

Superior Court of the District of Columbia

Child Abuse and Neglect Attorney Practice Standards

Executive Summary

Quality legal representation is essential to a high functioning court process. Attorneys practicing in the child abuse and neglect field must be well trained and educated to deliver high quality representation for all parties. These practice standards are intended to define the role of counsel in the child abuse and neglect system in the Superior Court of the District of Columbia and improve the level of representation for all parties in that system. The standards apply to parents' counsel, caretakers' counsel, guardians *ad litem*, attorneys for children, and any other court appointed counsel in abuse and neglect cases.

Basic Obligations

The practice standards address the general authority and duties of child abuse and neglect attorneys. Under these standards, attorneys shall only accept an appointment or otherwise appear in child abuse and neglect proceedings if they are knowledgeable about substantive and procedural child abuse and neglect laws and have participated in the required training programs. The fundamental obligations are based on the DC Rules of Professional Conduct and the Superior Court Rules; they are elements that help define competent representation.

The standards also address the role of individual counsel:

- ❑ The guardian *ad litem* appointed by the Court to represent the child in abuse and neglect proceedings. The guardian *ad litem* shall in general be charged with the representation of the child's best interest. The role of the guardian *ad litem* is to protect a child's basic needs and interests. The guardian *ad litem* should always be mindful of the child's safety and well being and take all steps to promote speedy permanency for the child.
- ❑ Parent's counsel appointed to provide legal representation to one of a child's parents. Since passage of the Adoption and Safe Families Act and the implementation of its shortened timeframes, parents' attorneys need to be even more diligent about acting quickly to advise and guide parents before their rights are terminated.
- ❑ Caretakers' and Other Counsel for Parties appointed to provide legal representation in abuse and neglect proceedings.

Responsibilities to the Client

Establishing and maintaining a trusting relationship with a client is the foundation of quality representation. These standards identify an attorney's responsibilities to his or her client, including:

- ❑ honest and regular communication;
- ❑ thorough investigation of all necessary and relevant information;
- ❑ attempts to settle the case or as many issues as possible, through formal or informal alternative dispute methods;
- ❑ adequate pre-trial preparation;
- ❑ attendance and participation in case conferences and hearings;
- ❑ periodic monitoring of case progression between hearings;
- ❑ post-hearing follow-up and review of any orders, including assisting clients with accessing services or navigating the system; and
- ❑ discussion with the client about his or her right to appeal and whether the appeal has merit.

The Panel Oversight Committee of the Family Court Implementation Committee has implemented Family Court Panels consisting of attorneys eligible for court appointments representing children and adult parties in Family Court. Procedures for accepting attorneys for these panels and evaluating attorneys who are members of these panels have also been developed. Superior Court Administrative Order 09-07 outlines the current procedures. In order to remain on a panel, attorneys must be in full compliance with these practice standards.

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Statement of Intent

D.C. Code §16-2304(b) provides that children and parents involved in abuse and neglect cases in the Superior Court of the District of Columbia are entitled to representation at all critical stages of the proceedings.¹ The District of Columbia Family Court Act of 2001, Pub. L. 107-114, provides that the Superior Court shall establish standards of practice for attorneys appointed as counsel in matters under the jurisdiction of the Family Court.² The Court recognizes the legal and psychosocial complexity of child welfare matters and its oversight role with respect to attorneys appointed to represent children, parents, caretakers, and any other parties entitled to court appointed counsel in abuse and neglect cases.

To accomplish the goals of the Family Court Act and to promote high quality representation for all parties in abuse and neglect proceedings, the Chief Judge issued Administrative Order No. 02-15, which required the Family Court Panels Committee to establish panels of qualified attorneys to represent children and families in abuse and neglect cases.³ These panels have been established. The following Child Abuse and Neglect Attorney Practice Standards were issued in 2003 and have now been revised.

A. Panels, Appointments, Certification, and Training

A-1 Application for Appointment to the Family Court Panel

Individual attorneys wishing to receive appointments as guardians *ad litem* or counsel for parents or other parties in Family Court child abuse and neglect cases shall be selected from the Family Court Guardian *ad Litem*, CCAN, or CCAN Provisional Panel. An attorney seeking to become a member of these Panels must: complete a Family Court Panel Application that sets forth his or her qualifications to act as a Guardian *ad Litem* or attorney in these cases; provide a Certificate Regarding Discipline from the Office of the District of Columbia Bar Counsel and equivalent documents from other jurisdictions where the attorney has been admitted to the Bar; provide certification that D.C. Bar dues are currently up to date; provide certification that the attorney has read and understands these standards, the District of Columbia Rules of Professional Conduct⁴

¹ D.C. Code §16-2304(b) (2011).

² Pub. L. No. 107-114, § 11-1103, 115 Stat. 2100, 2108 (2001).

³ Family Court Panels Administrative Order 02-15(April 26, 2002) *available at*: <http://www.dccourts.gov/internet/documents/02-15.pdf>; re-established through Administrative Order 10-01 (January 15, 2010) *available at* <http://www.dccourts.gov/internet/documents/10-01.pdf>. These panels are reestablished periodically. Check the DC Courts website (www.dccourts.gov) for the most current version.

⁴ D.C. Rules of Prof'l Conduct (2007) *available at* http://www.dcb.org/for_lawyers/ethics/leguardian_ad_litem_ethics/rules_of_professional_conduct/amended_rules/index.cfm.

and the Superior Court Rules⁵ and Statutes⁶ governing Neglect Proceedings; and otherwise provide information requested in the application.

Applications will be considered on a schedule set and published by the Family Court's Panels Oversight Subcommittee (hereafter "Panel Oversight Committee").

After appointment to the Guardian *ad Litem*, CCAN, or CCAN Provisional Panel, counsel must complete the training requirements set forth in A-2 below. Counsel must also comply with all continuing legal education requirements as set forth in Section A-3 below.

A-2 New Panel Attorney Training Requirements

Any attorney admitted to the Guardian *ad Litem*, CCAN, or CCAN Provisional Panel must receive initial training arranged by the CCAN Office. Attorneys will be required to complete a minimum of sixteen hours of training.

The sixteen hours of training shall be devoted to the following categories:

- (1) Statutory law and rules regarding neglect and abuse cases in the District of Columbia;
- (2) The role of the guardian *ad litem* and attorney for the parent and other adult parties;
- (3) Permanency options and related guardianship, adoption, and custody cases;
- (4) Ethics related to representing parties in the abuse and neglect system;
- (5) Basic trial skills;
- (6) Courtroom observation of at least one initial hearing; additional courtroom observation is strongly encouraged.

Training topics may also include those listed in Section A-3 of the Standards. This list is illustrative, not exclusive.

As part of the training process, new attorneys are assigned to experienced CCAN attorney mentors and strongly encouraged to seek the advice and input of these more experienced lawyers who have represented parties in child abuse and neglect cases in Family Court. Likewise, experienced attorneys are encouraged to provide mentoring to new attorneys, including assisting new attorneys in preparing cases, debriefing following court hearings, and answering questions as they arise. Experienced attorneys designated by the CCAN Director as "trainer attorneys" will

⁵ Available at <http://www.dccourts.gov/internet/documents/order062104.pdf>.

⁶ D.C. Code §§ 16-2301 *et seq.*

receive credit toward their twelve hours of continuing legal education requirements for the time they spend instructing new attorneys.

A-3 Continuing Legal Education (CLE) Requirements for All Attorneys

All attorneys appearing before the Superior Court in an abuse or neglect case shall be familiar with relevant federal and D.C. laws, regulations and policies affecting child welfare. Counsel shall only accept an appointment or otherwise appear in child abuse and neglect proceedings if they are knowledgeable of substantive and procedural child abuse and neglect laws and have participated in the required training programs.

All panel attorneys are required to complete a minimum of twelve hours of CLE annually; at least one hour shall be devoted to trial, evidence, and ethics and at least one hour shall be multi-disciplinary training (i.e., sessions on interviewing children, understanding different types of therapy, developmental stages of children, understanding substance abuse and mental illness, developmental disabilities, etc).⁷ Attorneys admitted to the Panels who are practicing before the Family Court have a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should be aware of any special requirements of the specific judge before whom a case is pending. Counsel should also be familiar with substantive child abuse and neglect law (federal and local), the Rules Governing Proceedings of the Family Court, the Rules Governing Abuse and Neglect Proceedings, and the Rules of the District of Columbia Court of Appeals.

Appropriate training topics may include, but are not limited to, relevant legal topics as well as specific child welfare topics such as:

- federal laws, including the Adoption and Safe Families Act (ASFA),⁸ the Multi-Ethnic Placement Act (MEPA),⁹ the Indian Child Welfare Act (ICWA),¹⁰ the Child Abuse Prevention and Treatment Act (CAPTA),¹¹ the Foster Care Independence Act of 1999,¹² the Fostering Connections Law,¹³ Social Security entitlements, disabilities law, and fiduciary law;
- DC neglect law;

⁷ New panel attorneys will satisfy this requirement for the first year of admission to the panel by attending the required new attorney training described in Section A-2. Attorneys employed by Children's Law Center must satisfy internal training requirements which meet the above outlined requirements for CCAN panel attorneys.

⁸ Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C.A. §§ 603, 622, 629a-29b, 653, 671-75, 677-79, 1320a-9 (2011)).

⁹ Pub. L. No. 103-382, 108 Stat. 3518 § 551-54 (1994) (repealed and amended by Pub. L. No. 104-188, 110 Stat. 1755 § 1808 (1996) (codified at 42 U.S.C.A. §§ 671, 674, 1996b, 5115a, (2011)).

¹⁰ Pub L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§1901-1963 (2011)).

¹¹ Pub L. No. 93-247. 88 Stat 4 (1974) (codified at 42 U.S.C. §§5101-07, 16-16I (2011)); This law was completely rewritten in the Child Abuse Prevention, Adoption and Family Services Act of 1988 (Pub. L. No. 100-294). It was further amended by the Child Abuse Prevention Challenge Grants Reauthorization Act of 1989 (Pub. L. No. 101-126) and the Drug Free School Amendments of 1989 (Pub. L. No. 101-226).

¹² Pub. L. No. 106-169, 113 Stat. 1822 (1999) (codified at 42 U.S.C.A. §§ 671-77, 1396a-96d, (2011)).

¹³ Pub. L. No. 110-351, 122 Stat. 390 (2008) (codified at 42 U.S.C.A. § 670 et seq.).

- professional ethics;
- termination of parental rights law;
- evidence and trial procedure;
- rules of civil procedure;
- legal permanency options;
- adoption and guardianship subsidies;
- custody and child support;
- developmental psychology;
- developmental disabilities;
- communicating with clients in developmentally appropriate language;
- medical issues and medical evidence in child abuse and neglect cases;
- negotiation strategies and techniques;
- trial skills training;
- appeals procedures;
- understanding mental illnesses and mental habilitation;
- issues arising from substance abuse;
- the impact of domestic violence on children and families;
- cultural, ethnic and socioeconomic issues;
- available services and resources for families;
- immigration law issues that relate to child welfare;
- education laws and resources.

To assess compliance with certification requirements, the CCAN Office or the Panels Oversight Committee may request a copy of any training program or seminar outline. Any training program must be approved by the CCAN Director in order for the attorney to receive credit. CCAN counsel must present a Certificate of Completion to the CCAN Director at or near the end of the calendar year.

Attorneys appearing *pro bono* in abuse and neglect matters must ensure that they receive the necessary training on child welfare issues to provide competent representation in these matters.

Commentary –
D.C. Rules of Prof'l Conduct R. 1.1 (Competence)

The practice of child abuse and neglect law is complex and multi-faceted. It involves knowledge of traditional legal sources such as case law, statutes, evidence, and trial practice, but is further complicated by the need to understand information generally not part of legal practice. In addition, the stakes for children and families involved in the child welfare and court systems are very high. Therefore, attorneys practicing in the field must be well trained and educated to deliver high quality representation for all parties.

B. General Duties

B-1 Reasonable Diligence and Promptness

Guardians *ad litem* for children and the attorneys appointed for parents and other parties in Family Court shall act diligently and promptly in the representation of clients. Counsel should avoid unnecessary delay in the disposition of the cases, take steps to inform all parties when delay is unavoidable, and be punctual when attending in court or other case related meetings. Counsel shall prepare and file all pleadings and motions in a timely fashion, serve all filings and communications with the Court and on all parties, and obtain copies of all pleadings and relevant notices filed by other parties.

B-2 Rules of Ethics, Contact with Other Parties, Civility, and Conflicts of Interest

Counsel must be knowledgeable of the District of Columbia Rules of Professional Conduct. An attorney who is unclear about how to resolve an ethical issue should seek guidance from other experienced attorneys or the Legal Ethics Counsel at the D.C. Bar (www.dcbbar.org). Should it be determined that a conflict exists requiring withdrawal, such withdrawal shall be requested expeditiously.

Contact with Other Parties

Counsel shall not contact or interview other represented parties without permission from the party's attorney. This includes discussions with the child without permission from the guardian *ad litem*. The guardian *ad litem* may contact represented parties for the limited purpose of scheduling visits with the child. Counsel may not circumvent the Rules of Professional Conduct concerning communication with a represented party by asking a caseworker or other third party to ask a represented party for information.¹⁴

Counsel may communicate with the social worker unless, in exceptional cases, directed otherwise by the Office of the Attorney General or caseworker's counsel.

In dealing with a person who is not represented by counsel, counsel shall not state or imply that he or she is disinterested, and when the unrepresented person misunderstands counsel's role, the lawyer shall make reasonable efforts to correct the misunderstanding.

Commentary –

D.C. Rules of Prof'l Conduct R. 4.1 (Truthfulness in Statements to Others)

D.C. Rules of Prof'l Conduct R. 4.2 (Communication Between Lawyer and Person Represented by Counsel)

¹⁴ See D.C. Bar Legal Ethics Comm., Op. 295 (2000) (Restriction on Communications by a Lawyer Acting as Guardian *ad Litem* in a Child Abuse and Neglect Proceeding), available at http://www.dcbbar.org/for_lawyers/ethics/leguardian_ad_litem_ethics/opinions/opinion295.cfm

D.C. Rules of Prof'l Conduct R. 4.3 (Dealing with Unrepresented Parties)
D.C. Rules of Prof'l Conduct R. 4.4 (Respect for Rights of Third Persons)

While child abuse and neglect proceedings may at times appear informal, it is important that all counsel fully respect the attorney-client relationship.

Civility

All attorneys practicing in Family Court must conduct themselves with civility and professional integrity. The D.C. Bar has adopted *Voluntary Standards for Civility in Professional Conduct*.¹⁵ These standards encourage attorneys to cooperate and communicate civilly with other professionals and parties in a case. Civil communication includes not only speaking to others with respect, but also responding to telephone calls and other communications promptly. The Preamble to the Standards states in part:

Civility in professional conduct is the responsibility of every lawyer. While lawyers have an obligation to represent clients zealously, we must also be mindful of our obligations to the administration of justice. Incivility to opposing counsel, adverse parties, judges, court personnel, and other participants in the legal process demeans the legal profession, undermines the administration of justice, and diminishes respect for both the legal process and the results of our system of justice.

These Standards are especially important in what can be a highly emotional practice involving sensitive issues, rigorous litigation, and high stakes for families. Attorneys practicing in Family Court are expected to abide by these Voluntary Standards.

Attorneys should also discuss services they intend to request in court with the other parties prior to the court hearing, to the extent possible.

Conflict Situations

Attorneys must be aware of potential conflicts of interest and have a duty to ensure that conflicts are resolved promptly. If during the course of representing a parent or child, counsel becomes aware of a conflict of interest, counsel must resolve the conflict in accordance with the guidance provided by D.C. ethics rules and opinions before taking any further action in the matter. If the conflict necessitates the attorney's withdrawal from the case, the attorney must request permission to withdraw expeditiously so as to not negatively affect his or her client's rights or interests.

Counsel shall not represent two or more clients who are named parties in the same child abuse and neglect proceeding. A guardian *ad litem* may represent more than one child in a sibling group unless there is a conflict.

¹⁵ Available at http://www.dcb.org/for_lawyers/ethics/leguardian_ad_litem_ethics/voluntary_standards_for_civility/index.cfm (amended 1997).

Guardian *ad litem* – The guardian *ad litem* shall not represent two or more siblings when their interests are adverse and is prohibited from representing siblings when it is alleged that one sibling has physically or sexually abused the other even when the siblings come to the court’s attention at separate times. Further, an attorney shall not serve as the guardian *ad litem* for a minor in the neglect system and that minor’s child if the minor’s child enters the abuse and neglect system. The guardian *ad litem* is also prohibited from representing the minor in his or her capacity as a parent in an abuse and neglect case. The guardian *ad litem* should always give careful consideration to potential conflicts and seek guidance as necessary.

Further, if the guardian *ad litem*’s assessment of the child’s best interests conflicts with the views of the child, the guardian *ad litem* shall notify the court of the child’s views and in some circumstances, an attorney may be appointed to represent the child’s expressed interests. The new attorney for the child will represent the child’s expressed interests, while the guardian *ad litem* will make recommendations to the court with regard to the child’s best interests. As soon as the court resolves the issue that caused the conflict, the attorney for the child representing the child’s expressed interests shall request leave of court to withdraw.

Commentary –

D.C. Rules of Prof’l Conduct R. 1.7 (Conflict of Interest: General)

D.C. Rules of Prof’l Conduct R. 1.9 (Conflict of Interest: Former Client)

In re A.S. and J.S., 118 Daily Wash. L. Rptr. 2221, 2227 n. 15 (D.C. Super Ct. Oct. 11, 1990).

S.S. v. D.M., 597 A.2d 870 (D.C. 1991).

D. C. Bar Legal Ethics Comm., Op. 295 (2000) (Restriction on Communications by a Lawyer Acting as Guardian *ad Litem* in a Child Abuse and Neglect Proceeding)¹⁶

One of the guardian *ad litem*’s most important roles is to counsel the child client and help the child understand the legal process and the guardian *ad litem*’s assessment of the child’s situation. If the client, after thorough and informed discussions with the guardian *ad litem*, continues to disagree with the guardian *ad litem* about the direction of the case, the guardian *ad litem* should inform the court of the conflict. This conflict does not include the situation in which the guardian *ad litem* and the child cannot work together and the child has a personality clash with the guardian *ad litem* and wants another representative; such a conflict does not automatically warrant the appointment of an attorney for the child. Rather, the court should determine if a new guardian *ad litem* should be appointed.

Parent’s Counsel – Counsel shall not represent more than one named parent.

Commentary –

D.C. Rules of Prof’l Conduct R. 1.7 (Conflict of Interest: General)

D.C. Rules of Prof’l Conduct R. 1.9 (Conflict of Interest: Former Client)

¹⁶ Available at http://www.dcb.org/for_lawyers/ethics/leguardian_ad_litem_ethics/opinions/opinion295.cfm

In re A.S. and J.S., 118 Daily Wash. L. Rptr. 2221, 2227 n. 15 (D.C. Super Ct. Oct. 11, 1990)

It is important to have separate counsel for each named parent. Based on the Rules of Professional Conduct, one attorney should not represent multiple parties if a conflict is foreseeable. Often in abuse and neglect cases, a situation does not appear to present a conflict at the beginning of the case, but develops into a conflict between the parents as the case progresses and a conflict is therefore foreseeable. If only one attorney were to represent multiple named parents and such a conflict occurred, the attorney would have to be removed from the case and two new attorneys appointed. In addition to the ethical dilemma this situation presents, there are practical issues such as the waste of time, money, and judicial resources that results.

Caretaker's Counsel – Counsel shall not represent multiple caretakers seeking different outcomes in the same case. It is permissible for counsel to represent a couple who act as caretakers for the child/ren.

B-3 Case Management

An attorney should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality legal service, endangers the client's interest in the prompt resolution of the case, or may lead to the breach of professional obligations. An attorney who is considering whether to act as counsel or to accept appointment by a court must have sufficient time, resources, knowledge, and experience to offer quality legal services in the particular matter. For example, counsel shall ensure that he or she is available within 45 days after an initial hearing in order to participate in mediation, pretrial hearings, and trial (if the child is placed in conditional release). Counsel shall also ensure that he or she is available to attend and participates in trial within 105 days after the initial hearing if the child is placed in shelter care. If, after accepting an appointment, it later appears that counsel is unable to offer effective representation, counsel should consider appropriate case law and ethical standards in deciding whether to move to withdraw or take other appropriate action.

Counsel's obligations include the following:

- maintain a case file on each active case which includes, but is not limited to: the client's contact information, other relevant contact information and copies of court orders;
- conduct a thorough investigation of all necessary and relevant information pertaining to the client's case;
- thoroughly prepare for all hearings;
- attend and participate in all relevant social service, therapeutic, and other meetings as required for the client's case;
- prepare or help prepare findings of fact and conclusions of law when requested;
- participate in negotiations, discovery, pretrial conferences, mediation sessions and hearings;

- counsel clients concerning matters related to their cases;
- assess client’s needs for services and assist in obtaining those services;
- seek access to appropriate support services, such as investigative assistance, sign interpreters, and language interpreters;
- seek approval for the use of experts where necessary;
- develop a case theory and strategy to follow at hearings and negotiations;
- periodic monitoring of case progression between hearings;
- cooperate and communicate civilly with other professionals and parties in a case;
- provide the case file to successor attorneys if counsel is removed or withdraws from a case.

Commentary –

- D.C. Rules of Prof’l Conduct R. 1.1 (Competence)
- D.C. Rules of Prof’l Conduct R. 1.3 (Diligence and Zeal)
- D.C. Rules of Prof’l Conduct R. 1.4 (Communication)
- D.C. Rules of Prof’l Conduct R. 1.16(d) (Declining or Terminating Representation)
- D.C. Rules of Prof’l Conduct R. 2.1 (Advisor)
- D.C. Rules of Prof’l Conduct R. 2.1 cmt. 4 (Advisor, Consultation with Other Professionals)
- D.C. Bar Voluntary Standards for Civility in Professional Conduct¹⁷

These basic obligations are based on the D.C. Rules of Professional Conduct and Superior Court Rules. They are elements that define “competent representation” and are not exhaustive. For instance, in most cases, all attorneys should work to reduce case delay because delays generally hinder progress in a case and are not beneficial to any of the parties. There may be times as part of a case strategy that delay is necessary but this should be rare. Additionally, counsel should make an independent determination of what services are necessary to meet the client's needs and to advance the client's interests in the litigation. Counsel should consider any barriers to the client's use of available services including disabilities or transportation, language, cultural, or financial barriers and seek to overcome such barriers.

When counsel is filing a pleading or report with the court, it shall be filed in the Family Court Central Intake Center pursuant to the time set by the requisite Superior Court Rule. Counsel must send a courtesy copy of the pleading or report to the judge and serve all parties of record in accordance with Superior Court Rules. (*See* Section D-3).

¹⁷ Available at http://www.dcbart.org/for_lawyers/ethics/leguardian_ad_litem_ethics/voluntary_standards_for_civility/index.cfm (amended 1997).

B-4 Financial Eligibility Determinations

Pursuant to District of Columbia Code § 16-2304 and Administrative Orders of the Superior Court, immediately upon appointment, counsel must ensure that adult clients are interviewed to determine their financial eligibility for court appointed counsel under the CCAN Program. If after investigation, the client cannot be located or is incarcerated or hospitalized, the attorney may file an absent party form with the CCAN office. Once the party is available, the attorney has an obligation to ensure that the eligibility interview is held.

B-5 Case Organization

Counsel shall maintain a client case file on each active case and provide the case file to successor attorneys. Counsel is expected to maintain all information about the case's history and future proceedings, deadlines, dates, etc., on or within the client case file so that it is readily discernible. All client case files must reflect the procedural history of the case and all other information necessary to render effective legal service, including copies of documents, all discovery, pleadings, settlement offers, notes and other communications to and from the client and other relevant parties in the case, the names and telephone numbers of other parties and counsel and service providers and other key players in the case, and information on how to locate the client.

Counsel shall comply with all statutory and court-imposed deadlines. Counsel should develop a timeline for each case that identifies the actions to be taken and their deadlines. Counsel should maintain a manageable caseload to adequately represent clients and avoid scheduling conflicts when possible.

Commentary –

An attorney must be aware of several time-sensitive events set forth in the Adoption and Safe Families Act (ASFA).¹⁸ For example, within 60 days of a child's removal from the home, CFSA, in conjunction with the parents, must create a case plan setting forth the services to be delivered and tasks each party must complete. The court must hold a permanency hearing 12 months after the child enters foster care at which time the court will establish a permanency plan for the child. Finally, a termination of parental rights motion must be filed when the child has been in care for 15 of the last 22 months, unless certain exceptions apply.

The attorney must, therefore, know the case specific timelines prescribed by ASFA to manage the process for reaching the permanency goal. For example, in addition to the 12 and 15 month deadlines, the court must hold hearings every six months to consider reasonable efforts to finalize the permanency plan. The attorney must understand the implications of the timeline, understand whether any exceptions apply, and counsel clients regarding the importance of these deadlines and any actions necessary to protect the client's interests in achieving his or her goal in the case.

¹⁸ Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C.A. §§ 603, 622, 629a-29b, 653, 671-75, 677-79, 1320a-9 (2011)).

B-6 Continuity of Representation

It is expected that counsel of record shall continue to represent the client from the initial court proceeding through disposition, review hearings, permanency hearings and related TPR, adoption and guardianship proceedings, and appeal until the case is closed. If counsel determines that he or she can no longer represent the client, counsel must request the court's permission to withdraw in a manner that seeks to avoid prejudice to the client and must provide written notification of the withdrawal request to the client.

An attorney who becomes aware that he will not be able to fulfill his obligations to a client for a period of time, whether because of disability, change in plans, or any other reason, must inform the client and make arrangements for a stand-in (subject to the court's approval) or request the court to appoint a replacement attorney. In most situations, an attorney who will be unavailable for 30 days or more will need to move to withdraw and ask the court to appoint replacement counsel. In the case of the attorney being absent for a brief period of time, the attorney may request permission from the judge to have a stand-in attorney appear for him and must inform his client about the stand-in attorney. See Section B-8 below on the duties of the stand-in attorney.

If an attorney has an emergency and is not able to arrange for stand-in counsel, the court will arrange for either stand-in counsel or a replacement attorney, depending on the nature of the case. In general, an attorney who will be unavailable for 30 days or more and does not arrange for stand-in counsel will be replaced. Counsel shall provide the case file to successor counsel as soon as possible.

Commentary –

D.C. Rules of Prof'l Conduct R. 1.16 (Declining or Terminating Representation)

The best representation for a client occurs when the counsel of record handles the case from the beginning through all stages until the case is closed. To effectuate this principle, counsel are encouraged to remain on a case until it closes.

B-7 Court Appearances

At all hearings, counsel has an obligation to be prepared and, consistent with client confidentiality and the ethical duty of zealousness, provide information to the court on the status of the matter. In advance of the hearing, counsel may submit to the court and all parties a Status Report, if appropriate. Counsel must attend all court hearings unless excused by the court.

Additionally, counsel should make efforts to avoid scheduling conflicts that prevent counsel from attending a court hearing. If counsel is unable to attend a court hearing, he or she shall notify his

or her client, the courtroom clerk and/or judge's chambers and secure stand-in counsel. Counsel is also obligated to notify all other parties.

Commentary –

Super. Ct. Neg. R. 21(b)

B-8 Duty of Counsel Regarding Stand-In Counsel

In the event that counsel must rely on stand-in counsel to be present at a hearing, counsel, where practicable, must inform the client prior to the proceeding that there will be a stand-in counsel. Additionally, counsel must brief stand-in counsel of the status of the client's case, as well as follow-up with stand-in counsel as soon as possible after the proceeding. When briefing stand-in counsel, appointed counsel must inform stand-in counsel of all relevant issues in the case and all potential issues that may be addressed during the court hearing so that stand-in counsel is prepared to address those issues during the hearing. If counsel is acting in a stand-in capacity for another attorney, counsel has an obligation to prepare for the hearing and inform the attorney of record about all information regarding the proceeding, any obligations or actions that appointed counsel or the client must take as a result of the hearing, and the future court dates set in the matter.

A guardian *ad litem* may never act as stand-in counsel for parents' or caretakers' counsel.

C. Attorney-Client Relationship

C-1 Role of Counsel/Retainer Agreements

Guardian *ad litem* for the Child

A guardian *ad litem* is an attorney appointed by the court to represent the child in abuse and neglect proceedings. The guardian *ad litem* is charged with representation of the child's best interests. A guardian *ad litem* fulfills a dual role, as an independent fact finder and as zealous advocate for the child's best interests. The guardian *ad litem* should also monitor all litigation concerning the child such as delinquency matters and any civil proceedings.

Commentary –

D.C. Code § 16-2304(b)(3) (2011)

In re L.H., 634 A.2d 1230 (D.C. 1993)

S.S. v. D.M., 597 A.2d 871 (D.C. 1991)

D.C. Bar Legal Ethics Comm., Op. 252 (1994) (Obligations of a Lawyer Appointed Guardian ad Litem in a Child Abuse and Neglect Proceeding with Respect to Potential Tort Claims of the Child)¹⁹

¹⁹ Available at http://www.dcb.org/for_lawyers/ethics/gal_ethics/opinions/opinion252.cfm

The role of the guardian *ad litem* is to advocate for the child's safety, well being, permanence, and best interests. In serving this role, the guardian *ad litem* must fulfill the following functions:

- an independent investigator whose task it is to discover all the relevant facts;
- an advocate whose task is to ensure all the relevant facts are before the court at all hearings;
- counsel whose task is to ensure the court has all available options before it at all stages of the proceedings;
- an advocate whose task is to ensure the child's interests are fully protected.

The guardian *ad litem* is responsible for ensuring that the child's wishes are expressed to the court, even if these wishes differ from the guardian *ad litem*'s recommendations.

The guardian *ad litem* has a duty to investigate and preserve tort claims pursuant to DC Legal Ethics Opinion 252.²⁰

The guardian *ad litem* should always be mindful of the child's safety, well being, and permanency interests and ensure these issues are raised at every hearing. Further, the guardian *ad litem* should take all steps to promote speedy permanence for the child, which will generally mean: attempting to reduce case delay, ensuring the issue of reasonable efforts is raised and addressed at all hearings, and working with the agency responsible for the care of the child to identify and provide appropriate services to the family and find the child a permanent home. Counsel shall visit all placements and conduct appropriate introductions and interviews at the placement in addition to making recommendations to the court and CFSA regarding the guardian *ad litem*'s assessment of the appropriateness of the placement. This duty to visit continues throughout the entire case. (*See* Section C-3).

Guardians *ad litem* should approach decision making on behalf of their clients with extreme caution. In determining what is in the child's best interests, the guardian *ad litem* should use objective criteria and avoid relying on experiences from the guardian *ad litem*'s own childhood or stereotypical views of clients whose backgrounds differ from the guardian *ad litem*'s.

The criteria for determining what is in the child's best interests should include, but not be limited to:

- interviews/observations and/or discussions based on the child's developmental stage with the child in an environment familiar to the child;
- a full and efficient independent investigation including interviews and consultation with the child's caretakers, relatives, therapists, teachers, doctors, social workers and other service providers to assess the child's circumstances;

²⁰ Available at http://www.dcbart.org/for_lawyers/ethics/legal_ethics/opinions/opinion252.cfm

- careful investigation of available kin interested in being a placement option;
- an inquiry into all available placement and visitation alternatives (including sibling).

To provide competent representation, the guardian *ad litem* shall meet with the child in his or her environment. It is important for the guardian *ad litem* to recognize that children may not be comfortable talking to the guardian *ad litem* in his or her office. A child will often not trust new adults and may be more willing to confide in the guardian *ad litem* in a setting that is familiar. Further, it is important for the guardian *ad litem* to observe a child's home or foster home to be confident that the child's surroundings are safe, nurturing, and appropriate. The guardian *ad litem* should, when appropriate, meet with his or her client alone to ensure that the child has a safe space to discuss the case and other matters with the guardian *ad litem*. Even preverbal children can provide valuable information about their needs through their behavior, including their interactions with their caretakers and other adults. The guardian *ad litem* should be prepared to spend meaningful time to build a trusting relationship with his or her client. Building this relationship with a child client is one of the most important things that a guardian *ad litem* can do in a case. By building this trusting relationship, the guardian *ad litem* will not only know the child client better, but also be able to make solid, well-reasoned recommendations to the court and others with regard to what is in the child's best interests.

As part of the guardian *ad litem*'s duty to determine and represent the child's best interests, the guardian *ad litem* may during the course of the case advocate for services for other parties that the guardian *ad litem* believes is in the child's best interests for that party to receive. For example, the guardian *ad litem* may advocate for a parent to receive drug treatment or assistance with housing.

Counsel, and especially the guardian *ad litem*, may find there are issues presented by the case that are beyond the scope of original appointment. These issues could include child support, delinquency proceedings, domestic violence, SSI and other benefits, personal injury, immigration, special education, probate matters or mental health proceedings. In cases such as these, the guardian *ad litem* shall ensure that the child's interest in these matters are protected and, where appropriate, seek other counsel to assist in protecting the child's interests.

The guardian *ad litem* must ensure that any apparent and legitimate claims available to the child are explored and, when appropriate, retain or request that the court appoint counsel to institute administrative or court actions related to the claim.

Parent's and Caretakers' Counsel

Retainer Agreements

When entering into representation of a parent or other adult party, the attorney should provide the parent or other adult party with a written document that outlines how fees will be paid (for example, by the court if the client is eligible for a court appointed attorney), the scope of representation, and any expenses for which the client might be responsible.

It is advisable for counsel representing adults in abuse and neglect proceedings to provide either a retainer agreement or letter to the adult client outlining the scope of representation to be provided in a particular matter. A sample letter is contained in the appendix. This letter should be tailored based on counsel's own legal research and scope of representation.

When representing a parent in a child abuse and neglect proceeding, counsel shall seek the lawful objectives of the client and not substitute counsel's judgment or opinions in those decisions that are the responsibility of the client. Counsel must take all affirmative steps to ascertain the parent's position prior to all hearings, negotiations and dealings with the child welfare agency responsible for the case. Counsel should explain the nature of the overall proceeding and then obtain the client's views and position before advocating on behalf of the client. Counsel should, where appropriate, identify alternatives for the client's consideration and should explain to the client the risks, if any, in the client's position.

Commentary –

D.C. Rules of Prof'l Conduct R. 1.2 (Scope of Representation)

D.C. Rules of Prof'l Conduct R. 1.3 (Diligence and Zeal)

D.C. Rules of Prof'l Conduct R. 1.4 (Communication)

D.C. Rules of Prof'l Conduct R. 1.5 (Fees)

D.C. Rules of Prof'l Conduct R. 1.6 (Confidentiality of Information)

D.C. Rules of Prof'l Conduct R. 1.14 (Client Under a Disability)

D.C. Rules of Prof'l Conduct R. 2.1 (Advisor)

Since the passage of the Adoption and Safe Families Act²¹ and the implementation of its shortened timeframes, the role of the parent's attorney has become even more challenging and essential. The stakes for parents are higher because the time they have to seek reunification with their children is shorter, and their responsibilities are greater to achieve that goal. Therefore, the duty of their attorney to counsel them about the expedited ASFA timelines and their parental obligations is vital.

The attorney must take all possible steps to locate the client and help the parent understand the gravity of the situation and the risks of not participating in the proceedings. Parents counsel may need to employ an investigator to help locate clients. If a judicial officer directs counsel to reveal information on the status of the client's whereabouts or other information, counsel must respond to the court's inquiry by providing information based upon the client's informed instructions to counsel. For example, if a client instructs counsel to not disclose the client's whereabouts, counsel is prohibited from revealing the location of the client. Counsel must ensure that they are not acting contrary to his client's expressed informed instructions when providing information to the court. Absent instructions from the client, counsel should merely respond to the court's inquiry with "I have no representations."

²¹ Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C.A. §§ 603, 622, 629a-29b, 653, 671-75, 677-79, 1320a-9 (2011)).

The attorney may also find him or herself taking on tasks that formerly belonged to others. For example, the attorney may be the best person to help the client obtain services that will increase the chances of reunification. Parent's counsel may also find that mediation and other alternative dispute methods are more helpful to the parent than over-litigating the case. Counsel must be open to these alternatives and always act in furtherance of the client's position.

Commentary –

In re J.J.Z., 630 A.2d 186 (D.C. 1993)

D.C. Rules of Prof'l Conduct R. 2 (Scope of Representation)

D.C. Rules of Prof'l Conduct R. 1.3 (Diligence and Zeal)

D.C. Rules of Prof'l Conduct R. 1.4 (Communication)

D.C. Rules of Prof'l Conduct R. 1.13 (Organization as Client)

D.C. Rules of Prof'l Conduct R. 2.1 (Advisor)

C-2 Protecting Confidentiality of Communication and Proceedings

A lawyer shall not knowingly reveal a confidence or secret of the client. Accordingly, counsel should ensure that all confidential communications between counsel and the client are conducted in private. All Family Court child abuse and neglect proceedings are closed to the public and during the course of representing a party in those proceedings, counsel must not discuss the case with persons not involved in the court hearing. Moreover, before speaking with the attorneys of the other parties about confidential information that may be necessary to share in the course representation, counsel must have the client's permission. Counsel must be familiar with the appropriate procedures for obtaining records, and must be aware of and comply with the federal and local confidentiality statutes and rules of professional conduct relating to the dissemination of confidential information concerning Family Court matters. Counsel must comply with all privacy statutes.

During the course of representation, counsel may be required to speak with numerous professionals and obtain many records relating to the client's or child's social, mental health, educational, and medical histories. Counsel must obtain the client's written consent or a court order to obtain the records and must follow all requirements with respect to confidentiality and re-disclosure, as noted above.

Commentary –

DC Code § 4-1303.06

DC Code § 16-2331 Juvenile case records; confidentiality; inspection and disclosure

DC Code § 16-2332 Juvenile social records; confidentiality; inspection and disclosure

DC Code § 16-2333 Police and law enforcement records

DC Code § 16-2334 Fingerprint records

DC Code § 16-2335 Sealing of records

DC Code § 16-2336 Unlawful disclosure of records; penalties
Super. Ct. Neg. R. 45
Super. Ct. Neg. R. 46
In re T.W., 732 A 2d 254 (D.C. 1999)
Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (b)
Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d-6
D.C. Mental Health Information Act of 1978, D.C. Code § 7-1201.04

C-3 Meeting with the Client

In all cases, counsel must maintain sufficient contact with the client to establish and maintain an attorney-client relationship that will enable counsel to keep abreast of the client's interests, needs, and position in the case. This is essential for counsel to adequately represent the client's interests in court.

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

Counsel shall remain in communication with the client during the course of the case and especially before court hearings or important planning meetings and when emergencies or changes in the case arise to discuss, to the extent possible given the client's age and abilities, the progress of the case, trial strategy and preparation, negotiation and settlement strategies, and post-trial goals. Counsel shall inform the client of all court hearings, mediations and other case related meetings and inform the client of his or her right and/or obligation to attend these events. Counsel should respond to telephone calls and other types of contact from his or her clients promptly.

Guardian *ad litem* – Regardless of the child's age, counsel should observe and/or talk with the child regularly, but at least every three months unless the court or the child's circumstances, such as a change in placement, hospitalization or other traumatic event, direct otherwise. It is important for counsel to see the child in the child's own environment. When talking to the child about the case, counsel should be mindful of the child's emotional well being and developmental stage. Counsel may or may not need to repeat interviews that have previously been conducted by caseworkers, law enforcement, therapist or medical experts, but should learn about the child and the child's wishes concerning the future. The guardian *ad litem* should determine, on an individual basis, whether a repeat interview is necessary.

The guardian *ad litem* must meet with her client prior to an initial hearing, unless due to circumstances beyond counsel's control, the client cannot be located.

Parent's Counsel – Counsel must meet and communicate with the parent regularly. Prior to each court session counsel must make efforts to communicate with the client. If the client is involuntarily committed or incarcerated and wishes to attend a hearing, counsel shall make all necessary arrangements for the client's participation in the hearing. This includes, but is not limited to, arranging for an incarcerated parent to be brought up from the jail (if located in D.C.) or to participate by phone or video conferencing, if possible. It takes time and coordination to bring a client up from the D.C. jail or make arrangements for the client's participation by phone or video; counsel must notify the court in ample time prior to the scheduled hearing so that the necessary arrangements and accommodations can be made. Counsel must attempt to meet and communicate with the client prior to each and every court hearing.

Commentary –

D.C. Rules of Prof'l Conduct R. 1.2 (Scope of Representation)

D.C. Rules of Prof'l Conduct R. 1.3 (Diligence and Zeal)

D.C. Rules of Prof'l Conduct R. 1.4 (Communication)

D.C. Rules of Prof'l Conduct R. 1.14 (Client with Diminished Capacity)

D.C. Rules of Prof'l Conduct R. 2.1 (Advisor)

In re Lieber, 442 A.2d 153 (D.C. 1982)

Establishing and maintaining a trusting relationship with a client is the foundation of representation. For this reason, it is essential that an attorney be in regular contact with a client. A trusting relationship develops over time and is based on honest and regular communication. No matter whom the attorney represents in an abuse and neglect case, communication is necessary for high quality representation.

The attorney has an obligation to explain clearly, precisely, and in terms the client can understand, the meaning, implications and consequences of legal proceedings. A client may not understand the legal terminology and, for a variety of reasons, may choose a particular course of action without fully appreciating the implications that may follow. It is incumbent on the attorney to become knowledgeable about a client's ability to understand the intricacies of the proceedings and communicate information in an appropriate, understandable manner, ensuring that a client ultimately understands what is being told to them.

With a child, the potential for misunderstanding may be even greater. The guardian *ad litem* has additional obligations based on the child's age, level of education, and language skills. There is also the possibility that, because of a particular child's developmental limitations, the guardian *ad litem* may not completely understand the child's responses. The guardian *ad litem* must learn how to ask developmentally appropriate questions and interpret the child's responses. The guardian *ad litem* must be especially careful when interviewing children so as not to unduly influence the child's statements. The guardian

ad litem shall work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

At the initial stage of the case, the guardian *ad litem* should try to minimize the number of interviews a child has by speaking with other professionals or reviewing reports regarding the alleged abuse or neglect. This should be done on a case by case basis. The guardian *ad litem* should evaluate the impact of the child's participation in a criminal proceeding and take the necessary steps to safeguard the child's best interests.

C-4 Barriers to Communication with Client

At all interviews and proceedings, counsel should ensure that specific barriers to communication, such as differences in language or literacy, or in mental or physical disability, are addressed. An attorney encountering such barriers to communicating with a client shall take whatever steps are necessary to ensure effective communication with the client and to ensure that the client understands the proceedings. To this end, counsel must be mindful of any special needs of the client and should secure appropriate expert services, such as an interpreter or translator. (*See* Section C-3).

C-5 Preparing for and Conducting the Initial Client Interview

Prior to conducting the initial interview, where possible, the attorney should be familiar with the allegations in and status of the case and any other related cases. At the initial interview, counsel should obtain a signed release from an adult client authorizing the attorney and/or the attorney's agent to obtain educational, medical, or other records relevant to the neglect matter. If the client is a child, the guardian *ad litem* should ensure that he or she secures the appropriate waivers from the court. In addition, at the initial interview, counsel should endeavor to convey the following types of information to the client:

- 1) An explanation of the neglect process, the role of counsel, the attorney-client privilege, and the limits to privileges covering the client's communications with counsel, therapists, case workers, social workers, and other relevant individuals;
- 2) An explanation of how counsel can be reached and the preferred means for contacting counsel;
- 3) An answer, to the extent possible, to the client's most urgent case-related questions; and
- 4) A discussion of the next steps counsel will take on the client's behalf.

(*See* Section C-3).

C-6 Duty to Keep Client Informed

Counsel shall maintain regular contact with the client during the course of the case, especially before court hearings and other case related meetings. Counsel shall respond promptly to

telephone calls and other types of contact from clients, and whenever possible, within one business day. Counsel has a continuing duty to keep the client informed of developments in the case including any settlement offers and the progress of preparing the case. Counsel must promptly comply with all reasonable requests from the client for information. When on vacation or otherwise unavailable for a considerable length of time, counsel shall make reasonable efforts to provide emergency contact information and/or arrange to have back-up counsel available to respond to client emergencies.

Commentary –

D.C. Rule of Professional Conduct 1.4(a)

C-7 Advising the Client

Counsel should advise the client about all aspects of the abuse and neglect case, including candidly assessing the legal merits of the case and any probable outcomes, as well as the broader implications of different case outcomes on the possibility of termination of parental rights, adoption, guardianship, legal custody, criminal, or any other related proceedings that may be filed. Counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the client's decision as to the effect of a settlement. Counsel should keep the client informed of all significant developments in the case and should explain legal rights and options to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the course of the case and the representation.

C-8 Distinguishing Between Client and Attorney Decisions

Parents' and Caretaker's Attorneys

Certain decisions relating to the conduct of the case are ultimately the province of the client, whereas others are ethically the responsibility of counsel. Decisions that are to be made by the client after full consultation with counsel include, but are not limited to, whether to request a probable cause hearing, what placement to seek for the child, whether to proceed to trial or stipulate to neglect, what defense should be mounted, whether to testify in his or her own behalf, whether to assert or waive any right or position of the client, what disposition to seek, and whether to appeal. Strategic and tactical legal decisions should be made by counsel after consultation with the client, to the extent that such consultation is feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross examination, what trial motions should be made, and what evidence should be introduced at hearings and trial.

Open, candid, and ongoing communication with the client is essential to effective representation. Parent's counsel is not free to substitute or impose counsel's own judgment as to what is in the best interest of the child for that of the parent/client.²²

Counsel should inform the client of all administrative proceedings, court proceedings, and other meeting (including education) relating to the child.

²² The attorney's duty is to follow the informed express interest of the parent/client. Thus, the duty is not -- as for a guardian *ad litem* in a neglect matter -- determining and pursuing the best interest of the child.

Counsel shall *not* make any representations in court or other proceeding related to the neglect representation without consulting with the client.

Special Considerations for the Guardian *ad Litem*

A guardian *ad litem* is appointed to represent the child's best interests and therefore is not bound by the explicit direction of the client in abuse and neglect proceedings. The guardian *ad litem* must conduct a thorough investigation of all relevant facts and interviews to determine what is in a child's best interests. The guardian *ad litem* must make recommendations to the court based on these interviews and investigation, even if the expressed wishes of the child client are different. However, the guardian *ad litem* must inform the court if the child client's wishes are different from the guardian *ad litem*'s own recommendation of what is in the child client's best interests.

C-9 Negotiating a Resolution or Settlement Agreement

Counsel should participate in settlement negotiations to seek the best result possible for the client consistent with the client's objectives and express interests. Prior to entering into any negotiations, counsel shall have sufficient knowledge of the strengths and weaknesses of the client's case, or of the issue under negotiation, to enable counsel to advise the client of the risks and benefits of settlement. Counsel should always promptly inform the client of the substance of any and all offers of settlement.²³ Counsel shall explain all offers of settlement to the extent necessary for the client to make an informed decision. After such consultation, counsel shall abide by a client's decision whether to accept an offer of settlement of a matter.²⁴

Special Considerations for the Guardian *ad Litem*

The guardian *ad litem* should keep informed of all discussions regarding potential stipulation in an abuse and neglect case and should weigh in on the propriety of the terms of the stipulation. However, the guardian *ad litem*'s signature is not required for a stipulation to be accepted by the court.²⁵ If the disposition is to be a stipulated disposition, the guardian *ad litem*'s signature is required.²⁶ It is important for the guardian *ad litem* to be aware of, and participate in, any settlement negotiations in the case in order to ensure that the child's interests are protected.

²³ D.C. Rules of Prof'l Conduct 1.4(c).

²⁴ D.C. Rules of Prof'l Conduct 1.2(a).

²⁵ Super. Ct. Neg. R. 18 (b).

²⁶ Super. Ct. Neg. R. 23.

D. Pre-Trial Actions

D-1 Investigation

Counsel should conduct a thorough, continuing, and independent review and investigation of the case, including obtaining information, research and discovery to prepare the case for trial or post-adjudicatory proceedings. The investigation should include but is not limited to:

- Interviewing clients and individuals the client appropriately believes are potential witnesses;
- Identifying and interviewing potential witnesses such as school personnel, neighbors, relatives, foster parents, etc.;
- Talking with the client and caseworker about necessary services for the client;
- Advocating for and assisting the client in obtaining the needed services;
- Reviewing the client's records including educational, psychological, psychiatric, medical, substance abuse treatment, law enforcement, and court files;
- Conferring with other counsel on the case about settlements or interviews with the other parties;
- Obtaining necessary authorizations for releases of information;
- Reviewing court files and other records concerning the child;
- Reviewing all relevant evidence, which may include photographs, videos, etc.;
- Retaining the service of a private investigator or other experts when appropriate.

Commentary –

Super. Ct. Civ. R. 26 (General provisions governing discovery)

D.C. Rules of Prof'l Conduct R.1.1 (Competence)

Conducting a thorough investigation is an essential aspect of competent representation because it is through this investigation that counsel may learn necessary and relevant information about the case and preserve the client's rights.

(See Section C-2).

D-2 Participation in Case Plan and Requests for Services

Counsel should attend case plan meetings, which must take place within 60 days of removal of the child/ren from the home. If there is a disagreement about the provision of services, counsel should make a formal request to the court or otherwise preserve the client's interests.

Commentary –

D.C. Code § 4-1301.02 (2011)

Super. Ct. Neg. R. 15 (b)(6) (Findings and order at initial hearing)

A case plan meeting must occur within 60 days of the child's removal and the parents must be included in the plan. During these meetings, important decisions are made concerning services, permanency goals and tasks for each party to complete. It is important for counsel to participate in these meetings and request services that will, in the attorney's estimation, assist the client in reaching desired outcomes. A date for the case plan meeting should be established at the initial hearing. If it is not, counsel should request a date.

D-3 Filing Pleadings

When appropriate, counsel must file motions, requests for discovery, and responses and answers to pleadings filed by other parties. These pleadings must be thorough, accurate, and timely. They must be served on all parties pursuant to Superior Court Rules.

Commentary –
Super. Ct. Neg. R. 43 (Motions)

D-4 Negotiating Settlements

Counsel should participate in settlement negotiations to seek the best result possible for the client consistent with the client's interests and directions to counsel. Counsel should consider using available settlement resources to narrow contested issues or reach a global resolution. There are certain issues, however, that cannot be compromised, e.g., the child's health and safety. Prior to entering into any negotiations, counsel shall have sufficient knowledge of the strengths and weaknesses of the client's case, or of the issue under negotiation, to enable counsel to advise the client of the risks and benefits of settlement.

It is important for the attorney to keep the client's position in mind while negotiating. Counsel should use alternative dispute resolution resources when appropriate. Counsel shall never make a decision without consulting with his or her client. Counsel shall never enter into an actual settlement without the express consent of his or her client.

Commentary –
D.C. Rules of Prof'l Conduct R. 1.2 (Scope of Representation)

Negotiated settlements often provide clients with a greater sense of ownership and empowerment because of their participation in the process. Direct participation in alternative dispute resolution leads to a higher degree of compliance with a plan and generally reduces delay, which can have a negative effect on the child and family. Furthermore, contested litigated actions are detrimental to the development of positive, trusting relationships between parents, children, social workers and others involved in the case.

While all issues may not be resolved through an alternative dispute program, in the interest of reaching positive results for all parties, counsel should attempt to settle the

case or as many issues as possible, through formal or informal alternative dispute methods.

D-5 Mediation

Mediation is ordered in all abuse and neglect cases. Counsel shall participate in mediation sessions in good faith. Good faith implies the obligation of full preparation prior to the mediation session, an open mind and full participation with regard to any possible resolution of disputes, including appropriate consultation with clients and other parties, performance of site visits, investigation, research, and preparation of all required reports.²⁷

D-6 Evidence and Preparation for Hearings

Counsel shall prepare as early as possible for each hearing. Counsel should develop a witness list well in advance of a hearing. Counsel shall subpoena witnesses and obtain records in a timely manner. Counsel shall set aside adequate time to prepare their witnesses and exhibits before the hearing. Counsel must follow Superior Court Neglect Rules and Superior Court Rules of Civil Procedure as incorporated into the Neglect Rules while preparing all cases.

Commentary –

Super. Ct. Neg. R. 9 (Petition)

Super. Ct. Neg. R. 11 (Service of Process)

Super. Ct. Neg. R. 43 (Motions)

Super. Ct. Civ. R. 26 (General provisions governing discovery)

Super. Ct. Civ. R. 35 (Physical and mental examinations of persons)

Preparation is the key to successfully resolving a case, either in negotiation or trial. By spending time preparing the case, counsel will generally save time later and will certainly provide a higher level of representation for the client. At a minimum, adequate preparation requires communicating with the client in advance of the hearing, attempting to resolve issues prior to the hearing, preparing witnesses in advance of the hearing, preparing exhibits and conducting necessary legal research on relevant topics when appropriate. Being familiar with and following the relevant Evidentiary and Procedural Rules governing proceedings in Superior Court is essential.

E. Hearings

E-1 Court Appearances

Counsel must attend and be prepared for all hearings and participate in all telephone or other conferences with the court. If counsel has a conflict, he or she has an obligation to call the court's conflict line and notify the courtroom clerk and all other counsel. Counsel should maintain a manageable caseload to adequately represent clients and avoid numerous scheduling conflicts.

²⁷ <http://www.dccourts.gov/dccourts/superior/multi/child.jsp>

E-2 Child Participation in Hearings

Age appropriate children are encouraged to be present at court hearings. Some children benefit from being present in court and hearing directly from the judge and other parties about issues fundamental to their lives. A decision to exclude the child from the hearing should be made based on a particularized determination that the child does not want to attend, is too young to sit through the hearing, would be severely traumatized by such attendance, or for other good reason would be better served by nonattendance. There may be other reasons for the child's non-attendance. The guardian *ad litem* should consult the child, therapist, caretaker, or any other knowledgeable person in determining the effect on the child of being present at the hearing. Even a child who is too young to sit through the hearing may benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making the decisions. The guardian *ad litem* should provide the court with notice that the child will be present, to the extent possible. Concerns about the child being exposed to certain parts of the evidence or discussion may be addressed by the child's temporary exclusion from the courtroom during the taking of that evidence or discussion, rather than by excluding the child from the entire hearing. If a child attends many hearings, the guardian *ad litem* should be mindful when scheduling subsequent court hearings in an effort to avoid conflict with the child's school and other activities schedules.

If the court orders an agency or foster parent to transport a child to court for a hearing, the guardian *ad litem* should monitor compliance with this order and notify the court if issues arise.

E-3 Client and Witness Testimony

Counsel should explain to the client and the witnesses in clear, developmentally appropriate language what is expected to happen before, during and after each hearing. Counsel should prepare clients and witnesses for both direct and cross-examination.

E-4 Child as Witness

In determining whether to call a child as a witness, counsel should consider the child's competency to testify and the need for the testimony. The decision should also include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination.

If counsel seeks to call a child as a witness, counsel must contact the child's guardian *ad litem* and may not have discussions with the child without permission from the guardian *ad litem*. The guardian *ad litem* shall file any appropriate motions objecting to a party calling the child as a witness as well. If the motion is scheduled for a hearing, the guardian *ad litem* shall ensure that he is prepared to offer evidence and argument to support his position.

If the child is to serve as a witness, the guardian *ad litem* shall ensure that the child is prepared to testify and understands the process of testifying in court. This includes familiarizing the child with what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child. Counsel should also consider taking the child to the courtroom, when court is not in session, so that the child can see where he/she would sit while testifying, where other parties will sit during testimony, and to familiarize the child with the courtroom setting in general.

In the event that the child does not testify, the guardian *ad litem* should present the child's position to the court and incorporate the child's position in the court record, to the extent possible.

Commentary –

Maryland v. Craig, 497 U.S. 836 (1990).

Hicks-Bey v. United States, 649 A.2d 569 (D.C. 1994)

In re Jam.J., 825 A.2d 902 (D.C. 2003)

Whitcomb, Debra. *When the Victim is a Child*, 2d ed. Washington DC: US Department of Justice, March 1992

Testifying in court can be difficult for any witness, but may be even more so for a child. Counsel, even those representing parents, should be mindful of the negative impact testifying could have on the child and consider ways to lessen potential trauma to the child such as: taking the child to see the courtroom ahead of time, having the child testify in chambers, phrasing questions in ways the child can understand, keeping argumentative questions to a minimum, requesting the presence of support persons, using closed-circuit television, conducting trials at multidisciplinary centers or using special one-way mirrors during the child's testimony.

E-5 Motions and Objections

Counsel should make appropriate motions and evidentiary objections during hearings to advance the client's position. Counsel should file appropriate motions with memoranda of points and authorities and proposed orders in support of the client's position. Counsel must preserve legal issues for appeal.

Commentary –

Super. Ct. Neg. R. 43 (Motions)

E-6 Presentation of Evidence

When necessary to advance the client's position, counsel must present and cross-examine witnesses and prepare and present exhibits.

Commentary –
D.C. Code § 16-2316

There may be times when the guardian *ad litem*'s position is the same as the government's or a parent's position. The guardian *ad litem* should communicate in advance with the Assistant Attorney General or parents' attorneys and coordinate the presentation of evidence, rather than duplicating efforts. However, the guardian *ad litem* should fully participate in the hearing.

E-7 Conclusion of Hearing

Counsel may make a closing argument and when requested provide proposed findings of fact and conclusions of law. Counsel should take necessary actions to ensure a written order is entered and provided to the client.

Commentary –
Super. Ct. Neg. R. 18 (Stipulations)
Super. Ct. Neg. R. 19 (Fact finding hearing)
Super. Ct. Neg. R. 25 (Findings and order of disposition)
Super. Ct. Civ. R. 41 (Dismissal of actions)

F. Post Hearing

F-1 Reviewing Order with Client

The attorney and client shall review any written order to ensure it reflects the court's oral order and the client understands what is required of all parties. If the client objects to the order, counsel should consider filing a motion to reconsider and/or pursuing an appeal if so directed by the client.

Commentary –
It is important to review an order with the client soon after the order is entered. If the client has tasks to perform as a result of the order, the client needs to understand them and begin taking action immediately. In reviewing the order, the attorney should remind the client of the ASFA timelines and possible implications of compliance or non-compliance with the court order. If the client wants to pursue an appeal, the attorney must take action within the time allowed by District of Columbia statutes and Superior Court Rules.

F-2 Implementation of the Order

Counsel should monitor the client's and agency's efforts to implement the order and answer any questions the client may have about his or her obligations under the order. Counsel should be available to assist the client in obtaining services or navigating the system.

Commentary –

Super. Ct. Neg. R. 23 (Stipulated Disposition)
Super. Ct. Neg. R. 25 (Findings and order of disposition)
Super. Ct. Neg. R. 28 (Review of disposition and placement)

Counsel's role since ASFA's passage has expanded. Attorneys may find themselves helping clients obtain services such as counseling, housing or substance abuse treatment. While this is not the traditional role of the attorney, it may be the best way to help the client attain his or her goals.

Counsel, and especially the guardian *ad litem*, may find there are issues presented by the case that are beyond the original appointment. These issues could include child support, delinquency proceedings, domestic violence, SSI and other benefits, personal injury, immigration, special education, probate matters or mental health proceedings. If issues arise beyond the original appointment, the guardian *ad litem* shall address or make a referral to assist the client in those matters.

G. Appeals

G-1 Decision to Appeal

Counsel shall consider and discuss with the client the client's right to appeal and whether the appeal has merit. When discussing the possibility of an appeal, counsel should explain both positive and negative effects. Counsel should discuss with the client the possibility of expediting the appeal. Counsel should also discuss whether he or she will represent the client in the appeal or whether another attorney will be appointed. Counsel shall also inform the client of the time periods within which an appeal must be noted and the serious repercussions of missing those deadlines.

If the client decides to appeal, trial counsel must file any necessary post-hearing motions and the notice to appeal, and he or she must order the transcript. If trial counsel does not serve as appellate counsel, he or she must transmit all documents relevant to the appeal to appellate counsel.

Trial counsel must protect his or her client's interests by responding in a thorough and timely manner to any post trial motions, notice of appeal and order for transcript filed by any adverse party. This obligation remains in effect until appellate counsel has been appointed for his or her client.

Commentary –

D.C. Rules of Prof'l Conduct R. 3.1 (Meritorious Claims and Contentions)
D.C. Rules of Prof'l Conduct R. 1.16 (Declining or Terminating Representation)
D.C. Code §§ 16-2328-29

G-2 While the Appeal is Pending

Trial counsel, if appointed to handle the appeal, must carefully review his or her obligations as defined by the Rules of the District of Columbia Court of Appeals.²⁸

G-3 Concluding Appeals

Trial counsel must communicate the result of an appeal and its implications to the client in a developmentally appropriate manner. If, as a result of the appeal, the client must take action in the case, counsel should instruct the client to do so. Counsel must file any necessary motions with the trial court that result from the appeal. If trial counsel did not handle the appeal, he or she must keep apprised of the matter and monitor whether necessary motions are filed with the trial court.

H. Effective Date

H-1 Effective immediately

These practice standards shall take effect immediately.

²⁸ http://www.dcappeals.gov/dccourts/docs/DCCA_Rules-1-01-11.pdf.

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Association of Family and Conciliation Courts
<http://www.afccnet.org>

Child Welfare League of America
<http://www.cwla.org>

Children's Defense Fund
<http://www.childrensdefense.org>

National Council of Juvenile and Family Court Judges
<http://www.ncjfcj.org/>

National Court Appointed Special Advocate (CASA) Association
<http://www.nationalcasa.org>

Office of Juvenile Justice and Delinquency Prevention
<http://www.ojjdp.gov/>

U.S. Department of Health and Human Services
<http://www.hhs.gov/>

Sample Retainer Letter (Section C-1)

Date
Attorney Name
Attorney Address

Re: Case Name/Case Number

Dear Mr./Ms. _____,

As you are aware, Judge X appointed me to represent you in the case involving your children (other relation) in case number X on (date). My representation as your court appointed attorney depends on whether the court determines you are financially eligible for a free attorney. You will need to have an interview in the Room 4415, the CCAN office, so that the court can decide if you are eligible. If you are eligible I will continue to represent you, and my fees will be paid by the court. If you are not eligible, I will not be paid by the court for any work after the initial hearing and will no longer be your court appointed attorney. You can decide whether you want to retain me privately.

Assuming you are eligible for a court appointed attorney, I write this letter to further clarify my role and scope of work on your case. I represent you in connection with the case brought by the government in which it is alleged that your children (or other relation) were (neglected/abused); this representation will last from initial hearing through case closure. This representation does not include representing you through any appeal or other case that arises during the course of the neglect case.

During the course of my representation of you in the neglect case, I will take all legal steps necessary to achieve the goals in the neglect case. I will rely on you to assist me by being forthcoming with information that will assist me in representing you in the neglect case. This includes keeping me informed of your current home and work addresses and phone numbers at all times. I will make diligent efforts to keep you informed of the status of all matters and the course of action being followed or recommended by me.

For this representation to be effective, you must agree to assist me in this matter by: fully and accurately disclosing all facts and information necessary to enable me to represent you; maintaining regular contact with me during the course of the case; helping to locate documents and information necessary for the case; and appearing in person for all hearings. I will be a zealous and diligent attorney for you; but I cannot and do not guarantee any specific result in this case.

You can always reach me by phone or in my office:
PHONE NUMBER
OFFICE ADDRESS

Sincerely,

ATTORNEY

***The Court is not providing legal advice by sharing this document with panel attorneys. Sample documents are for informational purposes only. They should be used only in conjunction with an attorney's own research and independent reading and analysis of legal authority.