

North Carolina Commission on Indigent Defense Services

**Performance Guidelines for Attorneys Representing
Indigent Parent Respondents in Abuse, Neglect, Dependency and
Termination of Parental Rights Proceedings at the Trial Level**

Adopted December 14, 2007

North Carolina Commission on Indigent Defense Services

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A Parent Attorney Guidelines Committee was then formed to review drafts and assist in developing these performance guidelines. The IDS Commission and IDS Office are grateful to the following committee members and consultants, who generously gave their time and expertise to this project:

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Preface

The primary goal of the IDS Commission is to ensure that indigent persons in North Carolina who are entitled to counsel at state expense are afforded high quality legal representation. *See* G.S. 7A-498.1(2). To further that goal, the Indigent Defense Services Act of 2000 directs the Commission to establish “[s]tandards for the performance of public defenders and appointed counsel.” G.S. 7A-498.5(c)(4).

The initial draft of these performance guidelines was based on a review of standards and guidelines that have been adopted in several other jurisdictions—including California, Maryland, Oregon, South Carolina, and the District of Columbia—as well as resources published by the American Bar Association, the National Council of Juvenile and Family Court Judges, and Texas Lawyers for Children. For several months, a Parent Attorney Performance Guidelines Committee reviewed drafts of these guidelines and revised them to fit the nuances of North Carolina law and practice. Once a final proposed draft was complete, it was distributed to all private appointed counsel and assistant public defenders who handle abuse, neglect, dependency, and termination of parental rights cases, as well as all district court judges and representatives of the Department of Social Services and the state Guardian ad Litem program, for their comments and feedback. Based on the comments that were received, the Committee made a number of improvements to the guidelines. The full IDS Commission then adopted the attached performance guidelines on December 14, 2007.

These performance guidelines cover all indigent abuse, neglect, dependency, and termination of parental rights cases in North Carolina district court. The guidelines are intended to identify issues that may arise at each stage of the proceedings and to recommend effective approaches to resolving those issues. These guidelines do not replace or supersede statutes, case law, ethical rules or responsibilities, local rules, or the parent attorney’s best tool of all, his or her judgment about what course of action is best in any given situation. These guidelines are intended to be a fluid document, subject to changes in the law and the practical experiences of the attorneys who use them. Because all provisions will not be applicable in all cases, the guidelines direct counsel to use his or her best professional judgment in determining what steps to undertake in specific cases. The Commission hopes these guidelines will be useful as a training tool and resource for new and experienced parent attorneys, as well as a tool for potential systemic reform in some areas. The guidelines are not intended to serve as a benchmark for ineffective assistance of counsel claims or attorney disciplinary proceedings.

The IDS Commission believes that providing high quality representation of parents who are facing the possible loss of their children is a difficult and challenging endeavor, which requires great skill and dedication. That skill and dedication is demonstrated by parent attorneys across North Carolina on a daily basis, and the Commission commends those counsel. The Commission recognizes that the goals embodied in these guidelines will not be attainable without sufficient funding and resources, and hopes the North Carolina General Assembly will continue its support of both quality indigent defense services and appropriate community services for parents to help keep children with their families whenever possible.

The IDS Commission thanks all of the attorneys who zealously represent indigent parents across the state. In addition, the Commission thanks everyone who worked on the drafting of these performance guidelines and who offered comments. The Commission plans to review and revise the guidelines on a regular basis to ensure that they continue to comply with North

Carolina law and reflect quality performance, and invites ongoing feedback from the parents bar and juvenile court community.

Overview of North Carolina Juvenile Court for New Parent Attorneys

Before representing a respondent parent in an abuse, neglect, dependency, or termination of parental rights proceeding, counsel should become familiar with the relevant juvenile court laws, procedures, timelines, and actors in North Carolina. The following brief overview of some of the laws, procedures, timelines, and actors is intended to aid new parent attorneys in acquiring some basic familiarity. It is not intended to be a substitute for reading and researching the applicable statutes, case law, and local rules.

1. General Provisions

(a) Juvenile Court hosts two primary categories of juvenile cases:

(1) Abuse, neglect, dependency, and termination of parental rights matters, in which counsel is appointed to represent the indigent parent(s); and

(2) Juvenile delinquency and undisciplined matters, in which counsel is appointed to represent a juvenile who is alleged to be delinquent or in contempt of a court order finding the juvenile to be undisciplined.

These performance guidelines address abuse, neglect, dependency, and termination of parental rights proceedings, not delinquency or undisciplined contempt proceedings.

(b) The identity and roles of the major participants in abuse, neglect, dependency, and termination of parental rights actions include:

(1) The judge hears the case and renders decisions. The judge may hear only juvenile actions in larger counties or districts, or may appear in juvenile court only when assigned in smaller counties. More populous judicial districts and all Family Court districts follow the “one case, one judge” model, whereby a judge is assigned to hear all aspects of a case after it is filed. In other counties, judges rotate their assignments and many judges may hear different phases of a case.

(2) The parent attorney represents a respondent parent. When more than one parent is a party to the case, each parent should have separate counsel, even when their interests appear to be consistent with one another.

(3) The Department of Social Services (“DSS”) attorney represents and advocates for the position of the county DSS Director and his or her agents. The burden of proof is on DSS in abuse, neglect, and dependency cases, and in termination of parental rights actions initiated by DSS, and the DSS attorney presents evidence to meet this burden. The DSS attorney may be a county attorney, work for DSS as a full-time staff attorney, or be in private practice and work for DSS on a contract basis.

(4) The social worker is the agent of the DSS Director. The social worker works with the parent unless DSS has been relieved of reunification efforts by the court, directs the child’s care if the child is in custody, helps prepare court reports, and testifies when needed.

(5) The guardian ad litem (“GAL”) and GAL attorney advocate represent the best interests of the child. The GAL is typically an unpaid trained volunteer, and the GAL attorney advocate is an attorney paid by the state GAL program to represent and advocate for the position

of the GAL. Each judicial district has a GAL supervisor who assists the volunteers in completing written court reports and may appear in court.

(6) The juvenile clerk of court is the person from the Office of the Clerk of Superior Court who is assigned to the courtroom. The juvenile clerk maintains the confidential court file, issues summonses and assigns provisional counsel when a petition is filed, issues notices of hearing dates to the parties as required by law, maintains custody of the exhibits introduced in any hearing, and ensures that a digital or audiotape record of the proceedings is made for appellate review purposes. The juvenile clerk may also complete and obtain necessary signatures on the request for transcript and appellate entries forms when a trial order is appealed, and may assist with having a writ issued to bring an incarcerated client in for court.

(c) A case plan is a written document between DSS and the respondent parent setting forth the services to be delivered to the parent, the tasks each party must undertake, and the objectives or goals to be met by each party. Case plans set deadlines for these activities and are typically revised, renewed, or updated every 90 days.

(d) Throughout an abuse, neglect, or dependency proceeding, DSS is required by statute to make reasonable efforts to prevent the removal of the child from the home or to return the child to the home, and has a duty to continue reunification efforts unless and until relieved of that duty by the court. DSS can be relieved of reasonable efforts under the circumstances set forth in G.S. 7B-507(b), including when such efforts clearly are futile or inconsistent with the juvenile's health or safety, when any of the aggravated circumstances defined by G.S. 7B-101(2) exist, when the parent's rights to another child have been involuntarily terminated, or when the parent has committed certain violent crimes against another child of the parent. Because concurrent planning is permitted by the Juvenile Code, DSS may simultaneously pursue efforts toward reunification and another permanent plan, such as guardianship or adoption.

(e) Abuse, neglect, dependency, and termination of parental rights actions are civil proceedings, and the Rules of Civil Procedure apply unless a different procedure is provided by the Juvenile Code or case law. The Rules of Evidence apply at some, but not all, of the hearings in these proceedings.

(f) In some counties, the judge calls the calendar, while in other counties, the DSS attorney calls the cases. New parent attorneys should understand the procedure followed locally to ensure that counsel, the client, and any defense witnesses appear in court at the correct date and time.

2. Pre-Adjudication Proceedings

(a) An abuse, neglect, or dependency matter is initiated in court by the filing of a petition and issuance of a summons. If DSS determines that immediate removal of the child from the home is necessary, a social worker or law enforcement officer may take the child into temporary custody without a court order and prior to the filing of the petition, but must release the child within 12 hours (or 24 hours on a weekend or holiday) unless DSS files a petition and obtains a nonsecure custody order from the court within that time in accordance with G.S. 7B-502 through G.S. 7B-504.

(b) When DSS files an abuse, neglect, or dependency petition, the clerk is required to appoint provisional counsel for each respondent parent. While local practice may vary, provisional counsel typically is the attorney for the parent pending the parent appearing, applying for court-

appointed counsel, and being found to be indigent. If the court finds the parent indigent when he or she first appears, the same attorney usually will be appointed as counsel of record. While the Juvenile Code states that the court shall dismiss provisional counsel if the parent does not appear at the initial hearing, local practice may vary as to counsel's obligations if the parent client fails to appear. New parent attorneys should become familiar with local practices so they understand the scope and extent of provisional appointments.

(c) If the child is placed in nonsecure custody after DSS files an abuse, neglect, or dependency petition, "day-one" or pre-hearing conferences are scheduled in some districts before the initial nonsecure custody hearing. These are informal meetings, usually without the judge, to explain the proceedings and resolve as much as possible about the child's placement pending the adjudicatory hearing. These conferences may be combined with the initial nonsecure hearing or that hearing may occur on a different date.

(d) The purpose of nonsecure custody hearings is to determine whether the child should remain in DSS custody pending the adjudicatory hearing and, if so, to ensure that the child is in the most appropriate placement. If the child is in nonsecure custody, an initial hearing on the need for him or her to remain in custody must be held within seven calendar days after the child was taken into custody, unless the respondent parent and other parties consent to a continuance for up to 10 business days. If the court orders that a juvenile remain in nonsecure custody, unless waived by the respondent parent, the second nonsecure custody hearing must be held within seven business days after the initial hearing, and subsequent nonsecure custody hearings must be held at least every 30 calendar days thereafter until the adjudicatory hearing.

(e) The standard of proof at a nonsecure custody hearing is clear and convincing evidence that the juvenile's placement in custody is necessary. Per statute, the Rules of Evidence do not apply at nonsecure custody hearings.

3. Adjudication and Disposition Hearings

(a) The purpose of the adjudicatory phase in an abuse, neglect, or dependency case is to determine the existence or nonexistence of the conditions alleged in the petition. The adjudicatory hearing must occur no later than 60 days after the filing of the petition, unless the court orders a continuance.

(b) The standard of proof at an adjudicatory hearing is clear and convincing evidence. The Rules of Evidence apply at adjudicatory hearings.

(c) The purpose of the dispositional phase in an abuse, neglect, or dependency case is to determine the needs of the parent and child and ways to fulfill those needs, and to set a further review date for the court to receive reports from all parties about progress in meeting those needs. The dispositional hearing occurs after the adjudication, often on the same date but perhaps later if additional time is needed to investigate resources or obtain information requested by the court.

(d) There is no standard of proof at a dispositional hearing. Per statute, the Rules of Evidence do not apply at dispositional hearings and the court may consider any information that is relevant, reliable, and necessary to determine the best interest of the juvenile.

4. Review and Permanency Planning Hearings

(a) The purpose of review hearings is to enable the court to review and assess the progress of the case, including the services that have been provided to the parent and the parent's compliance with his or her obligations under the dispositional order. Review hearings must occur within 90 days after the dispositional hearing and at least every six months thereafter. The court may order that review hearings be held less frequently if the criteria set forth in G.S. 7B-906(b) are met, but the court may not refuse to conduct a review hearing if any party files a motion seeking one.

(b) There is no standard of proof at a review hearing. Per statute, the Rules of Evidence do not apply at review hearings and the court may consider any information that is relevant, reliable, and necessary to determine the needs of the juvenile.

(c) The purpose of a permanency planning hearing is to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time. The permanency planning hearing must occur within 30 calendar days after any court order directing the cessation of reasonable efforts toward reunification, and within 12 months of the initial order removing the child from the parental home. The permanency planning hearing may be combined with a review hearing.

(d) There is no standard of proof at a permanency planning hearing. Per statute, the Rules of Evidence do not apply at permanency planning hearings, and the court may consider any information that is relevant, reliable, and necessary to determine the needs of the juvenile.

(e) Pursuant to G.S. 7B-907(d), DSS must file a petition or motion to terminate parental rights any time the juvenile has been in placement outside the home for 12 of the most recent 22 months, a court has determined that the parent abandoned the child, or the parent has committed one of the criminal offenses specified in G.S. 7B-907(d). That requirement does not apply, however, if the court finds that the permanent plan for the child is custody or guardianship with a relative or other suitable person; that filing a petition to terminate parental rights would not be in the child's best interest; or that DSS has not been relieved of the duty to pursue reunification and efforts are still required to enable the juvenile's return home.

5. Termination of Parental Rights

(a) Termination of parental rights may be initiated by a new petition or by a motion in the cause in an underlying abuse, neglect, or dependency case. A petition or motion to terminate parental rights may be filed by a DSS that has custody of the child, by the child's GAL, or by a private party. If termination of parental rights is necessary to accomplish the permanent plan for the child, DSS must file a petition or motion to terminate parental rights within 60 calendar days of the date of the permanency planning hearing at which the plan was approved, unless the court makes written findings about why it cannot be filed within that time. Regardless of the identity of the petitioner, the respondent parent is entitled to appointed counsel if found to be indigent.

(b) Local practice varies as to the appointment of counsel in a termination of parental rights case. In some counties, counsel appointed in the underlying abuse, neglect, or dependency case continues automatically as counsel for the termination case. In other counties, the respondent parent must complete a new affidavit of indigency and, if approved by the court, counsel for the underlying abuse, neglect, or dependency case will be newly appointed to the termination case or

different counsel will be appointed to the termination case. New parent attorneys should become familiar with the local practice so they understand the scope and extent of case appointments.

(c) Local practice also varies as to the assignment of case file numbers when there are multiple cases involving the same child. Pursuant to the Administrative Office of the Court's Rules of Record-Keeping, a juvenile should have only one file in a county, but that file may be broken down into various subparts, and a termination of parental rights petition or motion should be assigned the underlying abuse, neglect, or dependency file number with an extension. However, in some counties, there may be multiple files involving the same juvenile, and a termination of parental rights petition or motion may be given a new file number. New parent attorneys should become familiar with the local practice so they are aware of all files that may be introduced in cases.

(d) The purposes and goals of the major stages of proceedings in termination of parental rights actions, and the required timelines for those stages, are as follows:

(1) The purpose of a pre-hearing (or "special hearing") under G.S. 7B-1108 is to determine the issues raised by the termination petition or motion and the respondent's answer or response. The pre-hearing is required only if an answer or response is filed. A respondent should receive between 10 and 30 days notice of the hearing. Local practice varies as to the timing of the pre-hearing relative to the adjudicatory hearing.

(2) The purpose of the adjudicatory phase in a termination of parental rights proceeding is to determine the existence or non-existence of any of the grounds for termination alleged in the petition or motion. The adjudicatory hearing must occur within 90 calendar days after the filing of the petition or motion, unless the judge for good cause orders that it be held at a later time. The adjudication order must be filed within 30 calendar days of the conclusion of the adjudicatory hearing.

(3) The standard of proof during the adjudicatory phase of a termination of parental rights case is clear, cogent, and convincing evidence. The Rules of Evidence apply during the adjudicatory phase.

(4) If grounds to terminate are found to exist at the adjudicatory hearing, the purpose of the dispositional phase in a termination of parental rights proceeding is to determine whether termination is in the best interest of the juvenile. While the dispositional hearing usually occurs immediately following the finding of grounds to terminate, there is no statutory deadline for the hearing. The dispositional order must be filed within 30 calendar days of the conclusion of the dispositional hearing.

(5) There is no standard of proof during the dispositional phase of a termination of parental rights case. Per statute, the Rules of Evidence do not apply during the dispositional phase, and the court may consider any information to determine whether termination of parental rights is in the best interest of the juvenile.

(6) Pursuant to G.S. 7B-908, following the termination of parental rights, the court must review the placement of the child at least every six months until the juvenile is the subject of a decree of adoption. Once a parent's rights have been terminated, the parent will not be a party to these post-termination placement reviews, unless an appeal of the termination order is pending and a court has stayed the order pending the appeal.

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency or Termination of Parental Rights Proceedings at the Trial Level

SECTION 1: GENERAL PROVISIONS

Guideline 1.1 Function of the Performance Guidelines

(a) The Commission on Indigent Defense Services hereby adopts these performance guidelines to promote one of the purposes of the Indigent Defense Services Act of 2000—improving the quality of indigent representation in North Carolina—and pursuant to G.S. 7A-498.5(c)(4).

(b) These guidelines are intended to serve as a guide for attorneys representing indigent parent respondents in abuse, neglect, or dependency and termination of parental rights proceedings at the trial level, and to contain a set of considerations and recommendations to assist counsel in providing quality representation for indigent parent respondents. The guidelines also may be used as a training tool.

(c) These are performance guidelines, not standards. The steps covered in these guidelines are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. In deciding what steps are appropriate, counsel should use his or her best professional judgment.

Guideline 1.2 General Role of the Parent Attorney

(a) The paramount obligations of parent counsel are to provide zealous and quality representation to their clients at all stages of the proceedings, and to preserve, protect, and promote their clients' rights and expressed interests throughout the proceedings. Parent attorneys also have an obligation to conduct themselves professionally, abide by the Revised Rules of Professional Conduct of the North Carolina State Bar and other ethical norms, and act in accordance with all rules of court. Unless inconsistent with the client's interests, parent counsel should cooperate with and promote a productive relationship between all parties and attorneys in the case.

(b) Parent counsel are the professional representatives of their clients. Counsel should candidly advise clients regarding the probable success and consequences of adopting any posture in the proceedings, and provide clients with all information necessary to make informed decisions. Counsel does not have an obligation to execute any directive of a client that does not comport with law or standards of ethics or professional conduct.

Guideline 1.3 Education, Knowledge, Training, and Experience of the Parent Attorney

(a) Before accepting appointment to an indigent abuse, neglect, dependency or termination of parental rights case, counsel has an ethical obligation to ensure that he or she has available sufficient time, resources, knowledge, and experience to afford quality representation to the parent in the particular matter. If it later appears that counsel is unable to afford quality representation in the case, counsel should move to withdraw. If counsel is allowed to withdraw, he or she should cooperate with new counsel to the extent that such cooperation is in the best interests of the client and in accord with the Revised Rules of Professional Conduct.

(b) To provide quality representation of respondent parents, counsel must be familiar with the North Carolina Juvenile Code and case law interpreting it. The following articles in Subchapter I of Chapter 7B of the General Statutes are of particular interest to the parent attorney:

- (1) Article 1, Purposes and Definitions: G.S. 7B-100-101;
- (2) Article 2, Jurisdiction: G.S. 7B-200-201;
- (3) Article 3, Screening of Abuse and Neglect Complaints: G.S. 7B-300-311;
- (4) Article 4, Venue and Petitions: G.S. 7B-400-408;
- (5) Article 5, Temporary and Nonsecure Custody: G.S. 7B-500-508;
- (6) Article 6, Basic Rights: G.S. 7B-600-603;
- (7) Article 7, Discovery: G.S. 7B-700;
- (8) Article 8, Hearing Procedures: G.S. 7B-800-808;
- (9) Article 9, Dispositions: G.S. 7B-900-911;
- (10) Article 10, Modification and Enforcement of Dispositional Orders, and Appeals: G.S. 7B-1000-1004; and
- (11) Article 11, Termination of Parental Rights: G.S. 7B-1100-1112.

(c) Parent attorneys should also be familiar with the following laws, rules, and resources:

- (1) The provisions in G.S. Chapter 50 related to child custody and support;
- (2) The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A;
- (3) The North Carolina Rules of Civil Procedure, G.S. Chapter 1A;
- (4) The North Carolina Rules of Evidence, G.S. Chapter 8C;
- (5) The North Carolina Rules of Appellate Procedure, with a particular focus on Rule 3A;
- (6) Any applicable local rules;
- (7) The North Carolina DSS Family Support and Child Welfare Manual, *available at* <http://info.dhhs.state.nc.us/olm/manuals/manuals.aspx?dc=dss>;
- (8) The North Carolina GAL Attorney Manual, *available at* <http://www.nccourts.org/Citizens/GAL/Manual.asp>;

(9) Local agencies that provide services pursuant to a contract with DSS, as well as any agencies in the community that might offer help to respondent parents in meeting their case plans; and

(10) Any relevant local interagency protocols or agreements.

(d) Counsel should be generally familiar with the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355-1357. Counsel should understand that ASFA is relevant to abuse, neglect, or dependency and termination of parental rights proceedings in North Carolina only to the extent that its requirements are reflected in North Carolina law, but that noncompliance with ASFA can affect DSS's funding.

(e) When warranted by the facts of the case, parent counsel should also review and consult the following:

(1) The Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, the ICWA Regulations, 25 C.F.R. Part 23, and the Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979);

(2) The Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP), 42 U.S.C. §§ 622(b)(9), 671(a)(18), 1996(b) (1998);

(3) The Child Abuse Prevention and Treatment Act (CAPTA), P.L. 108-36;

(4) The Interstate Compact on the Placement of Children (ICPC), G.S. 7B-3800-3806, and the ICPC Regulations, *available at* <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-70/man/CS1605-01.htm>;

(5) The Health Insurance Portability and Accountability Act (HIPAA), P.L. 104-191, including the privacy requirements in 45 C.F.R. Parts 160, 162, and 164; and

(6) Immigration laws relating to child welfare and child custody.

(f) Counsel should understand the standard of proof that applies at every stage of the proceedings in abuse, neglect, or dependency and termination of parental rights cases.

(g) Counsel should develop a basic knowledge of:

(1) Criminal law and procedure;

(2) Child development;

(3) Alcohol and drug abuse;

(4) Domestic violence;

(5) Sexual, physical, and emotional abuse;

(6) How children may be affected by abuse, neglect, and dependency;

(7) How parents and children may be affected by DSS involvement in the family unit;
and

(8) The unique issues that may arise when a minor child in DSS custody becomes pregnant.

(h) Counsel should be aware that cultural and ethnic differences exist as to child rearing.

(i) Counsel should be familiar with available programs and services that can aid older children, such as LINKS life skills services offered through the North Carolina Foster Care Independence Program for youth who are between 13 and 21 years of age, and Contractual Agreements for Continued Residential Services (“CARS Agreements”) for youth who are between 18 and 21 years of age. Information about those programs can be found in Chapter IV, Section VIII of the North Carolina DSS Family Support and Child Welfare Manual. When appropriate, counsel should inform the parent client of the availability and benefits of such programs.

(j) New parent attorneys should seek opportunities to observe various phases of juvenile court proceedings, and consider reviewing the following:

(1) The American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases (2006), *available at* <http://www.abanet.org>;

(2) Representing Parents in Child Welfare Cases: A Basic Introduction for Attorneys (American Bar Association 2000), *available at* <http://www.abanet.org/child/rcji/RepresentParents.pdf>;

(3) North Carolina Juvenile Court: Child Protection Hearings, A Handbook for Parents, Guardians, Custodians and Children (North Carolina Court Improvement Services); and

(4) Improving Outcomes for Older Youth: What Judges and Attorneys Need to Know (National Child Welfare Resource Center for Youth Development 2004), *available at* <http://www.nrcys.ou.edu/yd/resources/publications/pdfs/improveoutcomes.pdf>.

(k) Where appropriate to provide competent representation, counsel should consult with more experienced attorneys to acquire necessary knowledge and information, including information about the practices of the local DSS, judges, and other court personnel.

(l) Counsel should keep abreast of changes in this area of the law, and should seek continuing legal education in juvenile court representation and general civil trial practice.

Guideline 1.4 General Duties of the Parent Attorney

(a) Counsel should take all reasonable steps to maintain adequate and appropriate contact with the parent client throughout the proceedings. When the client is subject to a court order or case plan, counsel should attempt to communicate regularly with the client to assess whether the client is performing as he or she should pursuant to the order or plan. If counsel loses contact with a client, counsel should make a reasonable effort to reestablish contact, which may entail seeking information from family members, DSS, law enforcement, local adult probation offices, and other sources.

(b) Counsel should avoid conflicts of interest involving the parent client, any additional respondent parent(s), and prior clients. Counsel should understand that each parent should have his or her own attorney, and that one attorney should not represent both parents absent some unusual circumstances and express written consent. Where appropriate, counsel should consider seeking an advisory opinion on any potential conflicts from the North Carolina State Bar. Although counsel may interview the non-client parent, it must be done with the permission of that parent’s attorney.

(c) Counsel should be familiar with the applicable Revised Rules of Professional Conduct and the obligation of counsel to withdraw in certain circumstances. If, at anytime during the course of representation, the client makes it known to counsel that he or she no longer wants counsel to represent him or her, counsel should inform the client of the potential consequences of withdrawal, including delay in the progress of the case. Counsel should be aware that mere tactical disagreements between counsel and the client ordinarily do not justify withdrawal from a case. If it is necessary for counsel to move to withdraw, counsel should do so in a way that protects the client's rights and interests, and does not violate counsel's ethical duties to the client.

(d) Counsel must understand at which hearings the Rules of Evidence apply in these proceedings and at which hearings they do not. Even at hearings that are not governed by the Rules of Evidence, counsel should make appropriate objections to information and testimony that is blatantly unreliable, inflammatory, immaterial, inaccurate, or incapable of being verified.

(e) Counsel must be aware of the time requirements imposed by the North Carolina Juvenile Code. Counsel should consider developing a tickler system to keep track of all required stages and hearings, to determine whether they took place within the mandated time periods, and to enable counsel to make appropriate objections to untimely hearings to preserve issues for possible appellate review.

(f) Counsel should take all reasonable steps to ensure that the parent client is notified in advance of all court dates. Counsel should also provide the client with copies of all petitions, court orders, case plans, and other important documents in the case.

(g) Because children are often displaced during these proceedings and because deadlines are imposed by the Juvenile Code, counsel should attempt to avoid continuances by any party for frivolous reasons. If counsel determines that it is necessary to request a continuance on behalf of the parent or that a continuance would materially benefit the parent's case, counsel should file a written motion for a continuance that clearly states good cause or compelling reasons. Counsel should object to continuance motions by other parties where necessary and appropriate.

(h) Counsel should review the court file before each court date, and attempt to seek enforcement of any local rules requiring that court reports and attachments be distributed to parties in advance of the court date. Counsel should move to continue hearings where significant and detrimental recommendations are made in court reports that were not timely delivered to counsel so counsel can prepare to meet or challenge the recommendations.

(i) At all hearings in abuse, neglect, or dependency and termination of parental rights proceedings, counsel should consider whether a motion to close the courtroom to the public pursuant to G.S. 7B-801 is justified and appropriate.

(j) Where appropriate, counsel should advise the respondent parent and all potential defense witnesses as to suitable courtroom dress and demeanor.

(k) Counsel should appear on time for all scheduled court hearings in a client's case. If scheduling conflicts arise, counsel should resolve them in accordance with Rule 3.1 of the General Rules of Practice and any applicable local rules.

(l) If a parent client can not be located during the pendency of the proceedings and counsel is unaware of the client's objectives, counsel should act in accordance with any applicable ethics opinions, including filing a motion to withdraw if appropriate.

(m) If counsel is allowed to withdraw or is discharged by the court at any point in the proceedings, counsel should take reasonable steps to notify the parent of the withdrawal or discharge, the next scheduled court date, and the parent's right to reapply for appointed counsel at the next court date.

(n) Counsel should never give preference to retained clients over appointed clients, or suggest that retained clients should or would receive preference.

Guideline 1.5 Clients with Diminished Capacity and Guardians ad Litem

(a) Counsel must take into account the client's objectives when the client is mentally competent. When a client's capacity to make adequately considered decisions in connection with the representation is diminished, counsel should act in accordance with Rule 1.14 of the Revised Rules of Professional Conduct and any applicable statutory and case law.

(b) Counsel should be fully familiar with Rule 17 of the Rules of Civil Procedure, G.S. 7B-602, G.S. 7B-1101.1, and any applicable case law governing appointment of a GAL for a respondent parent. If counsel believes his or her client is entitled to a GAL due to age, incompetency, diminished capacity, or other reasons, counsel should file a motion seeking appointment of a GAL.

(c) If another party seeks appointment of a GAL for the respondent parent, counsel should consider all relevant factors in determining whether to oppose or consent to the appointment, including the services a GAL would provide and any inferences about the client's capacity or parenting ability that may be drawn from counsel's position or the appointment of a GAL.

(d) If a court appoints a GAL for the parent client, counsel for the parent should familiarize himself or herself with the GAL's role and duties under any applicable statutory and case law and ethics opinions.

Guideline 1.6 Incarcerated Clients

(a) Counsel should understand that an incarcerated client can actively participate in his or her case, and should determine if the client is being held in a Department of Correction facility that offers parenting, anger management, and other classes that may be required under the case plan or court order. If the incarcerated client is being held in a local county jail, counsel should determine if any of the services that are required under the case plan or court order can be provided at the local jail. If appropriate, counsel should attempt to make arrangements with the prison or jail for a contact visit between a service provider and the incarcerated client.

(b) Unless otherwise directed by the parent client, counsel should take steps to ensure that a writ is issued to have an incarcerated client brought to court for all hearings. Because local practice surrounding issuance of a writ may vary, counsel should become familiar with the local practice. If the client is incarcerated in another state or is in federal custody, counsel should be aware that a writ likely will not be available and should consider all alternative means of communication between the court and the client, including a telephone link during the hearing or a deposition of the client before the court date.

(c) Counsel should encourage an incarcerated client to write letters, send small gifts or cards to the child through DSS, pay small amounts of child support if possible, and otherwise attempt to maintain contact with the child despite the incarceration.

(d) Counsel should attempt to involve the state prison social worker or the client's case manager in the process, in order to identify relevant services that might be available inside the prison and to help coordinate communication with the client.

SECTION 2: CASE REVIEW, INVESTIGATION, AND PREPARATION

Guideline 2.1 General Obligations of Counsel Upon Appointment

(a) Counsel shall obtain and review copies of the petition and other documents in the court file, and determine DSS's grounds for alleging abuse, neglect, or dependency, or DSS's or a private party's grounds for seeking termination of parental rights.

(b) If counsel is provisionally appointed, counsel should attempt to make contact with the parent client before the initial court date if contact information is available and time permits. If the client appears at the initial hearing, counsel should ensure that the client is informed of his or her rights to have counsel appointed, to hire an attorney, or to represent himself or herself, and that the client will need to make a choice concerning representation on the first court date. If the parent client chooses to have counsel appointed at the first court date, provisional counsel may also assist the client in applying for appointed counsel.

Guideline 2.2 Theory of the Case

During case review, investigation, and preparation for all hearings, counsel should develop and continually reassess a theory of the case. A theory of the case is one central theory that organizes the facts, emotions, and legal basis in support of the client's position. The theory of the case furnishes the basic position from which counsel determines all preparation and actions in a case.

Guideline 2.3 The Initial Interview

(a) Counsel shall attempt to arrange for an initial interview with the respondent parent as soon as practicable after being assigned to the client's case. If necessary, counsel may arrange for a designee to conduct the initial interview.

(b) The purpose of the initial interview is to acquire information from the respondent parent concerning the client, the child, potential witnesses, and the allegations in the petition; to provide the client with information concerning the case; to explain the client's options; and to determine the client's expressed interests. Counsel should try to ensure at this and all successive interviews and proceedings that barriers to communication, such as disabilities or differences in language or literacy, are overcome. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court and present at the initial interview. Counsel should also consider utilizing the services of any professionals who are already providing services to the parent client.

(c) Information that should be acquired during the initial interview includes, but is not limited to:

(1) General information about the client, including his or her family and social support, and housing, transportation, financial, employment, and immigration status (if applicable);

(2) General information about any physical or mental health problems, or alcohol or substance abuse, which may have contributed to the allegations and/or impair the client's ability to work toward reunification;

(3) Information about the client's criminal history, if any, and any prior involvement with DSS;

(4) The existence of any companion criminal charges against the client arising out of the same facts or circumstances alleged in the juvenile petition, including the names of any appointed or retained criminal defense counsel;

(5) The client's version of the facts and circumstances surrounding the allegations and the client's view of any possible defenses;

(6) Information about any potential relative placements, including contact information and relevant background information, such as any substance abuse or criminal history;

(7) Information about the current visitation schedule between the parent and child if the child is not in the parental home, and the client's wishes regarding visitation;

(8) Information about services provided prior to removal of the child from the parental home, if any, as well as services that might have avoided the need for removal if DSS had provided them;

(9) Information about any documents that have been signed by the parent client at the request of DSS, if any, and the client's state of mind at the time of signing;

(10) Any evidence that should be preserved;

(11) Any photographs relevant to the defense of the allegations that may exist or should be taken as soon as possible; and

(12) The names of potential witnesses to the facts and circumstances underlying the petition, and permission from the client to contact those persons.

(d) Information that should be provided to the client at the initial interview includes, but is not limited to:

(1) An overview of the juvenile court process and actors, the possible timeline of the case, and an explanation that the client's level of effort and cooperation will be taken into account by DSS and the court;

(2) An explanation of the attorney-client privilege;

(3) The nature and elements of the allegations in the petition;

(4) How counsel may be reached by the client and when counsel plans to have contact with the client next;

(5) An explanation that the client should make and keep appointments with the attorney, appear in court when required, maintain a phone number, address, or both where the attorney can

reach the client or leave a message for the client, and the possible consequences of failing to maintain contact with counsel;

(6) The requirements of any case plan and the possible consequences of failing to abide by the plan;

(7) Any recommended evaluations or treatment and the possible consequences of failing to obtain them;

(8) The client's rights to visitation;

(9) The role of any foster parent(s) and the importance of developing a positive relationship with the foster parent(s), if possible; and

(10) Realistic answers, where possible, to the client's most urgent questions.

(e) Counsel should explain to the client his or her position concerning the client discussing the case with DSS personnel, the GAL for the child, service providers, forensic evaluators, any foster parent(s), and other persons outside of counsel's presence, and should ask to be informed of all such contacts. Counsel's position regarding contact with other parties should take into account the seriousness of the allegations, whether the client appears capable of determining if contact will be beneficial or detrimental to his or her interests, the need for social workers to have access to the client to pursue reunification, counsel's ability to be present for all contacts without unnecessarily delaying reunification efforts, and counsel's ethical obligations to the client. Regardless of counsel's position on third party contact with the client, the parent attorney should instruct the respondent parent not to sign any documents presented by any party, including a proposed case plan, without first consulting with counsel.

(f) After the initial interview of the client, counsel should follow up with the client in writing if appropriate and practicable, and should consider communicating in writing with all other parties about counsel's position on contact with the parent client.

Guideline 2.4 Counsel's Responsibilities After the Initial Interview

(a) Counsel has a duty to conduct an independent case review and investigation of the allegations in the petition, including but not limited to:

(1) Review of all pleadings and applicable statutes and case law;

(2) Review of all court files;

(3) Review of DSS files to the extent permitted by local rules or court order; and

(4) An additional in-depth interview or interviews of the client.

(b) If applicable, counsel should obtain and review all previous court files concerning the juvenile. If counsel is denied access to any such files in violation of G.S. 7B-2901(a)(4), counsel should seek a court order allowing that review.

(c) Counsel should make all reasonable efforts to obtain information in the possession of third parties, such as DSS, law enforcement, and the GAL. Counsel should make prompt requests for such information, including but not limited to physical evidence, social service records, medical or mental health records or reports, substance abuse treatment results, information about the client's attendance at anger management and parenting classes, and information about the

client's education, employment, and housing status. Where appropriate, counsel should ask the client to sign a release authorizing counsel to access confidential information.

(d) Counsel should identify all potential witnesses and determine priorities regarding which persons to interview. Potential witnesses include, but are not limited to:

- (1) Mental health workers who have worked with the parent or child;
- (2) School personnel;
- (3) Law enforcement;
- (4) Physicians;
- (5) Relatives;
- (6) Neighbors and landlords;
- (7) Employers;
- (8) Caseworkers;
- (9) Foster parents and other caretakers;
- (10) Alcohol and drug counselors;
- (11) Ministers, clergy, and other faith leaders; and
- (12) Parenting instructors.

If potential witnesses are represented by counsel, the parent attorney should obtain permission from that counsel and the interview should take place in the presence of that counsel, unless the witness waives that right.

(e) If the parent client also faces criminal charges arising out of the allegations in the juvenile petition and the parent attorney does not represent the client in criminal court, the parent attorney should consult with the parent's criminal defense attorney.

(f) If counsel determines that it is necessary to interview the child, counsel should obtain permission from the GAL attorney advocate, even if the child is not in nonsecure custody. If an interview is conducted, counsel should be careful to utilize interviewing techniques that are age appropriate and take into account the alleged abuse or neglect the child may have suffered.

(g) Counsel should determine whether any of the following items should be brought to the immediate attention of DSS, the GAL, and/or the court:

- (1) Possible placements for the child, including potential relative or kinship placements;
- (2) Services that might enable reunification or physical placement of the child in the parental home while DSS retains legal custody, if applicable;
- (3) The client's wishes regarding visitation; and
- (4) The client's and child's immediate physical and mental needs, if any.

(h) Counsel should evaluate DSS's efforts to reunify the respondent parent and the child, and ask DSS to provide appropriate services for the parent client, such as:

- (1) Mental or physical exam of a party;

- (2) A modification or increase in visitation;
- (3) Relative placement of a child who is in nonsecure custody; and

(4) Funds, transportation, or other services aimed at assisting the parent in overcoming the conditions that led to the filing of the petition and in pursuing reunification.

Counsel should maintain documentation of all requests for services that are made to DSS, when they are made, and the agency's response. Whenever possible and appropriate, counsel should encourage communication between service providers for the parent and the child.

(i) If appropriate, counsel should consider contacting a foreign consulate to obtain necessary evaluations or services.

Guideline 2.5 Evaluation of the Pleadings and Written Answers

(a) In an abuse, neglect, or dependency case, counsel should review the petition, summons, and return of service and, unless there are sound tactical reasons for not doing so, move to dismiss the pleadings if there are defects, such as:

- (1) The petition does not contain the name, date of birth, and address of the juvenile, and the name and last known address of the parent, guardian, or custodian;
- (2) The petition was not properly verified by the DSS Director or his or her designee;
- (3) The petition does not contain sufficient factual allegations to convey subject matter jurisdiction and personal jurisdiction over the parent; or
- (4) The petition and summons were not properly and timely served on the parent client.

(b) In a termination of parental rights case, counsel should review the petition or motion and, unless there are sound tactical reasons for not doing so, move to dismiss the pleadings if there are defects, such as:

- (1) The petition or motion does not contain the name of the juvenile, date and place of the juvenile's birth, the county where the juvenile is currently residing, and the name and last known address of the parent, guardian, or custodian;
- (2) The petition or motion does not contain the name and address of the petitioner or movant, and sufficient facts to identify the petitioner or movant as someone who is authorized by statute to file the petition or motion;
- (3) The petition or motion was not properly verified by the petitioner or movant;
- (4) The petition or motion does not contain sufficient factual allegations to warrant a determination that grounds for termination exist; or
- (5) The petition or motion was not properly and timely served on the parent client.

(c) If termination of parental rights is initiated by a motion in the cause in the underlying abuse, neglect, or dependency case, counsel should determine if the motion was accompanied by a notice to the respondent parent that meets the requirements of G.S. 7B-1106.1. If no such notice accompanied the motion, or if the notice does not meet the statutory requirements, counsel should consider moving to dismiss the motion in the cause.

(d) In an abuse, neglect, or dependency case, after reasonable inquiry, counsel should consider filing a timely written answer to the petition and raising any applicable affirmative defenses. In a termination of parental rights case, unless there are sound tactical reasons for not doing so, counsel should file a written answer to the petition to terminate, or a response to the motion to terminate, within 30 calendar days after service of the petition or motion.

(e) Even if the pleadings are adequate, counsel should be sufficiently familiar with the language of the pleadings to recognize if DSS subsequently moves to amend them in a way that would change the nature of the conditions upon which the pleadings were based in violation of G.S. 7B-800.

Guideline 2.6 Case Plans

(a) Counsel should be aware that a case plan may have been entered into between the parent and DSS prior to the filing of an abuse, neglect, or dependency petition in an attempt to avoid filing. Counsel should also be aware that, where nonsecure custody of the child is taken at the time the petition is filed, a case plan may have been entered into between the parent and DSS prior to the adjudicatory hearing.

(b) Counsel should review any proposed or signed case plan with the client to, among other things, verify that it requires services and service providers that are appropriate and tailored to the needs of the parent client and that it conceivably could be completed within the time allowed by the plan. Counsel should consider negotiating with DSS about the specific requirements of the proposed case plan if, after consultation with the client, counsel believes that modifications to the required services, the service providers, or the time frame for completion would be favorable to the client. If possible, counsel should ask DSS to provide a list of approved service providers and allow the parent client to choose an appropriate provider from the list. Counsel should also consider negotiating with DSS about the extent of and limitations on information that will be given to DSS in reports by service providers in order to facilitate a therapeutic relationship between the parent client and the service providers.

(c) After consultation with the client and taking into account the client's objectives and needs, counsel should advise the client whether to agree to and sign a proposed case plan, whether to sign a proposed case plan after crossing through those items with which the client disagrees, or whether to sign a proposed case plan after adding language in the "comments" section of the plan. If counsel and the parent client agree that the client will not sign a proposed case plan, counsel should instruct the client to write on the case plan "refused to sign on advice of counsel." Counsel should also advise the client that a refusal to sign a proposed plan may cause DSS to view the client as uncooperative and may be admitted into evidence and relied upon by the court.

(d) Whenever a case plan is signed, counsel should advise the client of his or her responsibilities under the plan, and of any potential consequences of not following the plan.

(e) If it later becomes relevant that the client could not have completed an objective of a signed case plan within the time allowed, counsel should consider gathering evidence for presentation at the next hearing about the impossibility of performance.

Guideline 2.7 Nonsecure Custody Hearings

(a) In preparation for a nonsecure custody hearing, counsel should ascertain the client's goals and the best strategy for achieving those goals, including contesting whether there is a reasonable factual basis for the allegations in the petition or presenting evidence in support of other reasonable placements or means of protecting the juvenile. In doing so, counsel should consider the tactical advantages and disadvantages of contesting the factual basis for any allegations at such an early stage in the proceedings, including the possibility that the client may be prejudiced by evidence that is elicited.

(b) If a nonsecure custody order has been granted, counsel should review the order with the client and explain the meaning of nonsecure custody. Counsel should also determine whether the client consents to DSS having nonsecure custody for seven additional business days, consents until the adjudication and waives his or her right to additional nonsecure custody hearings, or does not consent and desires a hearing. If the parent does not waive nonsecure custody hearings, counsel should take steps to ensure that the client gets all nonsecure hearings to which he or she is entitled by statute.

(c) Counsel should be familiar with the placement options generally available in that county and any potential placement options in the case, including relative placements, and should advocate for the client's wishes regarding placement at all nonsecure hearings. Counsel should request that any potential placement individual(s) attend the next nonsecure custody hearing to facilitate the court ordering placement if appropriate.

(d) Counsel should be aware of all inquiries that the court must make at nonsecure custody hearings under G.S. 7B-506, including whether the criteria for continued custody under G.S. 7B-503 continue to exist, the identity and location of any missing parent, whether paternity is at issue, potential relative placements, and the status of other children in the home, and should present appropriate evidence pertaining to those inquiries.

(e) Counsel should advise the court and DSS if the child has any specific medical or psychiatric needs of which counsel is aware.

(f) If necessary and appropriate, counsel should ask the court to provide local juvenile or mental health experts who can perform a psychological evaluation of the parent or child.

(g) If the court sets out placement or visitation conditions for the parent in the nonsecure custody order, counsel should explain to the client those conditions and any potential consequences of failing to comply.

(h) Counsel should be aware that nonsecure custody orders must contain appropriate findings of fact pursuant to G.S. 7B-507 as to whether DSS has made reasonable efforts to eliminate the need for the child's out-of-home placement and to reunify the parent and child, or relieving DSS of the obligation to make reasonable efforts. If necessary, counsel should ask the court to make appropriate findings on the record.

Guideline 2.8 Pre-Adjudication Motions

(a) The decision to file pre-adjudication motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of each case, as well as the

need to preserve issues for appellate review. Pre-adjudication motions that counsel should consider filing include, but are not limited to:

- (1) Discovery motions;
- (2) Motions for an in camera inspection;
- (3) Motions to dismiss the petition or other motions related to the insufficiency of the pleadings under Rule 12(b) of the North Carolina Rules of Civil Procedure;
- (4) Motions to divulge the identity and contact information for witnesses and others;
- (5) Motions for medical, psychological, or psychiatric evaluations;
- (6) Evidentiary motions and motions in *limine*;
- (7) Motions for appointment of a GAL for the respondent parent, if appropriate;
- (8) Motions for the appropriation of funds to enable the respondent parent to receive appropriate evaluations and services; and
- (9) Motions for any non-licensed placement provider to receive the county share of the applicable monthly foster care rate.

(b) Motions should be filed in a timely manner, comport with the formal requirements of statute and court rules, and succinctly inform the court of the authority relied upon.

(c) When a hearing is scheduled on a pre-adjudication motion, counsel's preparation for the hearing should include, but is not limited to:

- (1) Investigation, discovery, and research relevant to the claim(s) advanced;
- (2) Preparing and filing written briefs and memoranda on applicable points of law, if necessary and appropriate; and
- (3) Developing a full understanding of the standard of proof, evidentiary principles, and procedures that will apply at the hearing.

Guideline 2.9 Pre-Adjudication Conferences

(a) Counsel should be aware that, by local rule, some judicial districts conduct a pre-adjudication conference to clarify all issues for trial. Counsel should be familiar with all applicable local rules and should know what issues must be raised at a pre-adjudication conference to be preserved for the adjudicatory hearing. In districts that do not require a pre-adjudication conference by local rule, counsel should consider requesting a conference.

(b) Counsel should also be aware of any local rules requiring the parties to exchange at the pre-adjudication conference witness lists and documents they intend to introduce at the adjudicatory hearing, and should comply with those local rules.

Guideline 2.10 Discovery

(a) Counsel for respondent parents should be aware that they may use the discovery tools and procedures that are available to the parties in any civil matter, unless limited or prohibited by the

court or local rules. Counsel should consider utilizing all available informal and formal discovery methods, including informal written requests, depositions, interrogatories, requests for admissions, subpoenas for persons, subpoenas *duces tecum* for the production of documents, and other methods.

(b) Unless there are sound tactical reasons for not requesting discovery, counsel should seek discovery of relevant information to the broadest extent permitted under state and federal law, including but not limited to:

(1) The complete files of DSS, including the social worker's notes and reports about every contact with the respondent parent, child, and any other person material to the case;

(2) The complete files of the GAL for the child;

(3) Police records and reports;

(4) Records in the possession of medical or mental health professionals, with a release from the client;

(5) Records in the possession of alcohol or substance abuse treatment facilities, with a release from the client;

(6) School records for the child and/or the respondent parent, with a release from the client; and

(7) Impeachment evidence, such as prior convictions or similar evidence of other misconduct by or bias of a DSS witness.

(c) If discovery is not timely provided to counsel, the parent attorney should consider filing a motion to compel production and/or seeking a continuance of the applicable hearing.

(d) Counsel should be aware that the court may deny, restrict, or defer discovery in a juvenile case. If counsel's discovery requests are denied, counsel should ask for an in camera inspection by the court and submit affidavits or statements in support of that request in accordance with G.S. 7B-700. Counsel should preserve any discovery issues for appeal by objecting to the court's ruling on the record and making any appropriate offers of proof.

(e) If counsel receives discovery requests from DSS or any other party, counsel should comply with the requests to the extent required by the Rules of Civil Procedure and should object to any requests that do not tend to elicit admissible or relevant information. If necessary and appropriate, counsel should consider seeking a protective order from the court in response to discovery requests by DSS or the GAL attorney advocate.

(f) Counsel should be generally familiar with federal law providing that medical records regarding an evaluation, diagnosis, or treatment for alcohol or substance abuse are confidential and may not be released or disclosed without the patient's consent or a court order that meets federal requirements. If counsel is aware of any such relevant records regarding the client, counsel should ask the client to execute a release form.

(g) Counsel should be generally familiar with federal law prohibiting the release of educational records without the student's consent if he or she is now 18 years of age or older, a parent's consent if the student is still under 18 years of age, or a court order that meets federal requirements. If counsel is aware of any such relevant records regarding the child or the respondent parent, counsel should ask the client to execute a release form.

Guideline 2.11 Experts and Support Services

(a) Throughout case review and investigation, and in preparation for each hearing in an abuse, neglect, dependency, or termination of parental rights case, the parent attorney should consider whether the assistance of an investigator, licensed clinical social worker, family preservation specialist, mental health expert, or other expert is necessary and appropriate. If necessary and appropriate, counsel should file a motion with the court setting forth a particularized showing of necessity and requesting funds to secure the assistance of an expert whose evaluation, consultation, or testimony may assist the client at each phase of the proceedings. Counsel should be aware that local practice varies as to whether a motion for experts or support services can be heard *ex parte*.

(b) If counsel believes an expert evaluation of the child is necessary and appropriate, counsel should serve any motion for expert funding on the legal custodian of the child and the GAL attorney advocate.

(c) If appropriate, counsel should obtain reports from experts and prepare them to testify. Counsel should also prepare the respondent parent for any evaluation by explaining the nature of the procedure and encouraging the client's cooperation.

(d) If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court.

(e) Counsel should take all necessary steps to preserve for appeal any denial of investigative, expert, or interpreter funding.

(f) If, at any hearing in an abuse, neglect, dependency, or termination of parental rights case, the parent attorney learns that DSS or another party intends to call an expert witness to testify, counsel should take steps to determine whether the witness is qualified as an expert in the relevant field. If counsel believes the witness is qualified to testify in a given field, counsel should consider stipulating to the tender. If counsel believes the witness is not qualified or the testimony will address a subject matter outside of the witness's expertise, unless there are sound tactical reasons for not doing so, counsel should challenge the witness's qualifications and conduct a *voir dire* of the witness on the record to preserve the issue for possible appellate review.

SECTION 3: NEGOTIATING

Guideline 3.1 Negotiating a Consent Judgment

(a) After appropriate investigation and case review, counsel should explore with the client and DSS the possibility and desirability of reaching a negotiated consent judgment, and should be aware that DSS will often dismiss one of the grounds alleged in the petition in exchange for a stipulation to another ground. In doing so, counsel should understand that an adjudication of dependency is generally considered a better outcome for the client than an adjudication of abuse or neglect. Counsel should also understand that, while an adjudication of abuse or neglect is *res judicata* in a subsequent termination of parental rights proceeding, an adjudication of dependency may or may not be *res judicata* depending on the basis for the dependency.

(b) Counsel should be familiar with the conditions under which consent judgments are permissible under G.S. 7B-902, including that all parties must be present and consent, all parties must be represented by counsel or have waived counsel, and the court must make appropriate findings of fact.

(c) Throughout negotiations, counsel should consider any concessions the client might offer to DSS, including but not limited to:

- (1) Foregoing a hearing on uncontroverted allegations;
- (2) Refraining from asserting or litigating a well-grounded pre-trial motion;
- (3) Consenting to continued nonsecure custody; and

(4) Stipulating to the admissibility of evidence that requires the use of live witnesses, where the information is known to be admissible and relevant.

(d) Counsel should also consider any concessions DSS might offer to the client, including but not limited to:

- (1) Foregoing obtaining a nonsecure custody order;
- (2) Allowing suitable relatives to supervise visits;
- (3) Allowing visits between the parent and child at locations other than the DSS office;
- (4) Placing children in foster care closer to the parent's home; and
- (5) Providing gasoline and public transportation vouchers.

(e) Counsel should explain to the client all possible consequences of stipulating to one or more facts or circumstances or entering into a consent judgment, including the possible waiver of appellate rights. If counsel is not familiar with appellate practice, counsel should consider consulting with the Office of the Appellate Defender.

(f) Counsel must keep the client fully informed of all offers made by DSS with respect to a consent judgment, and should discuss with the client the advantages, disadvantages, and consequences of accepting any offers, including the possibility that the ultimate resolution could be termination of the parent's rights to the child.

(g) Notwithstanding the existence of ongoing tentative negotiations with DSS, counsel should continue to prepare and investigate the case to the extent necessary to protect the client's rights and interests in the event that negotiations fail.

Guideline 3.2 The Decision to Consent to a Judgment

Counsel should discuss with the client the goals the client seeks to achieve, and should thoroughly inform the client of his or her alternatives, the chances of prevailing at a hearing, and the advantages, disadvantages, and potential consequences of any consent judgment. If the parent client also faces criminal charges arising out of the allegations in the juvenile petition and the parent attorney does not represent the client in criminal court, the parent attorney should consult with the parent's criminal defense attorney. However, the decision to consent to a judgment ultimately rests with the client.

SECTION 4: ADJUDICATION AND DISPOSITION

Guideline 4.1 Preserving the Record on Appeal During Adjudication and Disposition

(a) Counsel should establish a proper record for appellate review throughout adjudication and disposition, including but not limited to:

(1) Making appropriate objections to testimony or information in any reports or prior orders that DSS or the GAL seeks to have admitted into evidence;

(2) Making appropriate offers of proof regarding excluded evidence; and

(3) Requesting recordation of the proceedings pursuant to G.S. 7B-806. If something non-verbal transpires during adjudication or disposition that is relevant and important, counsel should ask to have the record reflect what happened.

(b) Counsel should also take steps to ensure that the court's ruling on any objection is on the record and that any stricken information or evidence does not appear in the record.

Guideline 4.2 The Adjudicatory Phase Generally

(a) Throughout preparation and the adjudicatory hearing, counsel should consider the theory of the case and ensure that counsel's decisions and actions are consistent with that theory.

(b) Counsel should be familiar with the Rules of Evidence and the law relating to all stages of the adjudicatory process, as well as all legal and evidentiary issues that reasonably can be anticipated to arise at the adjudicatory hearing based on the pleadings, investigation, and discovery, and should be prepared to make appropriate objections. If, at the adjudicatory hearing, DSS or the GAL makes material allegations about facts or circumstances that are not contained in the petition, counsel should consider seeking a continuance or objecting to preserve the issue for appellate review.

(c) In advance of the adjudicatory hearing, counsel should take all steps necessary to complete appropriate and thorough investigation, discovery, and research, including but not limited to:

(1) Interviewing and subpoenaing all potentially helpful defense witnesses that have been identified by the client and by counsel's review of the pleadings and evidence, including medical personnel or other professionals that are referenced in the DSS files, as well as the DSS or GAL reports and attachments, if available to counsel pursuant to local rules;

(2) Interviewing and subpoenaing any needed adverse witnesses, including the child if necessary and appropriate;

(3) Examining and subpoenaing all potentially helpful physical or documentary evidence;

(4) Obtaining copies of all DSS and GAL reports and attachments, if available to counsel pursuant to local rules, so that counsel can be prepared with rebuttal witnesses and evidence;

(5) Making a timely motion in advance of the hearing for funds for investigators or other experts if warranted, and arranging for defense experts to consult and/or testify on issues that are potentially helpful;

(6) Obtaining and reading transcripts of any prior proceedings in the case or related cases, if applicable;

(7) Obtaining any photographs or preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may help the court better understand the case; and

(8) Meeting with the client to review the DSS and GAL reports and attachments, if available to counsel pursuant to local rules, and to discuss the defense and prepare the client's testimony.

(d) Where appropriate, counsel should have the following information and materials available at the time of the adjudicatory hearing:

(1) Copies of all relevant documents filed in the case, including the petition;

(2) A copy of the Juvenile Code and other critical statutes and cases related to anticipated issues;

(3) The DSS and GAL reports and attachments, if available to counsel pursuant to local rules;

(4) Any expert reports;

(5) Copies of subpoenas;

(6) A list of all exhibits to be offered and the witnesses through whom they will be introduced;

(7) Any reports from assessments or counseling that the client has completed;

(8) Documentation concerning the client's employment and housing status;

(9) Documentation regarding any special achievements of the child while in the custody of the parent;

(10) Negative drug screen results, if any;

(11) A plan, outline, or draft of opening statement;

(12) Cross-examination plans for all possible adverse witnesses;

(13) Direct-examination plans for all prospective defense witnesses;

(14) A plan, outline, or draft of closing argument;

(15) Proposed amendments to the petition, if applicable; and

(16) Proposed findings of fact and conclusions of law to be offered to the judge at the end of the hearing.

(e) Counsel should consider seeking an advance ruling on issues likely to arise at the adjudicatory hearing, by requesting a pre-trial conference, filing a motion in *limine*, or other means.

(f) Counsel should avoid unnecessarily having young children testify and should be sensitive to the nature of young children as witnesses. Where appropriate, counsel should ask for an in

camera interview of child witnesses in the presence of all attorneys, or for the court to allow remote testimony or other accommodations.

(g) Counsel should consider whether there are tactical reasons to stipulate to damaging facts that are readily provable and uncontroverted, such as the possibility that the facts will have less impact on the court if they are summarized rather than the subject of lengthy testimony, and the possibility that the court will view the client as accepting responsibility for the stipulated facts or circumstances.

(h) If counsel is entitled by local rules to the DSS or GAL reports and attachments prior to the hearing, but has been unable to obtain them, counsel should consider asking for a continuance to discuss the reports with the client and prepare rebuttal evidence.

(i) Counsel should be familiar with and advise the client of the direct and collateral consequences of an adjudication of abuse, neglect, or dependency, including the effect on any future allegations regarding this child or other children.

(j) If the adjudicatory hearing was not held within the time required by G.S. 7B-801(c), unless there are sound tactical reasons for not doing so, counsel should object and move to dismiss the petition to preserve the issue for possible appellate review.

(k) If the adjudicatory order does not contain appropriate findings of fact and conclusions of law or was not reduced to writing within 30 calendar days after the hearing, unless there are sound tactical reasons for not doing so, counsel should object and move to dismiss the petition to preserve the issue for possible appellate review.

(l) If the client is facing criminal charges or might face future criminal charges due to the allegations in the juvenile petition, the parent attorney should consider asking the court to place any adjudication order under seal and to direct all parties to maintain the confidentiality of the order.

Guideline 4.3 Confronting the Evidence at the Adjudicatory Hearing

(a) Counsel should anticipate weaknesses in DSS's proof, and research and prepare to argue corresponding motions, including motions to dismiss.

(b) Unless sound tactical reasons exist for not doing so, counsel should make timely and appropriate objections and motions to strike improper DSS or GAL evidence, and should assert all possible grounds for exclusion of the evidence.

(c) In preparing for cross-examination, counsel should:

(1) Consider the need to integrate cross-examination, the theory of the case, and closing argument;

(2) Be thoroughly familiar with the DSS file, as well as the DSS and GAL reports and attachments, if available to counsel pursuant to local rules;

(3) Consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking questions that are unnecessary or might elicit responses harmful to the parent's case;

(4) Anticipate the witnesses DSS or the GAL might call, including the parent client, and consider a cross-examination plan for each anticipated witness;

(5) Be alert to inconsistencies, variations, and contradictions within each witness's testimony;

(6) Be alert to inconsistencies, variations, and contradictions between different witnesses' testimony; and

(7) Be alert to issues relating to bias and credibility of witnesses.

(d) If DSS or the GAL attempts to present a disposition report to the court prior to the conclusion of the adjudication phase in violation of G.S. 7B-808(a), counsel should make appropriate objections.

(e) At the close of DSS's case, counsel should move to dismiss the petition for insufficient evidence. Where appropriate, counsel should be prepared to present argument in support of the motion, including supporting case law.

Guideline 4.4 Presenting the Parent's Case at the Adjudicatory Hearing

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not presenting evidence on behalf of the parent, and instead relying on the evidence and inferences, or lack thereof, from DSS's case.

(b) Counsel should discuss with the parent client all of the considerations relevant to the client's decision to testify, as well as the possibility that another party may call the parent client to testify, including but not limited to the likelihood of cross-examination and impeachment, and the possibility that the client might incriminate himself or herself by testifying in the juvenile proceeding if the client is also facing criminal prosecution. Counsel should also discuss with the client the possibility that, by invoking his or her Fifth Amendment privilege against self-incrimination when responding to questions about potentially criminal activity, the juvenile court may infer an answer unfavorable to the client.

(c) In preparing to present the parent's case, counsel should, where appropriate:

(1) Develop a plan for direct examination of each potential defense witness;

(2) Determine the implications that the order of witnesses may have on the parent's case;

(3) Consider the possible use of character witnesses and any negative consequences that may flow from such testimony;

(4) Consider the use of demonstrative evidence and the order of exhibits;

(5) Be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal; and

(6) Be fully familiar with North Carolina statutory and case law on the admissibility of documentary evidence, the foundation necessary to secure introduction of evidence, and any hearsay exceptions that might permit introduction of documentary evidence without authentication.

(d) In developing and presenting the parent's case, counsel should consider the implications it may have for rebuttal by DSS.

(e) Counsel should prepare all defense witnesses for direct examination and possible cross-examination.

(f) If a DSS objection is sustained or defense evidence is improperly excluded, counsel should make appropriate efforts to rephrase the question(s) and/or make an offer of proof. Counsel should take appropriate steps to preserve for appellate review any issues regarding the exclusion of evidence by placing on the record a forecast of the evidence, by describing the documentary or physical evidence sought to be introduced, or by conducting a *voir dire* examination of the witness.

(g) Counsel should conduct redirect examination as appropriate.

(h) At the close of all of the evidence, counsel should renew the motion to dismiss the petition for insufficient evidence.

Guideline 4.5 The Dispositional Phase Generally

(a) Throughout preparation and the dispositional hearing, counsel should consider the theory of the case and ensure that counsel's decisions and actions are consistent with that theory. Counsel should also consider whether asking for a continuance of the dispositional hearing would be in the client's best interest.

(b) Counsel should be aware that the Rules of Evidence do not apply at the dispositional hearing, and that the court may generally accept into evidence information from any source reasonably related to determining the best interests of the child. However, counsel should still be prepared to object on the record to information and testimony that is blatantly unreliable, inflammatory, immaterial, inaccurate, or incapable of being verified.

(c) If DSS or the GAL provides to counsel in advance of the dispositional hearing any reports or documentary evidence that they intend to offer at the hearing, counsel should review them carefully with the parent client to determine whether any information in the reports or evidence may be inaccurate or susceptible to impeachment. Counsel should also consider subpoenaing the authors of the reports to be cross-examined if counsel knows DSS or the GAL does not intend to utilize them as live witnesses.

Guideline 4.6 Confronting the Evidence at the Dispositional Hearing

(a) Counsel should anticipate and be prepared to respond to any inaccurate or unfavorable information that is presented at the dispositional hearing by DSS or the GAL.

(b) Where appropriate, counsel should cross-examine any witnesses whose testimony is damaging to the respondent parent's interests, and challenge the accuracy, credibility, and weight of any reports or other evidence before the court.

(c) If any reports or documentary evidence that DSS or the GAL offers at the dispositional hearing have not been timely provided to counsel prior to court in compliance with the Juvenile Code and any applicable local rules, counsel should consider moving to continue the

dispositional hearing to allow time for review of the reports or evidence, or filing a motion in *limine* to prohibit the introduction of the reports or evidence.

(d) Counsel should be aware that dispositional orders must contain appropriate findings of fact pursuant to G.S. 7B-507 as to whether DSS has made reasonable efforts to eliminate the need for the child's out-of-home placement and to reunify the parent and child, or relieving DSS of the obligation to make reasonable efforts. If necessary, counsel should ask the court to make appropriate findings on the record.

Guideline 4.7 Presenting the Parent's Case at the Dispositional Hearing

(a) Counsel should be prepared to present all mitigating and favorable information regarding the parent client to the court at the dispositional hearing—including evidence of the parent's achievements and progress after the filing of the petition—through documentary evidence, photographs, and the testimony of the respondent parent and other witnesses. Potential mitigating and favorable information includes, but is not limited to, medical, psychiatric, psychological, social, employment, and educational information.

(b) If appropriate, counsel should present to the court an alternative dispositional plan or report on behalf of the parent client, including placement of the child in the parental home or viable alternative placements for the child that are favorable to the client. Counsel should present evidence in support of the alternative plan or report, including but not limited to:

- (1) Supporting testimony of the client, relatives, and others;
- (2) Supporting testimony of experts, if necessary and appropriate; and

(3) Supporting affidavits, reports, and hearsay evidence, as long as such documents and evidence have been provided to opposing counsel in advance of the hearing to avoid a motion in *limine* to prohibit the introduction of the evidence.

(c) Counsel should be aware of the dispositional alternatives set forth in G.S. 7B-903, and should advocate for those that are consistent with the client's wishes and well grounded in fact and law.

(d) At the dispositional hearing, counsel should request that the court direct appropriate placements for the child and specific visitation schedules with the respondent parent. If appropriate, counsel should ask the court to direct DSS to conduct a home study of the client's home, a potential relative placement, or another suitable placement for the child.

(e) Counsel should also request orders for DSS to provide or make referrals for services that may benefit the parent client and aid in reunification, including but not limited to:

- (1) Family preservation services;
- (2) Medical and mental health services;
- (3) Alcohol or drug treatment;
- (4) Parenting education;
- (5) Housing assistance;
- (6) Domestic violence counseling;

- (7) Anger management counseling; and
- (8) Other social services.

Guideline 4.8 Post-Disposition

(a) Counsel should discuss with the parent client the result of the dispositional hearing, all responsibilities of the parent pursuant to the court's ruling, any available post-disposition motions to set aside an adverse decision, and the parent's right to appeal.

(b) Counsel should review any proposed order or orders and suggest amendments, if necessary to be consistent with the court's findings, conclusions, and decree. If counsel is not permitted to review the proposed order in advance of signing in violation of the Rules of Civil Procedure and there are errors in the order, counsel should consider filing a motion to set aside the court order, to have it stricken from the record, and to have an amended order entered.

(c) If the order was not timely filed within 30 calendar days of the hearing, counsel should consider objecting and moving to dismiss the petition to preserve the issue for possible appellate review.

(d) If the order does not contain all findings of fact that are required by G.S. 7B-807 and G.S. 7B-905, as well as all findings of fact regarding reasonable efforts that are required by G.S. 7B-507 if DSS has custody, counsel should consider filing a motion for rehearing or for an amended order.

(e) If necessary and appropriate, counsel should file any applicable motions for rehearing, for an amended order, or for relief from the order in accordance with the Rules of Civil Procedure, as well as any notices of appeal in compliance with Rule 3A of the Rules of Appellate Procedure.

(f) Counsel should take all reasonable steps to monitor the client's compliance with the court's order, as well as any barriers to the client's compliance such as a lack of transportation, and to monitor the provision of services.

SECTION 5: REVIEW AND PERMANENCY PLANNING

Guideline 5.1 Preserving the Record on Appeal During Review and Permanency Planning

(a) Counsel should be aware that there are statutory limits on the appealability of review and permanency planning orders and that an order ceasing reunification efforts can only be appealed in compliance with G.S. 7B-507(c) and G.S. 7B-1001(a)(5).

(b) Counsel should establish a proper record for appellate review throughout all review and permanency planning hearings, including but not limited to:

(1) Making appropriate objections to testimony or information in any reports or prior orders that DSS or the GAL seeks to have admitted into evidence;

(2) Making appropriate offers of proof regarding excluded evidence; and

(3) Requesting recordation of the proceedings pursuant to G.S. 7B-806. If something non-verbal transpires during the hearing that is relevant and important, counsel should ask to have the record reflect what happened.

(c) Counsel should also take steps to ensure that the court's ruling on any objection is on the record and that any stricken information or evidence does not appear in the record.

Guideline 5.2 Review and Permanency Planning Generally

(a) Counsel should be aware that the Rules of Evidence do not apply at review and permanency planning hearings, and that the court may generally accept into evidence information from any source reasonably related to determining the best interests of the child. However, counsel should still be prepared to object on the record to information and testimony that is blatantly unreliable, inflammatory, immaterial, inaccurate, or incapable of being verified. Counsel should also take steps to ensure that the court's ruling on any objection is on the record and that any stricken information or evidence does not appear in the record.

(b) In preparation for review and permanency planning hearings, counsel should conduct appropriate investigation and consider interviewing potential witnesses. In accordance with all applicable local rules and ethical standards governing interviews of represented parties, counsel should consider interviewing the foster parent(s), caseworker, and any professionals who are providing services to the parent. Counsel should also meet with the parent client, review the applicable DSS or GAL reports and attachments, and anticipate and prepare to counter any negative information or inferences about the client.

(c) Counsel should verify that any reports or documentary evidence that DSS, the GAL, or the GAL attorney advocate seeks to have admitted at a review or permanency planning hearing have been provided to counsel prior to court in compliance with any applicable local rules. If any reports or documentary evidence have not been timely provided to counsel, counsel should consider moving to continue the hearing to allow time for review of the reports or evidence, or filing a motion in *limine* to prohibit the introduction of the reports or evidence. When reports are provided to counsel in advance, counsel should consider subpoenaing the authors of the reports to be cross-examined if counsel knows DSS or the GAL does not intend to utilize them as live witnesses.

(d) Counsel should assess DSS's reunification efforts and consider whether any special limitations of the respondent parent warrant specific increased reunification efforts. If applicable, counsel should argue in favor of increased reunification efforts and against ceasing reunification efforts.

(e) Counsel should verify that DSS has provided all services and visitation promised or directed in prior orders and case plans, and should consider calling the parent to testify about any previously ordered services that were not provided.

(f) At review and permanency planning hearings, counsel should present favorable documentary and photographic evidence and testimony about the parent client's progress in meeting his or her case plan. Evidence counsel should consider presenting includes, but is not limited to:

- (1) Improvements in the parent's educational, employment, or housing status;
- (2) The parent's payment of child support obligations;
- (3) The parent's payment of mortgages, rent, and utilities;

- (4) Proper licensure and insurance of a motor vehicle;
- (5) The parent's attendance at group or individual therapy;
- (6) The parent's attendance at alcohol or substance abuse treatment programs or meetings;
- (7) The parent's regular communication and visitation with the child; and
- (8) The parent's compliance with other court orders, including probationary judgments.

(g) Counsel should ask the court to make specific findings on the record as to the reunification efforts expended by DSS and whether those efforts were sufficient and reasonable. If counsel believes reunification efforts have not been reasonable, counsel should object on the record to preserve the issue for possible appellate review.

(h) If a review order also serves as a cease reunification order pursuant to G.S. 7B-507, or as a permanency planning order pursuant to G.S. 7B-907, and does not contain the required findings of fact, counsel should consider filing a motion for rehearing or for an amended order.

(i) If necessary and appropriate, counsel should file any applicable motions for rehearing, for an amended order, or for relief from the order in accordance with the Rules of Civil Procedure, as well as any notices of appeal in compliance with G.S. 7B-1001 and Rule 3A of the Rules of Appellate Procedure.

Guideline 5.3 Review Hearings

(a) Counsel should request a review hearing if the need for additional services arises, if any event occurs that may significantly affect the need for continued placement, or if it otherwise becomes necessary to protect the client's interests. If necessary and appropriate, counsel should consider filing a motion for an order to show cause why another party should not be held in contempt for non-compliance with a court order.

(b) Counsel should be aware that review orders must contain appropriate findings of fact pursuant to G.S. 7B-507 as to whether DSS has made reasonable efforts to eliminate the need for the child's out-of-home placement and to reunify the parent and child, or relieving DSS of the obligation to make reasonable efforts. If necessary, counsel should ask the court to make appropriate findings on the record.

Guideline 5.4 Permanency Planning Hearings

(a) Counsel should explain to the parent client that a permanency planning hearing could result in a plan of adoption for the child, which would require DSS to initiate termination proceedings within 60 days of the hearing unless waived by the court.

(b) Counsel should be prepared at the permanency planning hearing to present an alternative long-term plan for the child and to present evidence in support of the alternative plan.

(c) If reunification with the parent is adopted as the permanent plan or a concurrent plan for the juvenile, counsel should take all reasonable steps to ensure that the judge's findings of fact and order clearly state the parent's and DSS's obligations, the time the parent has to comply, and the possibility of return to the parental home if the parent complies.

(d) If the court enters a permanency planning order that changes the permanent plan to adoption, counsel should advocate that reunification, or custody or guardianship with a relative or other suitable adult, be adopted as a concurrent plan where appropriate. Counsel should also explain to the client that, even when adoption is the primary permanent plan for the juvenile, the parent may still pursue reunification efforts on his or her own and the court may subsequently revise the permanent plan to direct reunification. Counsel should consider advising the respondent parent that, because the proceedings are now adversarial, the client should no longer cooperate with DSS except for purposes of scheduling visitation. Counsel should also consider asking to have the record reflect that advice.

(e) Counsel should advise the client when service of a petition or motion to terminate is expected to be made soon, such as at the conclusion of the permanency planning hearing where the court approves a permanent plan that requires termination of parental rights. Counsel should be aware that, depending on local practice, counsel may not be served as attorney of record for the client and may not receive a copy of the petition or motion from the petitioner's attorney. If warranted by local practice, counsel should ask DSS and the GAL attorney advocate to provide him or her with a copy of the petition or motion to terminate, or instruct the client to inform counsel immediately upon receipt of a petition or motion. With the permission of the client, counsel should consider arranging with the attorney for the petitioner to accept service of the petition or motion on behalf of the client.

SECTION 6: TERMINATION OF PARENTAL RIGHTS

Guideline 6.1 Preserving the Record on Appeal During Termination Proceedings

(a) Counsel should establish a proper record for appellate review throughout the termination proceedings, including but not limited to:

(1) Making appropriate objections to testimony or information in any reports or prior orders that the petitioner or the GAL seeks to have admitted into evidence;

(2) Making appropriate offers of proof regarding excluded evidence; and

(3) Requesting recordation of the proceedings under G.S. 7B-806. If something non-verbal transpires that is relevant and important, counsel should ask to have the record reflect what happened.

(b) Counsel should also take steps to ensure that the court's ruling on any objection is on the record and that any stricken information or evidence does not appear in the record.

Guideline 6.2 Termination of Parental Rights Generally

(a) Counsel should develop, in consultation with the client, an overall theory of the case. Throughout preparation and the termination hearing, counsel should consider the theory of the case and ensure that counsel's decisions and actions are consistent with that theory.

(b) If the petition or motion to terminate is not timely filed, and the court has not entered an order finding good cause for the late filing, counsel should move to dismiss the petition or motion, unless there are sound tactical reasons for not doing so.

(c) Counsel should confer with the client as soon as possible after a petition or motion to terminate is filed about all issues related to the defense of the petition or motion, including but not limited to:

(1) Witnesses that should be interviewed and possibly subpoenaed;

(2) Documentary and photographic evidence that should be gathered and/or subpoenaed;
and

(3) Any prior court files, both for the subject juvenile and any other child of the parent client, which may be relied upon or introduced into evidence by the petitioner or the GAL.

If appropriate, counsel should also discuss with the client whether there are tactical reasons to stipulate to any allegations in the petition or motion, other than ultimate facts that could themselves constitute a ground for termination, such as facts that are uncontroverted and/or readily capable of determination or proof. The decision to stipulate ultimately rests with the client.

(d) If the parent client also faces criminal charges arising out of the allegations in the juvenile petition and the parent attorney does not represent the client in criminal court, the parent attorney should consult with the parent's criminal defense attorney prior to filing any answer or response to the petition or motion.

(e) The decision to file pre-trial motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of each case, as well as the need to preserve issues for appellate review. Pre-trial motions that counsel should consider filing include, but are not limited to:

(1) Discovery motions;

(2) Motions for an in camera inspection;

(3) Motions to dismiss the petition or motion on the grounds of insufficiency of the pleadings under Rule 12(b) of the North Carolina Rules of Civil Procedure;

(4) Motions to divulge the identity and contact information for witnesses and others;

(5) Motions for medical, psychological, or psychiatric evaluations;

(6) Evidentiary motions and motions in *limine*; and

(7) Motions for appointment of a GAL for the respondent parent, if appropriate.

Motions should be filed in a timely manner, comport with the formal requirements of statute and court rules, and succinctly inform the court of the authority relied upon.

(f) Unless there are sound tactical reasons for not doing so, counsel should consider utilizing all available informal and formal discovery methods and should seek discovery to the broadest extent permitted by law, including but not limited to:

(1) The identity of all lay witnesses who will be called to testify at the termination hearing and a summary of the testimony to be elicited;

(2) The identity of all expert witnesses who will be called to testify at the termination hearing and copies of the witnesses' curriculum vitae and any reports prepared by the witnesses;
and

(3) A list of all reunification services that were provided to the parent prior to the filing of the petition or motion to terminate.

If discovery is not timely provided to counsel, the parent attorney should consider filing a motion to compel production and/or seeking a continuance of the termination hearing.

(g) After an answer or response is filed, counsel should take any necessary steps to enforce the parent's right to a special hearing within the time set forth in G.S. 7B-1108. At the special hearing, counsel should raise any pre-trial motions that may require an evidentiary hearing prior to the adjudication of the termination petition or motion, such as discovery motions or motions in *limine*.

(h) In advance of the termination hearing, counsel should take all steps necessary to complete appropriate and thorough investigation, discovery, and research, including but not limited to:

(1) Interviewing and subpoenaing all potentially helpful defense witnesses that have been identified by the client and by counsel's review of the pleadings and evidence, including medical personnel or other professionals that are referenced in the DSS files, or DSS or GAL reports and attachments;

(2) Interviewing and subpoenaing any needed adverse witnesses, including the child if necessary and appropriate;

(3) Examining and subpoenaing all potentially helpful physical or documentary evidence;

(4) Obtaining copies of all DSS and GAL reports and attachments so that counsel can be prepared with rebuttal witnesses and evidence;

(5) Making a timely motion in advance of the hearing for funds for investigators or other experts if warranted, and arranging for defense experts to consult and/or testify on issues that are potentially helpful;

(6) Obtaining and reading transcripts of any prior proceedings in the case or related cases, if applicable;

(7) Obtaining any photographs or preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may help the judge better understand the case; and

(8) Meeting with the client to review the DSS and GAL reports and attachments, discuss the defense, and prepare the client's testimony.

(i) Counsel should be familiar with the Rules of Evidence and the statutory and case law relating to all stages of a termination proceeding, as well as all legal and evidentiary issues that reasonably can be anticipated to arise at the termination hearing based on the pleadings, investigation, and discovery, and should be prepared to make appropriate objections. If, at the termination hearing, the petitioner makes material allegations about facts or circumstances that are not contained in the petition or motion, counsel should consider seeking a continuance or objecting to preserve the issue for appellate review.

(j) Where appropriate, counsel should have the following information and materials available at the time of the termination hearing;

(1) Copies of all relevant documents filed in the case, including the petition or motion;

(2) A copy of the Juvenile Code and other critical statutes and cases related to anticipated issues;

(3) The DSS and GAL reports and attachments;

(4) Any expert reports;

(5) Copies of subpoenas;

(6) A list of all exhibits to be offered and the witnesses through whom they will be introduced;

(7) Any reports from assessments or counseling that the client has completed;

(8) Documentation concerning the client's employment and housing status;

(9) Documentation regarding any special achievements of the child while in the custody of the parent;

(10) Negative drug screen results, if any;

(11) A plan, outline, or draft of opening statement;

(12) Cross-examination plans for all possible adverse witnesses;

(13) Direct-examination plans for all prospective defense witnesses;

(14) A plan, outline, or draft of closing argument; and

(15) Proposed findings of fact and conclusions of law to be offered to the judge at the end of the hearing.

(k) Counsel should avoid unnecessarily having young children testify, and should be sensitive to the nature of young children as witnesses. Where appropriate, counsel should ask the court for any appropriate accommodations and take steps to ensure that the substance of any testimony by child witnesses is placed on the record.

(l) If the adjudicatory and dispositional phases of the termination proceedings are not concluded within the time periods mandated by statute, counsel should move to dismiss the petition or motion, unless there are sound tactical reasons for not doing so.

Guideline 6.3 Confronting the Evidence During the Adjudication Phase of the Termination Hearing

(a) Counsel should anticipate the petitioner's theory of the case, all evidence the petitioner can reasonably be expected to introduce during the adjudication phase of the termination hearing, and any weaknesses in that evidence. Counsel should research and prepare to argue corresponding motions, including motions to dismiss.

(b) Unless sound tactical reasons exist for not doing so, counsel should make timely and appropriate objections and motions to strike improper evidence offered by the petitioner or GAL, and should assert all possible grounds for exclusion of the evidence.

(c) In preparing for cross-examination, counsel should:

(1) Consider the need to integrate cross-examination, the theory of the case, and closing argument;

(2) Be thoroughly familiar with the DSS file, as well as the previously submitted DSS and GAL reports and attachments;

(3) Consider whether cross-examination of each individual witness is likely to generate helpful information, and avoid asking questions that are unnecessary or might elicit responses harmful to the parent's case;

(4) Anticipate the adverse witnesses that might be called, including the parent client, and consider a cross-examination plan for each anticipated witness;

(5) Be alert to inconsistencies, variations, and contradictions within each witness's testimony;

(6) Be alert to inconsistencies, variations, and contradictions between different witnesses' testimony; and

(7) Be alert to issues relating to bias and credibility of witnesses.

(d) If DSS or the GAL attempts to present dispositional evidence or a dispositional report to the court prior to the conclusion of the adjudication phase, counsel should make appropriate objections.

(e) At the close of the petitioner's case, counsel should move to dismiss the petition or motion for insufficient evidence. Where appropriate, counsel should be prepared to present argument in support of the motion, including supporting case law.

Guideline 6.4 Presenting the Parent's Case During the Adjudication Phase of the Termination Hearing

(a) Counsel should consider whether the client's interests are best served by not presenting evidence on behalf of the parent, and instead relying on the evidence and inferences, or lack thereof, from the petitioner's case.

(b) Counsel should discuss with the parent client all of the considerations relevant to the client's decision to testify, including but not limited to the likelihood of cross-examination and impeachment, and the possibility that the client might incriminate himself or herself by testifying in the juvenile proceeding if the client is also facing criminal prosecution. Counsel should also discuss with the client the possibility that, by invoking his or her Fifth Amendment privilege against self-incrimination when responding to questions about potentially criminal activity, the juvenile court may infer an answer unfavorable to the client.

(c) Counsel should comply with any local rules of court that may require counsel to divulge to the petitioner and other parties a witness list or other information prior to the termination hearing.

(d) Counsel should address and defend all allegations in the petition or motion that are capable of a defense. In preparing to present the parent's case, counsel should, where appropriate:

(1) Develop a plan for direct examination of each potential defense witness;

- (2) Determine the implications that the order of witnesses may have on the parent's case;
 - (3) Consider the possible use of character witnesses and any negative consequences that may flow from such testimony;
 - (4) Consider the use of demonstrative evidence and photographs, and the order of exhibits;
 - (5) Be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal; and
 - (6) Be fully familiar with North Carolina statutory and case law on the admissibility of documentary evidence, the foundation necessary to secure introduction of evidence, and any hearsay exceptions that might permit introduction of documentary evidence without authentication.
- (e) In developing and presenting the parent's case, counsel should consider the implications it may have for rebuttal by DSS.
- (f) Counsel should prepare all defense witnesses, including the parent client, for direct examination and possible cross-examination.
- (g) If a DSS objection is sustained or defense evidence is improperly excluded, counsel should make appropriate efforts to rephrase the question(s) and/or make an offer of proof. Counsel should take appropriate steps to preserve for appellate review any issues regarding the exclusion of evidence by placing on the record a forecast of the evidence, by describing the documentary or physical evidence sought to be introduced, or by conducting a *voir dire* examination of the witness.
- (h) Counsel should conduct redirect examination as appropriate.
- (i) At the close of all of the evidence, counsel should renew the motion to dismiss the termination petition or motion, or any part thereof, for insufficient evidence.

Guideline 6.5 Confronting the Evidence During the Dispositional Phase of the Termination Hearing

- (a) Counsel should be aware that, during the dispositional phase of a termination hearing, the court may receive any information that would assist it in determining the factors set forth in G.S. 7B-1110. However, counsel should still be prepared to object on the record to any information or testimony that is blatantly unreliable, inflammatory, immaterial, inaccurate, or incapable of being verified.
- (b) If any reports or documentary evidence that the petitioner, GAL, or GAL attorney advocate offers at the dispositional hearing have not been timely provided to counsel prior to court in compliance with the Juvenile Code and any applicable local rules, counsel should consider moving to continue the dispositional hearing to allow time for review of the reports or evidence, or filing a motion in *limine* to prohibit the introduction of the reports or evidence.

Guideline 6.6 Presenting the Parent’s Case During the Dispositional Phase of the Termination Hearing

(a) If the court determines that grounds to terminate parental rights exist and the case enters the dispositional phase, counsel should be prepared to present to the court at the dispositional hearing all mitigating and favorable information on behalf of the parent client—including evidence of the parent’s achievements and progress after the filing of the petition and evidence of the child’s expressed interests regarding adoption—through documentary evidence, photographs, and the testimony of the respondent parent and other witnesses. Potential mitigating and favorable information includes, but is not limited to, medical, psychiatric, psychological, social, employment, and educational information. During the dispositional phase, counsel’s goal is to demonstrate that, while grounds to terminate may exist, termination would not be in the best interest of the juvenile.

(b) If appropriate, counsel should present to the court an alternative dispositional plan to termination and adoption, including viable alternative placements for the child that are favorable to the client. Counsel should present evidence in support of the alternative plan, including but not limited to:

- (1) Supporting testimony of the parent client, relatives, and others;
- (2) Supporting testimony of experts, if necessary and appropriate; and

(3) Supporting affidavits, reports, and other hearsay evidence, as long as such documents and evidence have been provided to opposing counsel in advance of the hearing to avoid a motion in *limine* to prohibit the introduction of the evidence.

(c) Counsel should be aware that a dispositional order must contain appropriate findings of fact pursuant to G.S. 7B-1110. If necessary, counsel should ask the court to make appropriate findings on the record.

Guideline 6.7 Relinquishment and Other Alternatives to Termination

(a) Counsel should be familiar with the statutory and case law governing voluntary relinquishment of parental rights, as well as the local DSS policy concerning relinquishments. If appropriate, counsel should discuss with the parent client his or her option of relinquishing parental rights to a specific person or persons rather than to DSS.

(b) Counsel should fully explain to the parent client the advantages, disadvantages, and consequences of voluntary relinquishment, including but not limited to:

- (1) The fact that the parent’s child support obligations will continue after relinquishment, until a final decree of adoption for the child is entered;
- (2) The fact that, unlike a termination order by the court, voluntary relinquishment is not a ground for the future termination of rights to other children; and
- (3) The possibility that visitation could continue until a final decree of adoption is entered.

(c) Counsel should fully explain to the parent client the applicable deadline for revocation of a relinquishment and the procedure to be followed if the parent decides to revoke within that time.

(d) If a parent client decides to voluntarily relinquish his or her parental rights, when possible, counsel should take steps to ensure that the relinquishment is executed during a court session and in the presence of multiple witnesses. Counsel should also consider tendering the client to the court for the court to make inquiry as to the knowing and voluntary nature of the relinquishment.

(e) Counsel should be familiar with and fully explain to the client all other termination alternatives, including placement of the child in the custody or guardianship of a relative or other suitable person who is agreeable to the petitioner and the respondent parent. Counsel should explain to the client that a custodial arrangement would allow the parent later to seek a change in visitation or custodial status by filing a motion to modify the dispositional order or a custody action pursuant to Chapter 50 of the North Carolina General Statutes.

SECTION 7: APPEAL AND POST-REPRESENTATION

Guideline 7.1 Appeal to the Appellate Division

(a) Counsel should inform the parent client of his or her right to appeal to the appellate division any appealable judgments of the court that are listed in G.S. 7B-1001, and the action that must be taken to perfect that appeal.

(b) Whenever the taking of an appeal is reasonably anticipated, counsel should immediately notify the Office of the Appellate Defender so that provisional appellate counsel can be appointed promptly.

(c) If the respondent parent has a right to appeal and wants to file an appeal, counsel shall preserve the parent's right to do so by filing and serving a notice of appeal in accordance with the procedures and timelines set forth in G.S. 7B-1001 and Rule 3A of the Rules of Appellate Procedure, including obtaining the client's signature on the notice of appeal and signing the notice of appeal as trial counsel of record. Counsel shall file any signed notice of appeal and certificate of service with the Clerk of Superior Court within the appropriate deadline and shall serve all parties to the action. Counsel should also take steps to ensure that the appellate entries form is prepared and filed.

(d) If the respondent parent does not have a right to appeal and counsel believes there is a meritorious issue in the case that might be raised in the appellate division by means of a petition for writ of *certiorari*, counsel should inform the parent of his or her opinion and consult with the Office of the Appellate Defender about the appropriate procedure.

(e) Pursuant to Rule 33(a) of the North Carolina Rules of Appellate Procedure and Rules 1.7(a) and 3.2(a) of the Rules of the Commission on Indigent Defense Services, the entry of notice of appeal does not constitute a general appearance as counsel of record in the appellate division.

(f) If notice of appeal has been entered, counsel should consider filing a motion for a stay pending appeal in accordance with the Rules of Civil Procedure. When an appeal is pending for orders other than termination of parental rights, or when a termination of parental rights order

has been stayed pending appeal, counsel should continue zealously representing the respondent parent and promoting the parent's rights and expressed interests at all subsequent proceedings. If the appeal is from a termination of parental rights order and a stay is denied, counsel should encourage the client to comply with prior court orders while the appeal is pending. Counsel should also inform the respondent parent of the need to maintain regular contact with the appellate attorney throughout the appeal.

(g) If counsel believes that the client has a right to appeal and continues to be indigent, but the trial court denies indigency status for purposes of appeal, trial counsel should consult with the Office of the Appellate Defender about the client's options and inform the client of those options.

Guideline 7.2 Trial Counsel's Duty to Assist Appellate Counsel

(a) Trial counsel should be generally familiar with the requirements of Rule 3A of the North Carolina Rules of Appellate Procedure and all applicable policies of the Office of Indigent Defense Services and Office of the Appellate Defender, including but not limited to, trial counsel's obligation to notify the Office of the Appellate Defender immediately following the conclusion of a hearing at which a decision was made adverse to the client when the client is considering entering notice of appeal, and the division of responsibilities between trial and appellate counsel in the preparation of the proposed record on appeal.

(b) Trial counsel should take all reasonable steps to assist the appellate attorney with securing needed documents from the court file, including the appellate entries. Upon request, trial counsel should also assist the appellate counsel in identifying issues for appeal. However, the ultimate responsibility for decisions in all phases of the appellate representation, and for compliance with all required appellate rules and procedures, rests with appellate counsel.

Guideline 7.3 Other Post-Representation Obligations

(a) Even after representation is complete, counsel should comply with the respondent parent's reasonable requests for information and material that is part of counsel's file.

(b) Pursuant to Rule 3A of the Rules of Appellate Procedure, trial counsel should promptly respond to any requests for information or documents from the appellate attorney, when applicable.