parent attorneys should ask clients for the best phone number to reach them, what the best method of communication is for the client, and if the client has any backup methods of communication. Parent attorneys should also make it clear to the client that it is the client's responsibility to keep the attorney informed of any changes to their contact information.

[5] Parent attorneys must also be cognizant of the client's accessibility to transportation and offer alternative meeting locations that are more accessible to the client that must utilize public transportation when scheduling in-person meetings.

[6] Many clients prefer to communicate via text message as opposed to phone call. Parent attorneys should consider utilizing a cellular phone to allow clients the option of text messaging, social media messaging, and other communication applications. Because sometimes other individuals may have access to a client's phone, when communicating with clients via text message, the attorney should be aware that the person they are communicating with may not be the client. The parent attorney should make efforts to confirm the text message recipient's identity before discussing confidential information.

[7] With the client's consent, parent attorneys should ask if there are any close relatives or friends with whom the client would be comfortable allowing the parent attorney to speak in the event the client is unable to communicate via their primary phone. Parent attorneys should never discuss case details with these individuals without express permission from the client, but should attempt to locate the client via these identified resources in the event other attempts are unsuccessful.

[8] *Termination of Attorney-Client Relationship.* - Parent attorneys must make an effort to clearly communicate with the client at the point the attorney-client relationship ceases. This can happen for a variety of reasons, including final resolution of the case or parent non-involvement. If the relationship is terminated due to final resolution of the case, the parent attorney shall provide the client a copy of the final order, along with communication explaining the order and the client's rights moving forward. If a request has been made to change the permanency plan to APPLA, the parent attorney should ensure that the client understands that parent attorneys are often discharged when the permanency plan is APPLA.

If the parent attorney is unable to engage the client and communication attempts are proving futile, the parent attorney shall make a clear record of efforts to locate and communicate with the client prior to making a request to withdraw.

The parent attorney shall also notify the client in writing, or request the Court to note in its order, that the parent attorney will be permitted to withdraw at a subsequent hearing if the client remains unengaged.

## **2.2 Communication Prior to and After Hearings**

- (a) Sufficiently in advance of each hearing, the parent attorney shall communicate with the client to ensure the client understands the purpose and potential outcomes of the hearing, to review evidence, and to establish goals and strategies for the hearing.

- (b) Within a reasonable time after any hearing, the parent attorney shall communicate with the client to answer any questions arising from the hearing, ensure the client understands what occurred at the hearing, and to discuss next steps.
- (c) Upon receipt, the parent attorney shall mail or otherwise transmit all court orders, pleadings, and other important documents to the client so that the client can be prepared for the next hearing.

### COMMENT

#### **Preliminary Protective Hearing**

[1] *Prior to court appointment.* – Upon receiving a petition for DSCYF Custody, parent attorneys should make reasonable attempts to contact a prospective client prior to the preliminary protective hearing (“PPH”). In many cases, the petition will contain the parent’s last known telephone number. Parent attorneys can also contact the Deputy Attorney General (“DAG”) assigned to the case to attempt to obtain contact information from the investigative worker. The attorney shall make reasonable attempts to schedule an intake interview with the parent in a time and manner that best suits both the attorney and the parent, and which may be held via telephone, virtual media platforms or in-person.

\* This will need to be revised to reflect the appointment practices in all counties or to reflect changes to the appointment process.

[2] Parent attorneys must be mindful of the Delaware Lawyers’ Rules of Professional Conduct, which prohibit an attorney from representing two parties whose interests are adverse (as is often the case in dependency proceedings). Once the parent attorney has spoken to a prospective client – even pre-appointment – the parent attorney shall not thereafter engage in substantive legal discussion or accept an appointment of the other parent without an express waiver of conflict by both parties. (DLRPC Rule 1.7, with Commentary).

Moreover, parent attorneys should refrain from representing both parents in these proceedings, even if the parents are intact or married at the outset of the case, as it is not uncommon for these relationships to deteriorate as the case progresses, creating a conflict for the parent attorney to continue representing both parties.

[3] *Initial client intake.* - At the initial intake interview prior to the PPH, the parent attorney should gather as much information as possible, including:

- Best contact information for the client;
- All relatives and current contact information;
- The client’s current employment, income, debts, and assets (to support a Motion for Finding of Indigency);

- Any relative or non-relative who may serve as a support for increased visitation (known as a “Visit Host”);
- Whether the client or the client’s child(ren) is a member of a federally-recognized Native American tribe;
- Involvement with current service providers (e.g. mental health, substance abuse, etc.);
- Whether the client identifies any barriers with regard to literacy or the English language;
- Whether the client identifies any barriers that may be considered a disability under the Americans with Disabilities Act (“ADA”) for which reasonable accommodations shall be made.

[4] In addition to gathering information from the client, during the initial client intake interview, the parent attorney should discuss the allegations contained in the petition and carefully explain the dependency proceedings to the client. To assist the client in making fully informed decisions, this explanation should go beyond just the PPH and adjudicatory hearing and touch upon the other hearings that will follow if the child(ren) remains in DSCYF custody, up to and including the potential for termination of parental rights as well as timelines for moving forward with termination of parental rights.

Further, the parent attorney should carefully explain roles of the various stakeholders involved in the proceedings, including, but not limited to, the judicial officer, DAG, DFS worker, Child Attorney, Court-Appointed Special Advocate (“CASA”), Court Improvement Program (“CIP”) Parent Attorney Social Worker (if applicable), and parent attorneys. Parent attorneys should emphasize that their role is not affiliated with DFS, Family Court, the Department of Justice, or the Office of Child Advocate, and is an independent role in the adversarial system.

[5] *Stipulations.* - Parent attorneys must clearly communicate the client’s right to contest the PPH. Once the client understands the process and the allegations in the petition have been discussed, the parent attorney should explain any waivers or stipulations that the client may choose to enter into at the PPH and counsel the client on how best to proceed.

[6] When meeting or speaking with the prospective client prior to the PPH is not possible, the parent attorney’s initial meeting with the client often must be condensed into the moments immediately before the PPH itself. In this event, the parent attorney should request the court staff allow a few minutes to speak to the parent. This should also occur in virtual hearing platforms via breakout rooms. In the event court staff does not permit sufficient time to meet with the client prior to the PPH, this issue should be noted on the record at the outset of the hearing.

[7] *After the hearing.* - At the conclusion of the PPH, should the child(ren) remain in DFS custody, the parent attorney should provide the client with the attorney’s contact information as well as the next court date and time, in writing. The parent attorney should also make definite

arrangements to meet or communicate with the client prior to the next hearing. Further, the parent attorney should provide the parent with a Parent Handbook. If time allows, immediately following the PPH, the parent attorney should discuss what happened at the hearing and next steps. If the scheduling of other hearings prevent discussion immediately following the PPH, the parent attorney should endeavor to have this discussion within several days of the PPH. Because court can be confusing and intimidating, the parent attorney should ensure that the client has a basic understanding of what the court is requiring of the client.

### **Adjudicatory Hearing**

[8] *The adjudicatory hearing.* – Communication with the client should begin near-immediately after the PPH in light of the short window between the PPH and adjudicatory hearing (generally 30 days or less). Parent attorneys should gather as much background information as is necessary to gain a full understanding of the events leading up to removal of the child(ren). Parent attorneys should obtain information from the clients necessary for the attorney to identify relevant documentary evidence and witnesses. Parent attorneys should also gather information about any steps the client has taken to remedy the situation that led to the child’s removal so the parent attorney can be prepared to argue that the child can be safely returned to the client. Once the parent attorney’s investigation is underway, the parent attorney should make reasonable attempts to schedule a minimum of one meeting with the client prior to the adjudicatory hearing. Prior to the adjudicatory, the parent attorney shall explain to the client all options and potential outcomes and provide legal advice on the best option to take.

[9] *Stipulations.* – Parent attorneys must clearly communicate the client’s right to a trial on DFS’s petition. If the parent agrees that there are certain issues that must be worked on prior to the safe return of the child(ren), the parent attorney should clearly explain the meaning of a waiver of a their right to a contested trial on the DFS petition, and the requirement for a stipulation as to specific reasons the child should remain in DSCYF Custody. The parent attorney should avoid stipulating to reasons for dependency or neglect that exceed the scope of the actual issues giving rise to the removal of the child(ren).

### **Developing a Case Plan & Dispositional Hearing**

[10] *The case plan and dispositional hearing.* – Developing a succinct yet meaningful case plan is a major milestone in a case and should not be taken lightly. DFS policy dictates that the parents should be involved in the drafting of their case plans. (*See*, Division of Family Services Principle of Child Welfare Eleven, Policy Manual, p. ix, updated March, 2019). Accordingly, parent attorneys should discuss what the client believes are the biggest barriers to reunification – and what services would be most effective in achieving the client’s case objectives. The parent attorney should advise the client to contact the parent attorney directly to discuss any discrepancies, hesitations, or objections to the elements of the case plan prior to the dispositional hearing. Parent attorneys should not simply guess or assume what should be on a client’s case

plan and should take an active role in its drafting. Parent attorneys should advise clients to not sign the case plan until they have had an opportunity to review and discuss it.

[11] Family Court Civil Procedure Rule 216(d) dictates that DFS must provide the case plan to all parties five days or more prior to the dispositional hearing. Immediately upon receipt of the case plan, the parent attorney should contact the client to discuss its elements. Parent attorneys should ensure the client understands each element thoroughly and should be prepared to answer all questions the parent has about any element or its requirements. Parent attorneys should ensure that the services on the case plan target the barriers to reunification and are specifically tailored for each client

[12] Once it is established what services the client should receive under the case plan, the parent attorney should strongly encourage the client to sign releases of information that will allow the parent attorney, and other parties, to contact and receive information from every agency and professional who may treat the client.

### **Review Hearings**

[13] *Review hearings.* – Parent attorneys should proactively contact the client for periodic updates, at least monthly, prior to review hearings; it is insufficient to wait until the day of the hearing to communicate with a client concerning the client’s case and case plan progress. In the event the parent attorney loses contact with the client despite utilizing all communication methods discussed with the client, the parent attorney should contact the DAG to determine if the DFS worker has current contact information for the client. The parent attorney should also attempt to reach out to other professionals involved, such as family interventionists, counselor, or therapists, for contact information or to pass a message to the client.

[14] In addition to regular phone calls or texts, parent attorneys should regularly contact clients by mail, providing an easy-to-read description of what tasks must be accomplished prior to the next review, along with a copy of the court’s order and notice of the next hearing. The parent attorney should also remind the client to be in contact with the parent attorney with any issues or concerns.

### **Permanency Hearing**

[15] *Permanency hearing.* – Because it is a major milestone in the case, communication between the parent attorney and the client leading up to the permanency hearing should be frequent. Even if previously explained, parent attorneys should explain to the client the significance of the permanency hearing and what a change of permanency plan could mean for the client’s case going forward. Parent attorneys must make every effort to fully and meaningfully discuss all possible permanency options with the client. If an opposing party has filed a motion to change the permanency plan, the parent attorney must make every effort to ascertain the client’s

position on the proposed change of plan. Communication around the time of the permanency hearing should also include another discussion of any possible family that may be available as a permanency option.

[16] *Alternative Dispute Resolution.* – Prior to the permanency hearing, the parent attorney should discuss with the client what alternative dispute resolution is, if it can be employed in the client’s case, and how it might affect the outcome of the case. The parent attorney should determine the client’s position on alternative dispute resolution and advance that position with opposing counsel as soon as practicable.

### **Post-Permanency & Termination of Parental Rights**

[17] *Post-permanency and termination of parental rights.* – In the event the permanency plan is changed to something other than reunification, the parent attorney must continue to maintain regular and meaningful communication with the client to ensure the parent attorney is appropriately advocating the client’s actual position.

[18] If the permanency plan is changed to termination of parental rights for the purposes of adoption (“TPR”), the parent attorney must take great care to ensure the client fully understands the risks and benefits of their legal options in response to a TPR petition. If communication has been sparse, the parent attorney must make every effort to locate the client and review the available options such that the client can make an informed decision.

[19] If the client has indicated that they will not consent to TPR or has expressed uncertainty as to how to proceed, sufficiently in advance of the TPR hearing, the parent attorney should meet with the client to prepare for the TPR. Such a meeting is critical in light of the fact that typically, DFS will not be assisting the parents with services at this point and it is incumbent upon the parent attorney to guide the client and mount a defense against the TPR. Moreover, if the parent attorney has lost contact with the parent at this stage, the parent attorney should prepare for the TPR as if it will be contested.

### **2.3 Communication During the Appeals Process**

- (a) Upon receiving a final order from the court that is adverse to the client’s interests, the parent attorney shall immediately communicate with the client regarding the order and the client’s appeal rights.
- (b) During the pendency of an appeal, the parent attorney shall keep the client apprised as to the status of the appeal and mail or otherwise transmit to the client all relevant appeal documents.

- (c) Upon receipt of the order on appeal, the parent attorney shall provide the client with a copy of the order, discuss next steps, and, if applicable, advise the client that the attorney-client relationship has concluded.

#### COMMENT

[1] *Efforts to contact the client.* – Since there is limited time to file an appeal with the Delaware Supreme Court after the Family Court issues a final order, the parent attorney must make strident efforts to contact the client, explain the court’s decision, and inquire as to how the client wishes to proceed. In some cases, a significant amount of time may have passed since the last hearing until the court issues its order – and the client may have relocated or changed contact information. Nonetheless, the parent attorney must work diligently to achieve a meaningful and substantive discussion as to whether the client wishes to file an appeal.

[2] *Grounds for appeal.* – Prior to filing the opening brief, the parent attorney should discuss with the client grounds for appeal; while in many cases, these will be largely be legal and tactical decisions made by the parent attorney, the client’s input should still be sought.

[3] *Appeals without merit.* – In situations where the parent attorney is satisfied that the appeal is without merit and will file a motion to withdraw pursuant to Supreme Court Rule 26.1(c), the parent attorney should have a candid discussion with the client about what that means for the appeal process and what the client’s responsibilities are in such a situation.

## **2.4 Incarcerated and Inpatient Clients**

Parent attorneys shall maintain the same standard of communication with incarcerated and inpatient clients as they would with any client pursuant to these Standards and the Delaware Lawyers’ Rules of Professional Conduct.

#### COMMENT

[1] *Phone contact.* – Prisons and jails are required to allow residents the opportunity to speak with their parent attorneys. This can occur over the phone, in-person or via virtual platforms. Arranging phone or virtual communication may require the parent attorney to provide proof of identity, proof of bar admission, and an order indicating that the attorney is appointed to represent the client. This can usually be accomplished by email, mail, or in-person. The parent attorney should keep in mind that phone calls to incarcerated clients may be recorded and, therefore, are not confidential. Similarly, inpatient facilities may have restrictions on phone contact with clients, but should allow clients to speak with their parent attorneys. Issues with communicating with incarcerated or inpatient clients should be brought to the court’s attention.

[2] *In person contact.* – Meeting with the client in-person is another option and encouraged to ensure confidentiality. Parent attorneys will need to identify themselves in the same manner

explained in comment [1] above. The parent attorney should call ahead to determine if there are certain times of the day that are not conducive to residents receiving visitors (*e.g.* shift change). Also, the resident may only have a certain allotment of time to speak to the parent attorney.

[3] *Letters and mail.* – Communicating by letter is another option, and the parent attorney should provide a self-addressed stamped envelope (or several) along with the correspondence to remove any barriers the client may face in responding.

[4] *Transportation.* – The parent attorney should confirm with court staff that arrangements have been made for the parent to be transported to the next hearing or that standing arrangements are made for transportation to all hearings, in the case of clients who are incarcerated for an extended period of time. If the parent attorney is unsure of whether or not a client is incarcerated, the attorney should contact the DAG or DFS worker who can look that information up, or consider utilizing services, such as VineLink, that provide notice of incarceration and release.

## **2.5 Non-English Speaking Clients**

- (a) At the initial client intake interview, the parent attorney shall determine the language in which the client is most comfortable conversing.
- (b) Regardless of the client’s spoken language, the parent attorney shall maintain the same standard of communication with non-English speaking clients as they would with any client pursuant to these Standards and the Delaware Lawyers’ Rules of Professional Conduct.
- (c) If the parent attorney or the parent attorney’s staff is not fluent in the client’s language, parent attorneys shall attempt to use certified interpreters and translators when feasible and should address reimbursement for the costs of those services with the court.

### **COMMENT**

[1] *Avoiding assumptions.* – Parent attorneys are cautioned against assuming a client is most comfortable speaking a particular language. Even if a client presents as capable of reading, understanding, and speaking English, counsel should not assume that is their preferred language. Keep in mind that parent attorneys are tasked with discussing high-level, technical concepts with clients – and clients may be much more comfortable and receptive to information if the conversation occurs with the help of an interpreter in their native language. Similarly, parent attorneys should be mindful of dialects and ensure the client is truly understanding what is being translated. In some cases, dialects can vary tremendously, making it very difficult for the client to understand the interpretation. If this presents as a barrier, be sure to raise the issue with the court, as it may be necessary to introduce a second interpreter with knowledge of the particular dialect.

[2] *Certified interpreters and translators.* – In most cases where the client is indigent, the court will approve reimbursement of reasonable costs associated with the parent attorney utilizing an interpreter or translator to communicate with the client between hearings. The court should have a certified interpreter present for all hearings with the client and that interpreter can be utilized by the parent attorney to speak with the client immediately before hearings. Prior to each hearing, the parent attorney should check with court personnel to ensure that the necessary interpreter will be present at the hearing.

[3] *Non-certified interpreters and translators.* – Other parties to the case should never be used to interpret or translate communication between the parent attorney and the client. Parent attorneys should exercise caution using the client’s family members or friends to interpret or translate attorney-client communications. In addition to creating uncertainty as to the accuracy of the information being conveyed, the use of a non-certified interpreter or translator could compromise attorney-client privilege. Similarly, when writing to the client, translation software should be used sparingly. While such software may be appropriate for translating simple letters or communications, it is likely not reliable for translating legal concepts or in-depth communications.

## **2.6 Out-of-State and International Clients**

Parent attorneys shall make reasonable attempts to maintain the same standard of communication with out-of-state and international clients as they would with any client pursuant to these Standards.

### **COMMENT**

[1] *Out-of-state clients.* – If the client is located in another state, parent attorneys may be limited in the number of face-to-face meetings that occur. Therefore, parent attorneys should utilize telephone, email, messaging services, and letters to maintain these standards of communication. Often, the court will permit out-of-state clients to participate in hearings by telephone or via virtual platforms if they cannot be physically present at court. Participation in hearings in-person is obviously preferred, and for those out-of-state clients who can attend the hearing in person, parent attorneys should attempt to arrange face-to-face meetings with the client around the court date. Similarly, the parent attorney should speak with the client about remaining in the state on the day of the hearing to potentially visit with the child(ren) or accomplish other tasks related to the case.

[2] *International clients.* – Frequent and meaningful communication with a client located out of the country may require use of a special messaging or telephone service. If there are any fees associated with reaching a client in another country, the court may be amenable to reimbursing these costs. Parent attorneys should still send letters as well, taking precaution to determine the precise international address for the client. Parent attorneys should consider contacting the local

consulate or embassy for the country where the parent is located as staff there may be able to facilitate communication with the client.

## **2.7 Clients with Diminished Capacity**

- (a) When representing a client with diminished capacity or suspected to have diminished capacity, the parent attorney shall be familiar with and comply with Delaware Lawyers' Rules of Professional Conduct 1.14 concerning diminished capacity.
- (b) Should the parent attorney suspect that the client's capacity is diminished to the point where the client is incapable of understanding the nature of the proceedings or of assisting the attorney with their legal representation, the parent attorney shall so advise the court in a manner reasonably calculated not to compromise or endanger the attorney-client relationship.
- (c) Parent attorneys shall make reasonable attempts to maintain the same standard of communication with clients with diminished capacity as they would with any client pursuant to these Standards and the Delaware Lawyers' Rules of Professional Conduct.

### **COMMENT**

[1] *Maintaining a normal attorney-client relationship.* – A client's diminished capacity could be the result of the client being a minor, suffering from a mental impairment, being under the influence, or some other reason. DLRPC Rule 1.14(a) requires the attorney for a client with diminished capacity to, "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Comment [2] to DLRPC Rule 1.14 specifically emphasizes maintaining communication with the client with diminished capacity, even if that person has a legal representative. As such, the parent attorney may need to utilize unique ways of communicating with the client so that they can best understand. This may include breaking down concepts into smaller pieces, utilizing visual aids, or bringing in a familiar third party into the discussion to help the client better understand concepts (with the client's consent).

[2] *Guardian ad litem.* – In some cases, the client's capacity is diminished to the point that they may direct the parent attorney to take certain action that will introduce substantial harm. Further, if communication proves futile and the parent attorney reasonably believes that the client is not understanding the communication, it may be necessary to request that the court appoint a guardian *ad litem* to represent the client's best interests in their stead. Under DLRPC Rule 1.6(a), a parent attorney may reveal general details as to the client's alleged diminished capacity to the extent necessary to advance the need for a guardian *ad litem* or other protective measures. As well, Family Court Rule of Civil Procedure 17(b) addresses the standard and procedures for appointment of a guardian *ad litem* to a person with incapacity engaged in Family Court proceedings.

### **III. CASE PREPARATION**

#### **3.1 Case Preparation: General**

- (a) Without thorough, diligent and ongoing case preparation, it is impossible for a parent attorney to effectively advocate for the client's specific goals and objectives.
- (b) Parent attorneys must develop a theory of the case at the outset of the attorney-client relationship. This case theory shall guide the parent attorney throughout the course of the proceedings
- (c) Parent attorneys shall be familiar with Delaware Lawyers' Rules of Professional Conduct, particularly as pertaining to case preparation. Namely, Rule 1.1 prescribes a certain level of competence and case preparation, while Rule 1.2 requires maintaining requisite knowledge and skill through ongoing education and continuing study.
- (d) Parent attorneys shall keep abreast of emerging legal issues, legal arguments, statutory changes and updates, case law updates, and policy as it relates to the practice of child welfare law.

#### **COMMENT**

[1] Termination of parental rights is considered by many to be the civil equivalent of the death penalty. In other words, this case result represents the worst possible outcome for many families. This, coupled with the classification of parental rights as sacred and fundamental, means parent attorneys must regard case preparation and child welfare work as incredibly important and deserving of the utmost diligence and attention.

[2] A parent attorney's obligation to provide diligent and effective representation, extends equally to all clients, paying and court appointed. Therefore, parent attorneys should employ the same level of diligence and care representing their court appointed clients as they would use representing a paying client.

[3] Thorough case preparation, including regular client communication and input, are essential components to developing a sound theory of the case. This tool helps parent attorneys develop a keen understanding of the underlying facts of the action (both positive and negative), which then develops into a case theme and can help drive the attorney toward effectively meeting the client's goals.

[4] Commentary to Rule of Professional Conduct 1.1 explains that, at a minimum, parent attorneys must analyze precedent, evaluate evidence, and conduct necessary legal drafting. New

parent attorneys are encouraged to seek advice from more senior experienced parent attorneys concerning legal issues that may be of first impression to the parent attorney. Comment [5] below mandates that the parent attorney shall discharge the required attention and preparation congruent with what is at stake.

[5] Child welfare law and policy is constantly evolving. It is not possible for a parent attorney to effectively advocate for a client's case goals without a strong working knowledge of the various state and federal statutes, regulations, policies, and case law relevant to child welfare law practice. Parent attorneys should also attend available trainings to ensure knowledge of changes and updates.

### **3.2 Investigation; Discovery**

- (a) Parent attorneys shall conduct a thorough and ongoing investigation for the duration of the client's case, which shall including regular client interviews, ongoing discovery, and identifying and communicating with potential witnesses.
- (b) Parent attorneys shall conduct a regular review of pertinent documents, including the family's DFS file, as needed to ensure the parent attorney is fully prepared to advocate for the client prior to and during court hearings.
- (c) Parent attorneys shall engage in formal discovery, as needed, if the requested information is relevant to the subject matter of the case or may lead to the discovery of relevant information.
- (d) Parent attorneys shall request relevant records and information from third-parties and seek court orders as needed to permit the disclosure of those records and information.

#### **COMMENT**

[1] *Client interviews.* – Conducting a thorough investigation throughout the duration of the client's case is the cornerstone of a prepared and effective parent attorney. The parent attorney should meet with the client regularly and gather as much information as possible, including information, documentation and the identification of witnesses relevant to any present barriers to, or progress towards, prompt reunification (*e.g.*, copies of a lease, records concerning mental health treatment, drug screens, etc.). At all client meetings, the parent attorney should ensure that releases and consents from service providers are signed by the client and up-to-date.

[2] Parent attorneys should adhere to the practices regarding client contact as set forth in Section II of the Delaware Parent Attorney Standards.

[3] *Relevance.* – Issues that are *always* relevant in dependency, neglect, and abuse cases include, but are not limited to: (1) whether the child(ren) are dependent/neglected/abused in the care of the parent; (2) whether continued placement out of the parent's care is in the best interests

of the child(ren) pursuant to 13 Del.C. § 722; (3) whether the child(ren) can be placed safely back in the care of the parent; and (4) whether DFS has met its reasonable efforts mandate concerning either avoiding placement or promoting the permanency plan in effect. Parent attorneys shall make diligent efforts to conduct an investigation and gather necessary evidence concerning these categories, depending upon the unique facts of each case.

[4] *Documentary Discovery.* – Parent attorneys should request and review the family’s DFS case file. In so doing, the parent attorney may develop a more thorough understanding of the circumstances leading to the client’s involvement with DFS, what steps were taken to avoid removal, what barriers appear prevalent for the family, and whether there may be suitable family members or non-relatives available as resources for the child(ren).

[5] *Third-party discovery.* – In the event a third-party provider or entity has relevant information that it is unwilling to disclose notwithstanding the existence of a valid release or in the absence of a valid release, the parent attorney should motion the Court for an order authorizing the release of records and information. A sample motion can be found in Appendix [#].

[6] *Formal and informal discovery.* – Generally, the court encourages informal discovery where practical and productive. Some judges issue discovery orders at the PPH that lay out an informal, but enforceable process for expedited production of documents. In the absence of such an order and should informal practices fail, Delaware Family Court Civil Rule 26 governs the process through which a parent attorney may engage in formal discovery. Because of the expedited timeframes in dependency/neglect proceedings, the parent attorney may need to address timing of discovery at the initial stages of the case. Parent attorneys should be familiar with the rules and the various mechanisms available to obtain relevant non-privileged information from opposing parties. Although, pursuant to Family Court Civil Rule 26, formal interrogatories are not permitted without court approval, it is good practice to make informal inquiries of opposing counsel, in writing, concerning witnesses, positions on specific issues, and other relevant matters.

### **3.3 Client Meetings**

- (a) Parent attorneys shall meet and communicate with the client regularly well in advance of the hearing, in accordance with Section II of these standards.
- (b) Parent attorneys shall utilize tools and checklists to ensure all relevant information is discussed.
- (c) Client meetings shall be respectful of a client’s primary language and may include necessary support person(s) upon client request.

## COMMENT

[1] Habitually only meeting clients in the minutes prior to the start of their hearing is unacceptable. Not only will the conversation be rushed and abbreviated, the presence of adversaries, witnesses, and potentially the child(ren) just feet away will create an atmosphere of stress and anxiety for the client. Rather, client meetings should occur preferably in a location most comfortable and accessible for the client. This may include the attorney's office, a local library or restaurant, the client's home, or the home of a trusted family member or support person, or even virtually.

[2] It is not uncommon for clients to seek to cover a number of topics while meeting with their parent attorney. In order to keep a cohesive record of material topics to cover, parent attorneys should develop a checklist system that includes the keystone topic areas, such as (but not limited to):

- Client's specific case goals;
- Possible family and non-relative resources;
- Assets and barriers to frequent, meaningful and natural family time;
- Discussion of the client's perception of DFS' efforts in helping with reunification;
- Involved service providers and whether a current release is in place;
- How the child(ren) is doing in care (*e.g.*, mental and physical health needs met);
- Whether the parent is invited to/included in the child(ren)'s physical and educational meetings;
- Any additional issues unique to the client's case.

[3] Client meetings can involve the use of technical legal language. While a client may indicate an understanding of the English language, parent attorneys should strive to conduct meetings with the help of an interpreter to ensure the client clearly understands the substance of the discussion (*see*, Section 1.5, Non-English Speaking Clients, *supra*).

### **3.4 Communication with Counsel and Parties; Settlement**

- (a) In conjunction with the client's identified case goals, parent attorneys shall communicate with opposing counsel and other parties to the case as necessary to reach a resolution if possible.
- (b) Parent attorneys should approach each case with a collaborative mentality, utilizing team meetings and other collaborative methods where appropriate to help reach timely permanency.

## COMMENT

[1] *In general.* – One common goal among all parties to a child welfare case is the desire to keep a child(ren)’s stay in care as short as possible. In conjunction with the client’s stated case goals – and with the client’s consent – parent attorneys should regularly engage with opposing counsel and parties to determine possible ways to resolve the case and negotiate a settlement. Care should be taken not to communicate directly with represented parties without the consent of that party’s counsel. Parent attorneys should be trained in the basic skills of negotiation and should rely on a combination of these skills, consistent professionalism, and zealous advocacy when communicating with opposing parties.

[2] *Settlement.* - In the event a settlement offer is communicated to the parent attorney, the details must be communicated to the client without delay – even if the parent attorney does not believe the client will agree. Examples of this could include agreeing to a guardianship or permanent guardianship with a family member or non-relative. While this offer may fall short of the client’s primary goal of reunification, encouraging the client to consider the pros and cons of an alternative permanency plan may result in a mutually-agreeable conclusion.

[3] Parent attorneys must remain diligent and prepared for trial if the client so directs. Although parent attorneys should advise the client when a contested hearing may not be in the client’s best interests, parent attorneys should never encourage the client to accept a settlement offer simply to avoid a contested hearing.

[4] *Collaborative Approach.* – To the extent possible, utilizing a team approach to the case may be extremely advantageous in achieving timely permanency. Parent attorneys should consider regularly scheduling meetings to include DFS, Child Attorney, CASA volunteer, relevant service providers, the parent(s), and necessary support individuals. Team meetings can be used to identify remaining barriers to reunification, as well as what can be done to help alleviate any further delay in the child(ren) returning home.

### **3.5 Motions & Pleadings**

- (a) Parent attorneys shall timely file motions necessary to advance the client’s case goals and request hearings on those motions as needed.
- (b) Parent attorneys shall file responses to all motions, petitions, memoranda, and briefs as necessary to zealously advance the client’s stated case goals and objectives.
- (c) Parent attorneys shall keep abreast of emerging legal issues, legal arguments, statutory changes and updates, case law updates, and policy as it relates to the practice of child welfare law.

## COMMENT

[1] *In general.* – Parent attorneys shall be intimately familiar with the Family Court Rules of Civil Procedure, including all rules relevant to the filing and service of pleadings. Attorneys must also ensure strong knowledge of filing deadlines.

[2] *Motions and other pleadings.* – While collaboration between adversarial parties is ideal, it is not always realistic or possible. Regularly meeting with the client pursuant to Rule 1.3 above will inform the parent attorney as to areas in which the client’s legal rights are not being met, including reasonable efforts or sufficient family time. If the parent attorney believes the client is entitled to a certain service or right and time allows, this should first be communicated to the opposing parties in writing using a respectful tone. If this proves futile, the attorney may motion the court for relief. Even if the motion is unsuccessful, this preserves the issue in the event an appeal is necessary. All pleadings shall be drafted thoroughly and accurately, and the attorney must be prepared to distinguish unfavorable case law.

[3] *Hearings.* – At times, the need for certain relief will require an immediate decision and waiting until the next hearing, which could be several months away, will be detrimental to the client. In such situations, parent attorneys may need to request that the Court convene a hearing sooner than scheduled to address a motion or pleading. When requesting a more immediate evidentiary hearing, it can sometimes be beneficial to request a brief conference with the Court and counsel to address scheduling.

[4] Child welfare law and policy is constantly evolving. It is not possible for a parent attorney to effectively advocate for a client’s case goals without a strong working knowledge of the various state and federal statutes, regulations, policies, and case law relevant to child welfare law practice. Parent attorneys should also attend available trainings to ensure knowledge of changes and updates.

### **3.6 Witness Preparation; Experts; Review of Documentary Evidence**

- (a) Witnesses shall be identified in advance of upcoming hearings and the parent attorney may ensure witness attendance by use of a subpoena, if necessary. The parent attorney shall make contact with the witness ahead of the hearing to discuss the scope of the expected testimony.
- (b) The parent attorney should determine whether input from expert witness is necessary to advance the client’s position or more thoroughly explain a complex or technical matter.
- (c) Parent attorneys should ensure that all documentary evidence they may introduce into evidence is shared in advance of the hearing with all involved parties. Likewise, the

parent attorney should routinely request any evidence to be introduced by any opposing party prior to each hearing.

### **COMMENT**

[1] *Witnesses.* – A parent attorney should never assume that DFS or the Child Attorney is planning to present a certain witness at a hearing. If a witness is beneficial to the client’s case, the parent attorney should work diligently to ensure that witness will be available to provide testimony on the record. While some witnesses are more comfortable in the courtroom setting than others, the parent attorney may work with the witness to review a list of questions, as well as what may be asked on cross-examination. If a witness is unavailable to personally appear on the date of the hearing, the parent attorney should file a motion to allow the witness to testify by telephone

[2] *Expert Witnesses.* – Expert witness testimony is often required to explain technical matters such as concepts relating to psychology, psychiatry, pediatric mental health disorders, trauma, children with medically complex diagnoses, and cases involving serious unexplained physical injury (discussed further in Rule 3.7). While DFS or the Child Attorney may opt to present expert witness testimony, parent attorneys should also consider enlisting the services of an expert if doing so may advance the client’s position or case goals. Parent attorneys should quickly and diligently conduct a search for a possible expert and obtain a quote for expert fees. This quote, in conjunction with a motion for payment of fees, if the client is indigent, may be presented to the court in order for the parent attorney to secure the necessary funding. It is within Family Court discretion whether to allow for payment of expert fees on behalf of indigent parents, and the parent attorney should be prepared to specifically articulate why the particular expert is necessary to the case.

[3] *Documentary evidence.* – Careful review of potential documentary evidence is necessary and should take place well in advance of the hearing. Parent attorneys should be well-versed in the Delaware Rules of Evidence and prepared to make reasonable objections to the admission of documents which are negative to the client. Likewise, evidence the parent attorney will seek to admit should be shared with the parties in advance of the hearing. Sometimes, a parent may appear at the hearing with certain documentary evidence in hand (*e.g.*, pay stubs, lease agreement, etc.). Parent attorneys should ensure other parties are provided a copy as quickly as possible and should be prepared to meet objections relating to hearsay, etc. Certain documents may require a witness just to admit the document, but who will not otherwise elaborate on the contents of the document. In these situations, all counsel should consider stipulating to the admission of the document without requiring such limited witness testimony.

### **3.7 Serious Physical Injury & Complex Medical Neglect Cases**

- (a) Parent attorneys shall diligently prepare for adjudication of serious physical injury and complex medical neglect cases.

- (b) Parent attorneys shall timely request discovery from DFS and carefully review all records produced.
- (c) Parent attorneys shall work with the Court and counsel to ensure that the adjudicatory hearing is scheduled to allow counsel adequate time to prepare for trial; this may require going outside of the typical guidelines for the scheduling of adjudicatory hearings.

### **COMMENT**

[1] *In general.* – Serious physical injury and complex medical neglect cases are among the most complicated and difficult cases for a parent attorney to defend. These cases typically have dire consequences for parents which can include having the parent placed on the Child Protection Registry, allowing DFS to forego reunification efforts with the parents (in the instant case and any subsequent case), establishing a statutory ground for TPR, and, for clients with immigration issues, having an impact on their immigration status. Because child welfare cases are viewed as a continuum, from PPH through TPR, the outcome of the adjudicatory hearing in serious physical injury and complex medical neglect cases will often dictate whether a parent’s rights are ultimately terminated. Accordingly, these cases require special care and attention in all aspects.

[2] *Discovery.* – Parent attorneys should always make a timely discovery request from DFS in cases involving allegations of serious unexplained physical injury or complex medical neglect. The scope of the request should include all records relevant to the proceedings, including medical records and any other records to be reviewed by any expert witnesses DFS plans to present.

[3] Review of records in these cases will likely involve a multitude of documents. However, parent attorneys must closely review these records and thoroughly prepare for the adjudicatory hearing, wherein DFS will likely seek certain findings that may preclude the parent from engaging in reunification through a treatment case plan. Parent attorneys should be familiar with the legal implications of certain findings at the adjudication stage, as well as timely respond to motions filed to alleviate DFS’s reasonable efforts duties. Parent attorneys should be mindful to listen to their client’s recitation of events closely and carefully – avoiding the temptation to form pre-conceived theories of what may have likely transpired. This practice will also help the parent attorney better prepare for trial and will assist the attorney in productive collaboration upon the retention of a medical expert.

[4] *Experts.* – Parent attorneys may enlist the assistance of a medical expert to refute findings of alleged abuse or chronic neglect. Any efforts to retain a medical expert should begin immediately as it can be difficult to retain a local doctor in light of Delaware’s small medical community. Parent attorneys should be mindful of the process for motioning Family Court for payment of fees for indigent clients and factor that into the time needed to prepare for trial.

[5] *Criminal and immigration considerations.* – Parent attorneys shall remain informed as to any concurrent criminal proceedings involving the client that may directly impact the client’s options at the adjudication stage. Parent attorneys should make efforts to remain in regular communication with the client’s criminal defense attorney. Parent attorneys should ensure that an incarcerated client is scheduled for transport on the date and time of the hearing(s).

[6] *Fifth Amendment.* – If criminal charges are pending (or the parent is under a criminal investigation) related to the alleged abuse or neglect, ensure the client understands their rights against self-incrimination – including the right not to testify as to DFS’s allegations. The parent attorney must ensure that the client fully understands the effects of a waiver of their Constitutional protections and understands that the criminal court may use any of these statements against the parent for purposes of a pursuing a criminal conviction, which may result in incarceration. Moreover, the parent attorney should request that the court engage in a colloquy with the parent on the record to ensure the parent has been fully advised by both counsel and the court as to the dire consequences of testifying in this situation.

Parent attorneys should also be familiar with the Delaware Supreme Court’s analysis of the “inevitable” tension between the Fifth Amendment and parental rights as found in *Sierra v. DSCYF*, 238 A.3d 142, 158 (Del. 2020). While the Fifth Amendment protections apply in a child welfare matter, remaining silent when faced with an allegation of serious unexplained physical injury is not necessarily without consequence. In *Sierra*, the Court found that any conflict between the parents’ admission of culpability and the child(ren)’s safety must be resolved in favor of the latter. In other words, a parent who chooses to remain silent in this scenario in order to protect themselves against self-incrimination should be aware that, under *Sierra*, that parent does not also have the right to avoid the consequences of offering no explanation for the child(ren)’s injuries.

[7] *Immigration.* – Findings of abuse or neglect may have negative consequences for clients within certain immigration classifications. Parent attorneys should work with the client to determine what options are available, as well as help refer the client to the proper immigration advocates as needed. Parents facing deportation and held in an out-of-state facility may still be able to participate by telephone, a virtual platform or receive transportation upon request from the parent attorney or court.

[8] *Protocol for cases involving de-escalation of life support.* – For cases where a child(ren) is dependent on life-sustaining technology, the Child Protection Accountability Commission has developed a multidisciplinary protocol on how to proceed in these particularly unique cases. Parent attorneys should review this protocol when involved in any serious physical injury case as it contains useful guidance that can be applied to any case involving complex medical evidence and testimony.

#### **IV. COURTROOM ADVOCACY**

#### 4.1 Courtroom Advocacy: General

- (a) Strong trial advocacy skills are a cornerstone of zealous legal representation of parents, and parent attorneys should strive to consistently work to improve their practice strategies in the courtroom.
- (b) Parent attorneys shall ensure that objections are timely made and issues are properly preserved on the record for purposes of appellate review.
- (c) Parent attorneys shall be familiar with the Delaware Rules of Evidence and Delaware Family Court Rules of Civil Procedure. Strong working knowledge of evidentiary and procedural rules is vital to high-quality courtroom advocacy.
- (d) Parent attorneys shall be prepared to present witness testimony, documentary evidence and, if appropriate, testimony by the parent client as to the issues of dependency/neglect/abuse, best interest factors under 13 *Del.C.* § 722, reasonable efforts to promote the permanency plan in effect, and findings required by Family Court Rules of Civil Procedure 217 or 218 as applicable.

#### COMMENT

[1] *Preserving the record.* – Parent attorneys are required, at the direction of their client, to file an appeal in the event of an unfavorable case resolution (*e.g.*, TPR). Accordingly, parent attorneys should be appellate-minded from the initial stages of the case through the final ruling. Absent extreme circumstances, the Delaware Supreme Court will decline to review an issue that has not been properly preserved in the trial court below.

[2] *Objections.* – When objectionable testimony or evidence is presented to the trial court below, parent attorneys shall quickly and clearly articulate the objection and its basis. Parent attorneys should be prepared to rebut the arguments of adversaries in favor of the evidence – and must ensure that the court issues a ruling on the objection before the proceedings can continue. Objections should not be made frivolously or without a valid legal basis, even if the evidence is unfavorable to the client. Parent attorneys must maintain civility and respect for adversaries and the tribunal upon making an objection – remembering that the demeanor and professionalism of the parent attorney directly reflects upon the parent client.

[3] *Legal memoranda and briefing.* – In some cases, the court may request that the parties present their arguments on a contested legal issue in writing in the form of legal memoranda, legal briefs, or formal motions. Parent attorneys should file a well-researched and articulate position on the issue, even if their client is not implicated in the specific matter at hand or does not oppose the relief requested by another party.

[4] *Rules of Evidence and Civil Procedure.* – Parent attorneys should regularly review the Delaware Rules of Evidence to ensure a strong working knowledge of what evidence is and is not admissible. Moreover, parent attorneys should always have a copy of the Delaware Rules of Evidence available during court proceedings in the event an issue should arise requiring specialized recitation of a particular rule. As well, a strong working knowledge of the Delaware

Family Court Rules of Civil Procedure is essential to ensuring a parent’s due process rights are upheld throughout the duration of the proceedings.

[5] *Stipulations.* – Thoughtful stipulations can save the court and parties considerable time in a hearing that would otherwise be used to put uncontested facts on the record. In some instances, it may be in the client’s interest and the interest of judicial economy to stipulate to the admission of certain facts and evidence as an alternative to live testimony. Parent attorneys should carefully weigh out the benefits and risks of a stipulation – and discuss with the parent client accordingly. Stipulations should only be used for uncontested issues agreed to by all parties; they are not to be used for a parties to simply “report” their positions to the court.

[6] *Record of proceedings.* – To ensure the record is properly preserved and recorded, parent attorneys should ensure witnesses, attorneys, and the court are speaking clearly and audibly. Parent attorneys should put forward their best efforts to ensure that the court is proceeding in a manner that will result in a clear and actionable record with witnesses being sworn in and all persons speaking being adequately identified.

#### **4.2 Applications and Motion Practice: General**

- (a) Parent attorneys shall file motions and make applications to the court in a timely manner and in accordance with the client's particular case goals.
- (b) Parent attorneys seeking specific court relief must be prepared to present evidence in support of the client’s position.
- (c) Written motions for specific relief should be accompanied by relevant exhibits, including affidavits, records, or other supporting documentation. As well, the parent attorney is required by Family Court Rules of Civil Procedure to submit a written form of order, which should set forth the specific relief requested.

#### **COMMENT**

[1] *Supporting the motion.* – Strong courtroom advocacy for parent clients often requires the need for specific applications and motions for relief from the court. Parent attorneys must be mindful of their client’s particular case goals and make timely requests of the court accordingly. Requests for relief may be by written motion timely filed in advance of an upcoming hearing or by oral motion during a hearing. To advance a request made by motion or oral application, the parent attorney should present the court with legal argument, witness testimony, documentary evidence, and (if appropriate) testimony from the parent client in support of the request. When deciding if the parent client should testify in support of a particular application, the parent attorney should consider the necessity of the client’s input, the client’s comfort level with offering testimony, and any other relevant considerations (*e.g.*, issues relating to self-incrimination). Of course, adversaries may opt to call the parent as a witness, and the parent attorney should prepare the client for this scenario.

[2] *Format.* – Written and oral motions for relief should succinctly set forth the relevant facts and law in support of the client’s position. Parent attorneys must ensure motions are well-researched, free from typographical errors, drafted using proper grammar, and in accordance with formatting requirements.

[3] *Expedited relief.* – Occasionally, issues that require immediate resolution through court intervention arise in between scheduled hearings. Should an issue require the court’s more immediate attention, rather than waiting weeks or months for the next hearing, the parent attorney should request the court reconvene at an earlier date to hear the motion. Certain circumstances require emergency relief and the parent attorney should be familiar with the forms and procedure for filing emergency requests for relief.

[4] *Rescission* – Parent attorneys should file a motion to rescind custody at the point the attorney and client believe all barriers to reunification have been appropriately addressed. This may occur prior to the permanency hearing, but may occur sooner if the facts arguably support a rescission.

### **4.3 Courtroom Advocacy; Specific Issues**

- (a) **Family Time:** At every hearing, parent attorneys should aggressively advocate for regular and frequent family time (also referred to as “visitation”) in a natural setting and prepare to zealously represent the client concerning visitation – as well as litigate the terms of family time as necessary during a courtroom proceeding.
- (b) **Reunification and Case Plan:** Parent attorneys shall independently gather and present evidence supportive of their client's case plan progress at every hearing. Parent attorneys shall cross-examine witnesses or rebut other evidence that undermines their client's progress so that Family Court can receive a complete and accurate picture of the client's progress on the case plan.
- (c) **Best Interests Factors:** Parent attorneys shall review the best interest factors under 13 *Del. C. § 722* as applied to each individual case and be prepared to present relevant evidence in support of the parent client’s specific case goals.
- (d) **Family Inclusion:** To the extent inclusion of family members will advance the client’s goals, parent attorneys should bring to the court’s attention the availability of family to serve as a visit host, support person, placement resource, or alternative permanency plan (*e.g.*, guardian, permanent guardian).
- (e) **Child Interviews:** Parent attorneys should review information presented during a child(ren) interview and should make inquiries of the child(ren) as necessary and appropriate.

#### **COMMENT**

[1] *Family time.* – Frequent and meaningful family time is one of the strongest predictors of reunification between parent and child(ren) and should be at the forefront of the parent attorney’s case analysis at every stage of representation. There are no specific rules for what

visitation can be at various stages of the case and family time must be tailored to each family, taking into account their circumstances. From the outset, parent attorneys should strive to secure family time that is as least restrictive as possible and in the most natural setting possible. Research indicates that parents and child(ren) have much more meaningful time together in a natural setting versus a sterile office. Parent attorneys should inquire as to the specific reasons why strict supervision is necessary – particularly when there are no apparent safety issues. To the extent possible, parent attorneys should help the client determine a family time schedule that will be feasible in light of work schedules and logistics – as parents should *not* be forced to consistently choose between time with their child(ren) and their employment. Parent attorneys should ensure that family time is never used as a “reward” or “milestone” for sobriety or case plan progress and that a reduction of family time is never used as a “punishment” for negative progress or behavior. While it is often desirable to negotiate these issues prior to the court hearing – it is not always possible to secure a favorable outcome outside the courtroom; and applications to the court are often necessary to advance, increase, and bolster the family time dynamics.

There are a number of evidence-based family time resources with which parent attorneys should become familiar, as these research texts may be useful in advancing an argument for less-restrictive and more frequent visits.

[2] *Reunification and Case Plans*. – Practically speaking, parent attorneys are tasked with putting on evidence at every hearing concerning their client’s progress and the appropriateness of having the child(ren) returned to their care. To accomplish this, parent attorneys should be thoroughly prepared to highlight the client’s efforts on the case plan at each hearing. With some exceptions, live testimony from witnesses familiar with the parent’s efforts is preferable – particularly if there are issues in dispute. While stipulations of evidence may be appropriate in some instances (*e.g.*, if the testimony will be duplicitous or there are no contested issues of fact), witness input paints a clearer picture of the parent’s strengths – and areas for improvement.

Records and documentation gathered prior to the hearing should be timely shared with the other parties to promote an organized and well-informed presentation of evidence to the court. Handing stacks of documents to the other parties moments before a hearing is unprofessional and can often lead to delays in the proceedings. This practice should be avoided when possible (by all parties).

[3] *No Reasonable Efforts Finding*. – In some cases, DFS will be relieved of its obligation to provide reunification services due to the existence of an aggravating factor under 13 *Del. C.* § 1103(d). In the event the client still wishes to regain custody of their child(ren), the parent attorney shall continue diligently obtaining and presenting evidence to the trial court as if the client had a formal case plan. While DFS may be relieved of its duty to assist the parent with reunification, the court still must make the same findings as would be required in a case wherein a parent is owed reasonable efforts to promote reunification (i.e. that the child(ren) is dependent, neglected, or abused in the parent’s care). In this scenario, the parent attorney shall carefully assess what barriers must be addressed and help direct the client toward services that will mitigate the reasons for the child(ren) coming into care. The parent attorney should also utilize the best interests factors to build a case for return of the child to the parent when appropriate in aggravating factors cases.

[4] *Best interests.* – The court must find that it is in the best interests of the child(ren) to remain in the custody of DFS, and these factors should be considered at each hearing. 13 *Del. C.* § 722 enumerates the various factors the court must consider when making this ruling. Parent attorneys should review these factors, apply the facts of the case to the factors, and present relevant evidence to the court.

In any cases where the child(ren) is of an age and maturity to make their wishes known about reunification, the parent attorney shall make efforts to determine these wishes, often in conjunction with DFS and the Child Attorney. In some circumstances, parent attorneys may wish to have children speak directly to the judge regarding their wishes.

[5] *Parent Advocacy for Child Services.* – Parent attorneys should become familiar with the unique needs of the child(ren) at issue in the proceeding - including a review of relevant records and comprehensive questions for the parent client about any of the following issues relating to the child(ren): physical health, dental, vision, special educational needs, past mental health services, the child(ren)'s medication regimen, therapeutic services, personal interests, pastimes, religious affiliations, and any other child-centered details. As an advocate in court, the parent attorney can rely upon this background information, as provided by the parent, to ensure the child(ren) is having all personal needs met - along with a sense of normalcy while in care. These questions may be directed toward the DFS worker, foster parent(s), foster home coordinator/worker, school staff, or from the parent directly.

[6] *Family inclusion.* – Inclusion of family and non-relative resources can be a highly-effective tool in keeping families together. Parent attorneys should inquire early and often as to the availability and willingness of extended family and friends as a resource for the parent and child(ren). Including third-parties in the process can lead to additional family time, familial/familiar placement, or even a secondary permanency plan with a trusted relative or friend (in the event reunification cannot be achieved by the time of the permanency hearing). In the event that family is identified as a potential guardian, or other secondary permanency plan, parent attorneys should communicate with the client and family member (to the extent permitted by the client) about filing a petition for guardianship, etc. as soon as possible rather than waiting until reunification fails.

Parent attorneys must make certain that the client consents to the sharing of information with a third-party prior to any substantive conversation.

[7] *Child Interviews, Testimony & Allegations* – Statements from the child(ren) at issue in a dependency, neglect, or abuse case can be extremely impactful on the court. Child interviews often take place in chambers with only the Child Attorney and CASA in attendance. These interviews are part of the record, and parent attorneys should timely request an audio recording of the interview. Parent attorneys may also wish to submit questions to the court prior to the interview that the court may, in its discretion, rely upon to inquire. In the event no party has requested a child interview, a parent attorney may make the request by written motion to the court.

The child(ren) may make damaging statements against a parent during a child interview with the court - and a parent attorney must carefully weigh out the options to elicit cross-examination in a sensitive, respectful, and trauma-informed manner. If the child(ren) is competent

to testify, the parent attorney may request that the child(ren) provide testimony subject to cross-examination at a hearing on the record.

#### **4.4 Reasonable Efforts**

- (a) General: DFS is required to make reasonable efforts to promote the permanency plan in effect. Parent attorneys must make certain evidence is presented as to this issue at each hearing throughout the process, especially if DFS is not making reasonable efforts.
- (b) Pre-Removal: Parent attorneys shall conduct a thorough review of the circumstances preceding the removal of the client's child(ren) from the home. Parent attorneys shall also review whether DFS took steps prior to removal to mitigate the risk of harm to possibly avoid removal.
- (c) Challenges: Parent attorneys may consider challenging reasonable efforts to prevent removal within 60 days of the child(ren)'s removal from the home. Parent attorneys may consider challenges to reasonable efforts to promote the permanency plan at any time during the proceeding.

#### **COMMENT**

[1] *Reasonable efforts advocacy.* – The court must find that DFS has made reasonable efforts to effectuate the permanency plan in effect since the last court hearing. Reasonable efforts are required by federal and state law – and can have funding implications if the court makes a contrary finding. A finding that DFS has failed to make reasonable efforts towards a permanency plan of reunification can also extend the time for parents to work on their case plans. Parent attorneys should conduct diligent research on the issue of reasonable efforts, which should include regular communication with other parent attorneys to stay abreast of what has resulted in no reasonable efforts findings in other cases. To assess reasonable efforts, parent attorneys should regularly communicate with the client to determine the steps DFS is taking to genuinely and meaningfully promote the child(ren) returning home to the parents. Inquiry may include frequency of contact from DFS worker, whether the worker is returning the client's communication, frequency and logistics of family time, availability of services and efforts to connect the client with those services, accommodations made for the parent's work schedule, accommodations made for parents with disabilities, and reasonableness of DFS's expectations. The parent attorney should also regularly review the DFS records as those will have crucial information about DFS efforts.

In the event that the parent attorney believes that DFS has not made reasonable efforts towards the permanency plan in effect, particularly when that plan is reunification, it is incumbent upon the parent attorney to file a written motion or make an oral motion requesting the court make such a finding. The parent attorney will have to present evidence in support of the motion which will often include DFS' own records. Accordingly, staying informed about DFS efforts in between hearings is necessary for the parent attorney to anticipate a potential reasonable efforts issue and be appropriately prepared to present such a motion.

[2] *Reasonable Efforts to Prevent Removal.* – Parent attorneys should prepare for a hearing on the issue of reasonable efforts to prevent removal in conjunction with the PPH, adjudicatory

hearing, or separate hearing. Parent attorneys must also ensure the record adequately reflects efforts to prevent removal through witness testimony. Reasonable efforts to prevent removal is a distinct finding that requires a clear evidentiary record. It is separate from a finding of dependency or best interests. A parent attorney who believes the client was not afforded sufficient efforts to prevent the removal of the child(ren) may challenge this finding even if the client agrees to a finding of dependency.

[3] *Challenges to Removal.* – A challenge to reasonable efforts to prevent removal may be raised at the PPH, adjudicatory hearing, or at any point by motion in the interim. The court must make the finding within the first 60 days the child(ren) is in care, and challenges to this finding involve argument that DFS could have taken certain steps to prevent removal the child(ren) and did not. This could include transferring the case to a DFS treatment worker, referrals for parenting classes or family interventionist services, assistance with public assistance, vouchers for emergency housing, helping with transportation, or referrals to substance use disorder or mental health services, to name a few.

DFS records are one of, if not the, most important sources of information on efforts to prevent removal. A review of DFS records prior to challenging efforts to prevent removal is essential. The need to have an opportunity to review these records in cases where efforts to prevent removal are questionable may be used as justification to delay the court’s consideration of the issue. Moreover, a thorough review of DFS records may reveal a failure to meaningfully explore fit and willing relatives as a placement option. Parent attorneys may consider arguing for a change in placement to a fit and willing relative (*i.e.*, a permanency plan option under the Adoption and Safe Families Act (“ASFA”)) in conjunction with a reasonable efforts to prevent removal challenge, as oftentimes the issues go hand-in-hand.

[4] *Ex Parte Findings; Civil Procedure.* – The court routinely utilizes a form order to authorize the *ex parte* removal of child(ren) from the parents. Within this form is a “check box” that, when checked, indicates that “reasonable efforts have been made to prevent the unnecessary removal of the child(ren) from his/her home as follows....” – after which the court will typically handwrite or type in one or two sentences based on the sworn *ex parte* testimony of the DFS worker. This can be problematic for several reasons. Most obviously, the court is making the finding based on the one-sided testimony of the worker who was not subject to cross-examination to reveal issues of incomplete facts and credibility. Secondly, with this finding in the *ex parte* order the court may conclude that reasonable efforts to prevent removal issue is concluded and not subject to further challenge.

If the reasonable efforts to prevent removal box is checked in the *ex parte* order and the parent attorney wishes to raise a challenge to this finding, the parent attorney may consider

requesting relief from the order pursuant to Family Court Rule of Civil Procedure 60(b) and applicable rules relating to motion practice.

#### **4.5 Trial Advocacy Skills: General**

- (a) Parent attorneys shall engage in direct and cross-examination of witnesses as appropriate during each court hearing.
- (b) If an expert is presented to the court to opine on a relevant issue, the parent attorney should be thoroughly prepared to ensure the information is fairly presented to the court for consideration.
- (c) Parent attorneys should be prepared to make opening and closing statements as appropriate.
- (d) Parent attorneys shall present any relevant documentary evidence in accordance with formal court protocol.

#### COMMENT

[1] *Questioning witnesses.* – Direct examination of witnesses shall accompany the introduction of documentary evidence where the parties have not agreed to a stipulation. Cross-examination of witnesses is necessary to elicit relevant additional information not revealed on direct examination, as well as to impeach the credibility of a witness. Parent attorneys should be well versed in proper direct and cross-examination techniques such that testimony has the appropriate level of impact (positive or negative) on the client’s case. Parent attorneys should also be well versed in the facts of the case to effectively question witnesses. Parent attorneys should communicate with their clients as necessary during the hearing regarding witness testimony, always making sure to communicate in a way that does not disrupt the court proceedings.

[2] *Expert witnesses.* – If parties do not agree to an expert’s qualifications, the proponent of the evidence must place the expert’s background and credentials on the record and ask the court to qualify the witness as an expert. Parent attorneys should engage in *voir dire* as necessary to test the witness’s qualifications and appropriately limit the scope of the expert’s range of expertise. Parent attorneys should ensure that experts do not testify outside the scope of their expertise and may engage in inquiries as necessary for minimizing the impact of the testimony. Similarly, parent attorneys should prevent lay witnesses from opining on matters that require expert testimony.

Expert witnesses are usually involved in adjudications related to serious unexplained physical injury or severe neglect. Parent attorneys should carefully review the expert’s background, history, and findings prior to the court hearing to help better inform questions on cross-examination.

[3] *Opening and closing statements.* – Opening and closing statements (*i.e.*, “summation”) are not necessarily required; however, parent attorneys may wish to take the opportunity to provide such statements if doing so would advance the client’s interests. For instance, the conclusion of a multi-day adjudicatory, permanency, or TPR hearing may be an appropriate opportunity to

succinctly summarize the evidence for the court in a way that bolsters the client’s position and case theory. However, the court may not welcome lengthy statements as part of a routine case review or otherwise minimally adversarial proceeding – so parent attorneys should carefully balance the likely impact of such statements with the probable interest of the court in the contents of the statement.

[4] *Documentary evidence.* – Presenting documentary evidence shall include proper authentication and adherence with the rules of evidence and formal protocol for presenting the fact-finder with physical evidence.

#### **4.6 Courtroom Advocacy; Other Considerations**

- (a) Parent attorneys shall be advocates for their clients not only in litigating their cases, but also in ensuring that their clients can meaningfully and comfortably participate in the court process in-person or virtually.
- (b) Parent attorneys shall coordinate with the court and counsel to ensure physical and logistical barriers are removed to allow parents to meaningfully participate in their hearings. Parent attorneys may also explore virtual participation where appropriate.
- (c) Parent attorneys shall consistently adhere to principles of professionalism in action, appearance, and demeanor when appearing before the tribunal.

#### **COMMENT**

[1] *Court participation.* – Physical attendance in a courtroom setting can be extremely difficult for parent clients. Parent attorneys should consider the experience from the client’s point of view, making adjustments and recommendations as appropriate. Parent attorneys should review ongoing research relating to the concept of a trauma-informed courtroom approach. While it will not be necessarily possible to make drastic changes to the courtroom setting, parent attorneys should give consideration to and advocate for certain options that may make the experience less intimidating for the client. For instance, if the client has an extensive domestic violence history with the co-Respondent, careful consideration should be given to avoid conflict with and unnecessary exposure to the co-Respondent prior to, during, and subsequent to the hearing. With the introduction of virtual hearings as a result of the pandemic, best practices encourage exploration of virtual platforms for participation in court hearings where appropriate.

[2] *Closed proceedings.* – Child welfare proceedings are highly confidential and are “closed proceedings” under applicable statutes and rules. Accordingly, non-parties, witnesses, service providers, interns “observing” and any other individual who is not a party or court staff should be instructed to wait outside, unless all parties are in agreement with that person being in the courtroom. If a family member or non-relative has a concurrent guardianship petition pending, they may participate in the case management portion of the guardianship proceeding and, absent agreement of the parties, should thereafter be excused from the substantive dependency hearing. Keep in mind, testimony in these proceedings can cause the client embarrassment and regularly exposes highly personal struggles – and it is not unreasonable to expect the utmost of privacy. Prior to the hearing, the parent attorneys should advise their clients that they should not feel pressured to allow someone in the courtroom with whom they are not comfortable being

present. However, parents should also be encouraged to thoughtfully consider allowing full hearing participation of those relatives or others who are interested in the well being of their children.

[3] *Support person.* – Some parents identify a support person that can help alleviate the stress of participating in court. Parent attorneys should inquire with all parties as to whether anyone objects to the support person participating in the proceedings – and any objections should be met with due consideration given the confidentiality described above. However, if no party objects, this can be a powerful tool to bring some comfort to the parent during an otherwise tense experience. Parent attorneys should advise the support person of appropriate courtroom decorum and be mindful that some individuals claiming to support the parent can have personal opinions that are counterproductive to the client’s case goals.

[4] *Interpreters.* – Parent attorneys should work to master the art of participating in a hearing with the involvement of an interpreter. Parent attorneys should speak slowly and at a punctuated pace to ensure the non-English speaking parent(s) are receiving all the information discussed. Parent attorneys should remind all counsel and witnesses to maintain a similar approach during examination and testimony. When speaking to a client using an interpreter, the parent attorney should address their speech directly to the client, not to the interpreter.

[5] *Incarcerated clients.* – Incarcerated parent clients will most often be shackled at the ankles and wrists for the duration of the proceedings, making it very difficult to write notes or communicate with counsel. As appropriate, parent attorneys may request the Court allow the Department of Corrections to unshackle the client’s hands during the proceeding to ensure effective attorney-client communication can occur.

[6] *Scheduling.* – Parent attorneys shall ensure hearing dates and times are clearly communicated to the parent at the conclusion of the hearing. As well, parent attorneys shall advocate that hearings are scheduled such that timelines are upheld and scheduling guidelines are closely followed.

[7] *Remote hearings and participation.* – There may be occasions where court hearings will occur remotely (*e.g.*, via “Zoom” or “Skype”) or where certain parties or witnesses may participate virtually. This presents a number of barriers for parent clients, which parent attorneys must aggressively address to ensure due process and meaningful participation. Participation by video is much preferred to audio only. To the extent the parent attorney is able, parent attorneys should work with the parent to ensure access to technology and advise the court in advance of the hearing if the client or a witness has a barrier to participating remotely.

During remote hearings, it is not uncommon for sound to be inaudible at times. Parent attorneys should immediately stop the hearing if witnesses, the court, or any party cannot be understood – as a clear record is just as important in remote proceedings as in a traditional courtroom. Parent attorneys should attempt to establish a line of communication with the clients during the remote hearing (*i.e.* text, email, etc.) so that the attorney and client can communicate regarding any technological issues as well as the content of the hearing, in general. Breakout rooms for client communication should be utilized as necessary.

Remote hearings are to be as formal as an in-person hearing. Parent attorneys should immediately object if it becomes apparent that witnesses are reading their physical notes while testifying, referring to information on the computer screen, or otherwise not testifying from personal memory. Moreover, all traditional courtroom protocol should be followed in terms of examination of witnesses and presentation of evidence.

## **V. ADVOCACY OUTSIDE THE COURTROOM**

### **5.1 Collateral Contacts**

- (a) Parent attorneys shall engage in regular, ongoing communication with other stakeholders involved in the client’s case – including the DAG, Child Attorney, and any other attorney. Communication shall include, but is not limited to, requests for updates, advocacy relating to increased family time, collaboration concerning case plan elements, permanency planning or requests concerning the inclusion of family members and non-relatives as resources.
- (b) Parent attorneys shall regularly engage with the clients’ service providers to gauge progress on case plan elements.
- (c) Parent attorneys should promote a collaborative approach to resolving conflict and promoting case goals for clients.
- (d) With the consent of the client, parent attorneys should actively engage family members and non-relative supports to serve as resources.
- (e) Parent attorneys shall regularly communicate with other counsel representing the client on collateral matters.

### **COMMENT**

[1] *Communication with counsel.* – Parent attorneys should avoid waiting until the day before (or day of) a court hearing to begin requesting information and updates from stakeholders. Of course, it is understandable that the facts of a case may change and last minute information gathering is necessary – however, parent attorneys should be seeking regular, periodic updates in between hearings in conjunction with frequent client communication. Similarly, parent attorneys should generally not wait until the day of the hearing to raise issues that can potentially be resolved without court involvement or file motions for relief without first attempting to resolve the issue informally, where appropriate. Parent attorneys should be careful to include the assigned DAG in any written communication with the DFS worker and ensure that the DAG has given the parent attorney permission to have any communication with the DFS worker, which does not include the DAG.

[2] *Communication with third party providers.* – Frequent contact with the client’s service providers is essential in determining whether reasonable efforts are being met, if alternative services are needed, and if the client is engaging overall. Parent attorneys should be familiar with the client’s key service providers, be proactive in having the client sign releases authorizing the service provider to communicate with the parent attorney, and make a habit of inquiring regularly

for updates. Where releases cannot be obtained to communicate directly with the client's service providers, motions for release of records may be filed with the court to obtain the service provider's records.

[3] *Collaborative approach.* – Parent attorneys are encouraged to work with all parties in the most collaborative way possible, understanding that this is an adversarial system and disagreement will occur. Parent attorneys should promote a culture of regular team meetings to discuss case progress, which can include (but is not limited to) the DAG, DFS caseworker(s), Child Attorney, CASA, parent(s), child(ren) (as appropriate), foster family/placement resource, key service providers, and family supports. Professional collaboration and teamwork can, in many cases, promote reunification more quickly and lead to positive outcomes for child(ren) and families. Parent attorneys must be cautious, however, in appearing overly congenial with opposing counsel, witnesses, or court staff such that the client may call into question the parent attorney's independence, for example overly socializing or sharing personal stories in front of parent clients is disfavored. Parent attorneys should sit with the client prior to the case being called and should be consciously aware of being a loyal advocate inside the courtroom and out.

[4] *Relatives and non-relatives.* – In some cases, the parent may consent to a family member or non-relative filing for guardianship of the child(ren). With the client's consent, parent attorneys may communicate with the unrepresented family member or non-relative concerning the various aspects of pursuing a guardianship petition, including providing general guidance on preparing for their hearing. The parent attorney should be prepared to present evidence on behalf of their client in support of the proposed guardian at the hearing. However, parent attorneys should be careful not to inadvertently create an attorney-client relationship with the family member or non-relative.

[5] *Collateral legal proceedings.* – Oftentimes, findings in court have a direct impact upon co-occurring legal proceedings (and vice versa). Parent attorneys should regularly communicate with counsel representing the parent in proceedings relating to criminal charges, immigration, or other civil matters. If necessary, the parent attorney should ensure counsel understands the implications of a certain conviction or finding on the parent's DFS case, and advocate for the parent's interests accordingly.

## **5.2 Front-Loading Representation**

- (a) Parent attorneys shall make diligent efforts to engage the client prior to the PPH. This includes, at a minimum, attempting to contact the client, discussing the upcoming proceeding and the client's options, gathering information relating to the petition and relatives and non-relative resources, and ensuring meaningful family time is already occurring.
- (b) Depending on the client's needs, parent attorneys should advocate for specific services or interventions as early as possible in the representation, while at the same time, disfavoring any standardized services that are beyond the scope of the circumstances that brought the child(ren) into custody.

### **COMMENT**

[1] *Client intake.* – Parent attorneys should utilize a comprehensive intake form that elicits valuable information from the client. Intake information should cover a broad array of information, including all contact information, current service providers and familial supports. A sample intake form is provided in the Appendix.

[2] *Early advocacy.* – The time between notification of appointment and the PPH can be a valuable opportunity for out-of-court advocacy on issues including family time, placement, potential relative or non-relative guardianship options, and various other issues. Parent attorneys should use this time wisely and begin advocating for the parent’s interests as early as possible.

[3] Parent attorneys should promote early engagement with service providers as soon as possible, especially when the parent acknowledges the need for services. It is a misuse of valuable time to wait until the dispositional hearing to begin working on mitigating the issues that brought the child(ren) into care.

### **5.3 Building and Maintaining the Case Plan**

- (a) Parent attorneys shall ensure that the parent is meaningfully consulted with and engaged in the process of crafting a narrowly-tailored the reunification case plan.
- (b) Parent attorneys should become knowledgeable of available service providers in their geographical area of practice.
- (c) Parent attorneys shall frequently communicate with the client to identify successes and barriers to completion of the case plan. Parent attorneys shall be prepared to present evidence of the parents’ case plan successes at the next hearing and any barriers should be communicated to the other parties as quickly as possible with an invitation to collaborate on ways to promote success

#### COMMENT

[1] *Case plan contents.* – Parent attorneys should make certain they receive the proposed reunification case plan no later than five (5) days before the client’s dispositional hearing. When possible, the parent attorney should take an active role in drafting the case plan. The case plan should be reflective of the actual issues that brought the child into care. Parent attorneys should be mindful of the court’s findings after contested adjudicatory hearings as the case plan should address those findings exclusively. Case plan elements listed as a “rule out” should be opposed, particularly if the record does not indicate a need for the proposed service or evaluation. Parent attorneys should communicate with other parties about proposed case plan elements that are overly burdensome, unnecessary, or duplicative – and request a removal or amendment of those elements. As well, the case plan should clearly articulate: (i) who is responsible for initiating the service (*i.e.*, DFS, the parent via self-referral, or an alternative); (ii) who is the responsible payer for each service; and (iii) what the policy is in the event of a cancellation, no-show, reschedule, or similar appointment issue.

[2] *Familiarity with resources.* – Notwithstanding DFS’ reasonable efforts requirements, parent attorneys should become personally familiar with available service providers in their locality of practice, including agencies available to treat mental health issues, substance use

disorders, low- and no-cost physical or dental health care, bilingual services, transportation providers, food pantries, housing resources, and any other community-based entities that may be of assistance to clients in need. Service providers are often willing to provide general information about their agency, including tours or meetings by appointment – and counsel for parents should take advantage of the opportunity to learn as much about local resources as possible.

[3] *Case plan barriers.* – Parents face a multitude of barriers, and parent attorneys should strive to identify these barriers as quickly as possible. Families seeking reunification are not well-served when the parties only learn of these complications during a court hearing. Barriers that can be addressed may include lack of transportation, employment schedules that conflict with case plan requirements, or language barriers. Many times, a brief conversation with the other parties results in a logistical adjustment that helps the parent eliminate their difficulties. Parent attorneys should recognize, however, that some clients may be reluctant to admit they are struggling with a particular issue – as it amounts to a “defeat” for them. Respectful and intentional discussion about the specific problem at issue can oftentimes result in a solution that benefits not only the parent, but the child(ren) as well (*e.g.*, barriers to attending family time).

[4] *Case plan successes.* – Parent attorneys should be in frequent contact with their clients and keeping abreast of positive steps the parent is making in completing the elements of the case plan. Although DFS will typically present evidence of a parent’s completion of case plan elements at review hearings, it is important for parent attorneys to be prepared to present positive evidence in the event DFS does not. This can include not only completion of case plan elements, but also positive steps towards completing case plan elements or overcoming barriers. If the parent attorney receives documentation of a parent’s successes, it should be shared with the other parties as soon as practicable.

#### **5.4 Implementation of Court Orders; Records**

- (a) Parent attorneys shall review all court orders as soon as possible after issuance. Orders should be carefully reviewed with the client to ensure understanding and to determine areas of strength and work that remains. Parent attorneys must ensure that specific orders are implemented without delay.
- (b) Parent attorneys should request updated records from DFS as necessary throughout the course of the case, particularly prior to milestone hearings including permanency or TPR.

#### **COMMENT**

[1] *Court orders.* – It is insufficient to simply forward the court’s order to the client without fully discussing the findings and directives. Clients may have difficulty understanding the entirety of the order or may not realize that certain beneficial findings have been made (*e.g.*, increased family time). Parent attorneys should contact the client as soon as practicable after the issuance of the court order to discuss what tasks the client should prioritize before the next hearing. If the order is unclear or contains an error, the parent attorney should seek clarification or relief without delay.

[2] *DFS records.* – A review of DFS’ records can assist counsel in determining whether reasonable efforts are being met between hearings, as well as the parent’s level of engagement

with the caseworker and service providers involved. Parent attorneys should be mindful that DFS records can reveal deficiencies in the DFS provision of reasonable efforts and provide other useful information concerning the case that can be difficult to discern otherwise. Parent attorneys need not necessarily request records prior to every hearing in every case, however, this information can be a very valuable tool in identifying areas for increased advocacy between hearings. Serious consideration should be given to requesting the DFS records prior to any major contested hearings or if other contentious issues arise.

[3] *Other relevant records* – Parent attorneys shall engage the parent regularly to determine whether any other documentation exists to support case plan progress or engagement in services. This could include records generated by the parent’s substance use disorder treatment team, mental health providers, employment records and paystubs, a lease agreement, engagement in domestic violence or anger management services, probation/parole information, physical health/medical records, and any other documentation relevant to the court’s required findings.

## **VI. APPEALS**

### **6.1 Right to Appeal**

- (a) Parent attorneys shall immediately inform the client of the court’s decision in an appealable matter (*i.e.*, final order). Efforts to contact the client shall be diligent and well documented.
- (b) Parent attorneys shall inform the client of their right to appeal the court’s decision to the Delaware Supreme Court and the timeframe in which the appeal must be filed.

#### **COMMENT**

[1] *Notifying the client.* – Parent attorneys should carefully document their efforts to communicate with the client following the issuance of a final appealable order. Parent attorneys should make diligent attempts to reach the client by telephone, text message and email, as well as by U.S. Mail to the parent’s last known address. A review of Section One of these guidelines – relating to client contact protocol – provides more specific insight into the best practices to utilize when trying to connect with a client to discuss the right to appeal.

[2] *Methods of contact.* – Depending upon the client’s level of engagement at this stage of the proceeding, a parent attorney should begin by attempting to contact the client via telephone and text message (being mindful of the client’s primary language). As well, the attorney shall send written communication explaining the impact of the court’s decision, the timeline to appeal, the hard deadline to file the Notice of Appeal, and the fact that the right to appeal will expire if not filed timely.

[3] *Non-English speaking clients.* – Communication concerning the right to appeal and the deadline should be drafted in the client’s first language in accordance with language barrier guidelines provided in the Case Preparation and Client Contact sections. The parent attorney should send this written communication to, at a minimum, the client’s last known address. If the

parent attorney is aware of a family member or support person who may be of assistance in bridging communication barriers, it may be advantageous to contact that person via telephone or U.S. Mail to try and connect with the client (being mindful of confidentiality and privileged written communication concerns).

## **6.2 Merit**

- (a) Parent attorneys shall thoroughly review the order with the client and shall explain in clear terms how the court arrived at its conclusion.
- (b) Parent attorneys shall explain the likelihood of success on appeal.

### **COMMENT**

[1] *Language.* – Parent attorneys should strive to explain the court’s order in language that is easy to understand. Parents facing a TPR order may be understandably emotional, and the parent attorney should exhibit patience and respect for the parent while reviewing the court’s findings.

In the event the client’s first language is one other than English, the parent attorney may motion the Family Court for fees to transcribe the order into the parent’s native language. Given the strict appellate timelines, a parent attorney wishing to make this translation request shall do so with a sense of urgency. Additional guidelines for attorneys representing non-English speaking clients can be found in Section One, Guideline 1.11.

[2] *Potential outcomes.* – Parent attorneys should be careful to not guarantee a particular outcome on appeal. Parent attorneys may rely upon their understanding of the law, appellate standards of review, and past experience with appellate matters to formulate an opinion as to whether the appeal is likely to succeed. This should be a straightforward conversation with the client, and the parent attorney should practice transparency and honesty in communicating whether success on the merits is likely.

[3] *Appeals without merit.* – A parent attorney’s opinion on the likelihood of success of the appeal is not the same measure used to assess whether the appeal has no merit pursuant to Supreme Court Rule 26.1(c). In making a determination of merit for purposes of Supreme Court Rule 26.1(c), the parent attorney must consider any legal and factual issues preserved on the record and whether or not a good faith argument for remand or reversal can be made based on those issues. If the parent attorney determines that the appeal is without merit, a candid conversation should be had with the client concerning the decision, what that means for the appeal, and the client’s rights and responsibilities under Supreme Court Rule 26.1(c).

## **6.3 Commencement of Appeal**

- (a) In the event the client directs the parent attorney to appeal the order, the parent attorney shall immediately file a Notice of Appeal and ancillary documents with the Delaware Supreme Court.

- (b) Concurrent with filing the Notice of Appeal in the Delaware Supreme Court, parent attorneys must also motion the Family Court for payment of fees related to preparation of the transcript, as the trial court retains jurisdiction over this matter.

#### **COMMENT**

Parent attorneys are bound by their client’s directives and must file a Notice of Appeal regardless of the parent attorney’s opinion as to the likelihood of success or the merit of the appeal.

#### **6.4 Appellate Advocacy**

- (a) Parent attorneys must conduct a conscientious review of the trial court record, including transcripts, exhibits, orders, and pleadings.
- (b) Parent attorneys shall prepare a brief on the merits, accompanying appendices, and all ancillary filings if an appealable issue is discovered.
- (c) If oral argument is required, parent attorneys shall diligently prepare and argue the appeal on behalf of the parent.
- (d) Parent attorneys may file a non-merit brief if, after a conscientious review of the record, there exists no appealable issue. A parent attorney electing to file a non-merit brief must communicate this decision to the parent in accordance with Delaware Supreme Court Rule 26.1 and relevant Rules of Professional Responsibility.

#### **COMMENT**

[1] *Continued contact with client.* – As with all other aspects of a child welfare case, the parent attorneys must remain in contact with the client and keep them abreast of the status of the appeal. While parent attorneys need not consult with the client when formulating legal arguments on appeal, parent attorneys should remain available to field questions that the clients may have during this process.

[2] *Non-merit appeals.* – If a parent attorney elects to file a non-merit brief under Rule 26.1, the client must be given a meaningful opportunity to submit their own argument, in writing, to the parent attorney. This requires a request for an extension of time to file the Opening Brief. Further, the parent attorney must have the difficult discussion with the client regarding the attorney’s opinion as to lack of merit. The attorney should keep clear records indicating that the brief was mailed to the client’s last known address (as required by Supreme Court rules) and must allow the client the statutory time frame in which to submit their own points or argument. Compliance with Rule 26.1 and its applicable timelines usually necessitates a motion to the Supreme Court to request an extension of time to file the Opening Brief, which must be filed as soon as is practicable after the attorney decides to proceed with filing a non-merit brief

Parent attorneys should ensure clear communication accompanies the Rule 26.1 brief – explaining that the client has the opportunity to submit, in writing, their arguments as to why the

Family Court's order is appealable. This communication should be translated into the client's first language in accordance with the guidelines herein relating to non-English speaking parents.

[3] *Clients with diminished capacity.* – Delaware Supreme Court Rule 26.1 requires that the parent attorney make specific requests for input and legal argument from the parent client for inclusion in the non-merit brief. This mandate can present a unique challenge in the event the parent client is a minor (or otherwise lacks capacity) at the time of filing. In this scenario, the parent attorney shall consider requesting that the Supreme Court appoint an attorney *ad litem* to ensure fairness and due process.