

Standards of Practice for Lawyers Representing Child Welfare Agencies

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Introduction

The purpose of these standards is to improve the quality of child welfare agency representation and uniformity of practice throughout the country. Many agency attorneys who read these standards may recognize their practice in this document. The standards are meant to improve practice, but also to be realistically attainable by individual jurisdictions. The standards were written with the help of a committee of practicing agency attorneys and child welfare professionals from different jurisdictions in the country. With their help, the standards were written with the difficulties of day-to-day practice in mind, but also with the goal of raising the quality of representation as much as possible. While local adjustments may be necessary to incorporate these standards into practice, jurisdictions should strive to meet the fundamental principles and spirit of the standards.

The standards are divided into the following five categories:

- A. Definitions
- B. Role of the Agency Attorney, including a list of the Basic Obligations
- C. Fulfilling the Obligations
- D. Ethical and Practice Considerations
- E. Administrative Responsibilities, including a list of the Basic Obligations of an Agency Attorney Manager

Section B and E-1 contain lists of the standards for agency attorneys and agency attorney managers for quick reference. These standards are explained in more detail in the rest of the document. Within sections C, D, and E there are “black letter” standards, or requirements written in bold. Following the black letter are “actions.” These actions provide additional discussion on how to fulfill the standard; implementing each standard requires the accompanying action. After the action is “commentary” or a discussion of why the standard is necessary and how it should be applied. In some instances, a standard did not need further explanation, so there is no action or commentary attached. A number of the standards relate to specific sections of the Model Rules of Professional Conduct, and the Model Rules are referenced in these standards.

Representing a child welfare agency is a difficult yet important job. There are many, sometimes conflicting, responsibilities. These standards are intended to help the agency

attorney prioritize his or her duties and manage the practice in a way that will benefit the agency and ultimately the children and families for whom the agency provides services.

A. Definitions

A-1 Agency: The state or county child welfare agency that is charged with protecting and caring for children suspected or found to be abused or neglected and providing services to the child's family. The agency investigates reports of child abuse and neglect, provides preventative services to families and takes custody of children and oversees their placement in foster care. If a child is placed in foster care, the agency works with the family to reunite the child or achieve another permanency outcome for the child. The agency may also work with unruly children, status offenders, or delinquent children.

Commentary: When applying or adapting these standards locally, it is important to define this term in a jurisdiction-specific manner. There are a wide range of names for child welfare agencies such as the Department of Human Services (DHS), the Department of Social Services (DSS), Children Youth and Families.

A-2 Agency Attorney: An attorney who is an employee or contractor with the government who is charged with the responsibility of initiating proceedings on behalf of the government or the people to protect abused and neglected children.

Commentary: Defining this term in a jurisdiction-specific manner is critical. Everyone should be clear on which attorneys are covered by the practice standards and who the client is.

A-3 Client: A person or entity who employs an attorney or counselor to appear in court, advise, assist and defend in legal proceedings. The client is the entity to which the agency attorney is responsible.¹

Commentary: State law varies concerning the agency attorney's client. Generally, it is either the child welfare agency itself, or "the people" in a prosecutorial model of representation. *See* section B-1 for further discussion. The attorney must understand who the client is and the parameters of the representation.

A-4 Abuse and Neglect Proceedings: A category of legal proceedings designed to protect maltreated or endangered children that is generally initiated by the government. This group of cases may involve such proceedings as abuse, neglect, dependency, or abandonment cases. It typically involves, among other things, adjudications, case reviews, permanency hearings, termination of parental rights, adoption, and, in some states, guardianship and custody. "Family Drug Courts" and other specialty dockets, if they handle dependency cases, should be included in this category.

Commentary: State law and procedure will dictate the names and types of cases that fall in this category. Many states use different terminology to describe these cases such as “child in need of assistance,” “dependency,” “abuse and neglect.”

B. Role

B-1 Models of Agency Attorney Representation: There are two basic models of agency representation:

Agency Representation Model: Under this model, the agency attorney represents the agency as a legal entity, much the same as in-house counsel’s role in representing a corporation.² The attorney could be an employee of the agency or of another governmental body, but the agency is clearly the defined client. Some of the benefits of this model include:

- reliance on agency’s familiarity with a child and family in decision making;
- value placed on the agency’s expertise in making decisions regarding the safety, permanency and well-being of children and on the lawyer’s legal expertise on legal matters;
- consistent decision making and interpretation of laws;
- legal action supported by caseworker opinion, thus boosting caseworker credibility in court, for example, in deciding when to file an initial petition; and,
- the attorney is very familiar with the agency and its practices and policies.

One drawback to this model is that caseworkers may believe the attorney represents them personally rather than the agency as a whole. While in practice this may generally be true because the caseworker is the voice for the agency in court, the agency attorney must clearly communicate that he or she represents the agency as an entity and should use the conflict resolution system (refer to D-1 below) when the caseworker’s opinion varies from agency policy or the attorney has reason to question the caseworker’s decision.³

Prosecutorial Model: Under this model, an elected or appointed attorney (or the attorneys working for this individual), often a district attorney or county attorney, files petitions and appears in court on behalf of the agency, and represents the state or “the people” of the jurisdiction. This may mean the elected attorney may override the views of the agency in court. One positive aspect of this model is that the attorney may be more in tune with the wishes and beliefs of the community and how the community feels about handling child welfare cases. Concerns with this model include:

- the caseworker is often the only party in court without an attorney speaking for him or her;
- the caseworker’s expertise may be ignored, as the attorney has the ultimate say;
- the attorney may be handling all the business for the community and therefore not be able to specialize in child welfare law;

- political agendas may play a large role in decision-making;
- the agency as a whole may not be getting legal advice on policy issues;
- the attorney's personal beliefs about issues such as permanency rather than caseworker expertise dictate what will happen for a child; and,
- potential conflicts of interest may arise, such as when the prosecutor is pursuing a delinquency petition against a child who is in the agency's custody.⁴

Commentary: No matter what model of representation, it is essential that the agency attorney and agency communicate clearly about which model applies. Each should understand who makes the ultimate decisions in different circumstances and there should be a method for resolving a decision making conflict, should it arise. In each model, there will be times when decision-making roles are unclear and open communication is essential. The agency attorney and agency should understand the attorney's role and responsibilities concerning advising and protecting the agency on liability issues. Additionally, no matter which representation model is used, the agency attorney must understand his or her role with respect to private agencies with whom the agency contracts. The most important issues are that children are safe, their needs are met, and their families are treated fairly.

The drafting committee of these standards recommends the agency representation model. However, state legislation may dictate what model each attorney must follow. States are cautioned against developing hybrid models which incorporate elements of both the agency model and the prosecution model of representation because of the inherent risks of conflict such hybrid models could create for attorneys. These standards apply to all agency attorneys, no matter what model they use for representation.

B-2 Basic Obligations: The agency attorney shall:

General⁵

1. Fully understand and comply with all relevant federal and state laws, regulations, policies, and rules;
2. Promote timely hearings and reduce case continuances;
3. Protect and promote the agency's credibility;
4. Cooperate and communicate on a regular basis with other professionals and parties in a case, including the client/agency;⁶

Advise and Counsel⁷

5. Counsel the client/agency about all legal matters related to individual cases as well as policy issues and periodically monitor cases;

Court Preparation⁸

6. Develop a case theory and strategy to follow at hearings and negotiations;
7. Prepare or help prepare the initial petition and all subsequent pleadings;
8. Timely file all pleadings, motions, and briefs;

9. Obtain all documents and information needed, including copies of all pleadings and relevant notices filed by other parties;
10. Participate in all depositions, negotiations, discovery, pretrial conferences, mediation sessions (when appropriate), and hearings;
11. Participate in settlement negotiations and attempt speedy resolution of the case, when appropriate;
12. Develop a case timeline and tickler system;
13. Subpoena and prepare all witnesses, including the client;
14. Ensure proper notice is provided to all parties and necessary caretakers;

Hearings

15. Attend and prepare for all hearings;
16. Prepare and make all appropriate motions and evidentiary objections;
17. Present case in chief, present and cross-examine witnesses, prepare and present exhibits;
18. In jurisdictions in which a jury trial is possible, participate in jury selection and drafting jury instructions;
19. Request the opportunity to make brief opening and closing arguments when appropriate;
20. Prepare or help prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision;

Post Hearings/Appeals

21. Follow all court orders pertaining to the attorney for the client/agency;
22. Review court orders to ensure accuracy and clarity and review with agency when necessary;
23. Take reasonable steps to ensure the agency complies with court orders;
24. Consider and discuss with the agency the possibility of appeal;
25. If a decision is made to appeal, timely file the necessary post-hearing motions and the notice to appeal paperwork;
26. Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending;
27. Communicate the results of the appeal and its implications to the agency/client.

Commentary: This list is not comprehensive but includes key aspects of the agency attorney's role. The agency attorney has many tasks to perform. An initial section of any standards should define these responsibilities.

C. Fulfillment of Obligations

C-1 General:

1. Fully understand and comply with all relevant federal and state laws, regulations, policies and rules

Action: The following laws, at a minimum, are essential for the agency attorney to understand:

- Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357
- Child Abuse Prevention Treatment Act (CAPTA), 42 U.S.C. §5101
- Indian Child Welfare Act (ICWA) 25 U.S.C. §§1901-1963, and the ICWA Regulations, 25 C.F.R. Part 23
- Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622 (b)(9) (1998), 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. §1996b (1998).
- Interstate Compact on Placement of Children (ICPC)
- Foster Care Independence Act of 1999, P.L. 106-169
- Individuals with Disabilities Education Act (IDEA), P.L. 91-230
- Family Education Rights Privacy Act (FERPA), 20 U.S.C. §1232g
- Health Insurance Portability and Accountability Act of 1996 (HIPPA), P. L., 104-192 §264, 42 U.S.C. §1320d-2 (in relevant part)
- All state laws, policies and procedures regarding child abuse and neglect
- State laws concerning privilege and confidentiality, public benefits, education, and disabilities
- State's Rules of Professional Responsibility or other relevant ethics standards

Commentary: The agency attorney, in most instances, files the initial petition with the court and has the burden of proof during court proceedings. Additionally, the agency attorney must advise caseworkers and agency administrators concerning the legality of actions and policies. To best perform these functions, the agency attorney should be an expert in all relevant laws.

2. Promote timely hearings and reduce case continuances

Action: The agency attorney must be prepared to move cases forward in a timely manner. The agency attorney should only request case continuances in extenuating circumstances. The agency attorney should oppose other parties' requests for continuances absent extenuating circumstances. The agency attorney must be thoroughly prepared for all hearings.

Commentary: Delay in cases slows permanency for children. The agency has a duty to ensure that children do not linger in foster care, and the agency attorney must assist the agency meet this duty. Requesting or agreeing to case continuances should be unusual rather than routine practice.

3. Protect and promote the agency's credibility

Action: The agency attorney should work with the agency to bring only appropriate cases to the court. The agency attorney should not file frivolous motions or appeals and should counsel caseworkers concerning the legitimacy of positions. The agency attorney should present cases to the court in a professional, knowledgeable manner. The agency attorney should ensure accurate testimony and correct any misstatements in the courtroom. The agency attorney should present a positive image of the agency at community functions and meetings. The agency attorney should be respectful of caseworkers in the courtroom and in the presence of other professionals and parties in a case.

Commentary: The agency must abide by confidentiality laws, and therefore must keep some information private. Without that information, the public may blame the agency on issues concerning controversial cases. Similarly, the agency may make unpopular decisions that it views are in the best interest of the children in the community. The agency attorney should do everything in his or her power to demonstrate the positive aspects of the agency. The agency attorney must thoroughly understand the attorney client confidentiality issue and work diligently to avoid divulging confidential information. The agency attorney should guide the agency to avoid steps that will make it look bad in court and the attorney should protect the caseworkers from humiliation by the judge or other attorneys.

4. Cooperate and communicate on a regular basis with other professionals and parties in a case, including the client/agency

Action: The agency attorney should have regularly scheduled opportunities to meet with caseworkers and other agency staff. Agency attorneys should treat everyone involved in a case with professional courtesy and should work with everyone to resolve conflict. The agency attorney should have open lines of communication with the prosecutor of related criminal matters. This can be important, for example, in ensuring that probation orders and disposition orders do not conflict, and, where appropriate, are mutually reinforcing (e.g., a visitation order in an abuse and neglect case should not contradict a stay away order from a criminal court).

Commentary: The agency attorney must have all relevant information to effectively try a case. This requires open and ongoing communication with caseworkers and other witnesses. The agency attorney is often the actual or perceived representative of the agency and should present him or herself in a

professional manner when before the judge or meeting with other individuals involved in a case. The agency attorney should share relevant information from the case file with other parties in the case, when appropriate.

C-2 Advise and Counsel:

5. Counsel the client/agency about all legal matters related to individual cases as well as policy issues and periodically monitor cases

Action: The agency attorney must spend time with caseworkers to prepare individual cases and answer questions. The attorney should explain to the caseworker, in clear language, what is expected to happen before, during and after each hearing. The agency attorney should be available for in-person meetings, telephone calls, and when appropriate, to periodically monitor cases. The agency attorney is not the caseworker supervisor, but rather should monitor to ensure that legal barriers, such as notice and unresolved paternity, are removed. The agency attorney should attend major case staffings when appropriate. The attorney should be aware of any barriers the parents may have to participating in the proposed case plan, such as an inability to read or language barriers, and counsel the agency accordingly. The attorney should be available to agency administrative staff to advise on policy concerns or general issues facing the agency from the court or community.

Commentary: The agency attorney's job extends beyond the courtroom. The attorney should be a counselor as well as litigator. The agency attorney should be available to talk with caseworkers to prepare cases, to provide advice about ongoing concerns, and provide information about policy issues. Open lines of communication between attorneys and caseworkers help ensure caseworkers get answers to questions and attorneys get the information and documents they need. A major case staffing is one in which the attorney or caseworker believes the attorney will be needed to provide advice or one in which a major decision on legal steps or strategies will be decided. The attorney and agency may want to create a policy in advance concerning whether the agency attorney should routinely attend certain staffings, such as the development of an initial case plan, a case plan in which the goal will be changed to adoption, or when another major change is planned.

C-3 Court Preparation:

6. Develop a case theory and strategy to follow at hearings and negotiations

Action: At the beginning of the case, the agency attorney should try to project the future of the case and think through the steps that the caseworker and attorney will need to take to ensure the desired outcomes. In establishing the case theory and strategy, the agency attorney should think about concurrent planning, planning for reunification for the child as well as other permanency outcomes if

needed. The legal steps the agency attorney takes at the beginning of a case lay the groundwork for strong case planning by the agency and positive outcomes for the child and family throughout the life of the case. The case theory and strategy should have some flexibility built in so that as the agency attorney receives additional facts and information, the theory and strategy can be amended.

Commentary: Each case has its own facts, and more importantly, concerns an individual child and family. The agency attorney should give each case his or her full attention. By creating a case theory and strategy, the attorney will ensure that he or she analyzes the case thoroughly and thinks through its intricacies to increase the chance that the agency will be well represented and the result will be the best possible outcome for the child.

7. Prepare or help prepare the initial petition and all subsequent pleadings

Action: The agency attorney should play a lead role in drafting a petition or at least editing and/or reviewing a draft before a petition is filed with court. Similarly, the attorney should review the affidavit and supporting documentation before filing.

Commentary: The initial petition, as well as later petitions, are influential legal documents. The petition controls admissibility of evidence and has a strong impact on the judge and other parties. In general, caseworkers are not trained to write legal documents. If the agency attorney does not draft the petition, or at least review and edit a petition that a caseworker drafts, the agency may miss an important opportunity to shape its case and lay a legal foundation. A legal assistant who works for the agency attorney may be the appropriate person to prepare initial drafts of petitions when attorneys are unable to do so. If the lawyer or legal assistant does draft the petition, it should be based on information the caseworker provides.

8. Timely file all pleadings, motions, and briefs

Action: The attorney must file petitions (including termination of parental rights petitions), motions, requests for discovery, and responses and answers to pleadings filed by other parties. These pleadings must be thorough, accurate and timely.

Commentary: The agency is generally the moving party in abuse and neglect proceedings. The motions and pleadings the agency attorney files frame the case and must, therefore, be complete and contain all relevant information.

9. Obtain all documents and information needed, including copies of all pleadings and relevant notices filed by other parties

Action: The agency attorney must ensure all relevant information is brought to the court's attention. To do so, the attorney should request notes and documents, when needed, from the caseworker. Further, the agency attorney should counsel the caseworker to make sure he or she obtains records that are needed, or may be needed for later hearings. For example, the casework file should include full mental health and substance abuse treatment records, histories for the children and parents, abuse and neglect reports with supporting materials about the investigation, education records, health records, birth certificates for the children, death certificates, affidavits of efforts to locate parents, and results of paternity tests. If the caseworker cannot obtain the necessary documents, the attorney may need to personally obtain them or request a court order so the agency may obtain what might otherwise be confidential documents.

Commentary: Strong exhibits and documentary evidence can make or break a case. Knowing what the documents contain is essential to fully prepare a case. Therefore, the agency attorney should ensure all necessary documents are available for preparation and court.

10. Participate in all depositions, negotiations, discovery, pretrial conferences, mediation sessions (when appropriate), and hearings

Commentary: Jurisdictions vary concerning pre-hearing activity. A great deal of information can be shared during the pre-trial stage of a case, and may help reduce conflict, and save court time and resources. Therefore, the agency attorney should be actively involved in this stage.

11. Participate in settlement negotiations and attempt speedy resolution of the case, when appropriate

Action: The agency attorney should participate in settlement negotiations to promptly resolve the case, keeping in mind the effect of continuances and delays on the child. Agency attorneys should be trained in negotiation skills and be comfortable resolving cases outside a courtroom setting. However, the attorney must keep the agency's position in mind while negotiating. Certain things cannot be compromised (e.g., the child's safety, the key underlying facts of the case, or the assignment of culpability in abuse cases) and all parties should be aware of them. The attorney must communicate all settlement offers to the agency, and it is the agency's decision whether to settle. The attorney must be willing to try the case and not compromise on every point to avoid the hearing. The attorney should use mediation resources when available.

Commentary: Negotiation and mediation often result in a detailed agreement among parties of actions that must be taken by all participants. Generally, when agreements have been thoroughly discussed and negotiated all parties feel like they had a say in the decision and are, therefore, more willing to adhere to a plan. Negotiated settlements generally happen quicker than full hearings and therefore

move a case along in a reasonable time period. The agency attorney should ensure that the court is notified of the settlement so it can adjust its calendar accordingly.

12. Develop a case timeline and tickler system

Action: At the beginning of a case, the agency attorney and caseworker should develop timelines that specify what actions should be taken and when. The attorney should keep federal and state laws in mind. For example, under the Adoption and Safe Families Act, the attorney will need to ensure that a permanency hearing occurs at 12 months and will need to file a termination of parental rights petition when the child has been in care for 15 of 22 months, unless certain exceptions apply. The attorney should know when the 15 month point is and whether any exceptions apply. If exceptions apply, the attorney should have a tickler system to revisit whether the exceptions continue to apply at future permanency hearings. Additionally, the agency attorney should develop a tickler system or a plan for remembering the timelines.

Commentary: Agency attorneys handle many cases at a time and must be organized to juggle them all. A good calendaring system, implemented at the beginning and used throughout each case, can help the attorneys better manage their cases. The agency attorney shares a responsibility with the agency for keeping deadlines in mind and moving a case forward.

13. Subpoena and prepare all witnesses, including the client

Action: The agency attorney should develop a witness list well before a hearing. The attorney should, when possible, call the potential witness to determine whether the witness can provide helpful testimony, and then, when appropriate, let them know a subpoena is on its way. The attorney should also ensure the subpoena is served. Attorneys should set aside time to prepare all witnesses in person before the hearing. Some witnesses may require written questions. These should be provided when needed. Additionally, the agency attorney should counsel the agency on its obligations when agency staff are served with subpoenas by opposing parties.

Commentary: Preparation is the key to successfully resolving a case, either in negotiation or trial. The attorney should plan as early as possible for the case and make arrangements accordingly. The agency attorney should consider working with other parties who share the agency's position (such as the child's representative) when creating a witness list, issuing subpoenas, and preparing witnesses. Doctors, nurses, teachers, therapists, and other potential witnesses have busy schedules and need advance warning about the date and time of the hearing. The agency attorney should do whatever possible to minimize the time a witness must spend in court, such as requesting a time certain hearing or arranging for the witness to testify on speakerphone from his or her office.

Witnesses are often nervous about testifying in court. Attorneys should prepare them thoroughly so they feel comfortable with the process and the questions they will likely be asked. The agency attorney should know what the witness will say on the stand.

14. Ensure proper notice is provided to all parties and necessary caretakers

Action: The agency attorney should either send proper notice to parties and caretakers from the attorney office, or ensure that it is being done by the agency or court.

Commentary: ASFA requires that foster parents and relative caretakers receive notice of all review and permanency hearings. Parties to the case must receive notice of court hearings and motions filed with the court, such as TPR petitions. As the moving party in most proceedings, the agency has a duty to ensure this requirement is implemented properly. Since it is a legal obligation, the agency attorney should be directly involved. The agency attorney should ensure whoever is providing the notice provides it to noncustodial parents and any man who may have paternity rights to the child.

C-4 Hearings:

15. Attend and prepare for all hearings

Action: The agency attorney should attend and prepare for all hearings and participate in all telephone or other conferences with the court.

Commentary: If the agency is to be well represented, the agency attorney must be prepared and present in court. Even in jurisdictions in which the agency attorney represents the state, the attorney must be active in all stages of the court process to protect children and ensure their safety. In some jurisdictions a nonattorney representative from the agency appears in court on uncontested matters. In such a jurisdiction, there should be a system in place for a caseworker to request legal assistance before court, and an attorney should be available if the case becomes complicated. Even if the agency attorney has taken these precautions, it is possible that an unauthorized practice of law issue may arise from this practice.

16. Prepare and make all appropriate motions and evidentiary objections

Action: The agency attorney should make appropriate motions and evidentiary objections to advance the agency's position during the hearing. If necessary, the agency attorney should file briefs in support of the agency's position on evidentiary issues. The agency attorney should preserve legal issues for appeal.

Commentary: It is essential that agency attorneys understand the state's Rules of Evidence and all court rules and procedures. While there are many circumstances in which cases settle through alternative dispute resolution or during the pretrial

phase of the case, agency attorneys must be comfortable zealously trying a case in court. To do so, the attorney must be willing and able to make appropriate motions, objections, and arguments.

17. Present case-in-chief, present and cross-examine witnesses, prepare and present exhibits

Action: The attorney must be able to coherently present witnesses to move his or her case forward. The witness must be prepared in advance and the attorney should know what evidence he or she expects to present through the witness. The attorney must also be skilled at cross-examining opposing parties' witnesses in an effective, but non-malicious, manner. The attorney must know how to offer documents, photos and physical objects into evidence.

Commentary: Because the agency is generally the moving party in most hearings, the burden is on the agency attorney to present a solid case with well-prepared witnesses and documentary evidence. The agency attorney must ensure that appropriate witnesses, e.g., caseworkers who are familiar with the entire case, are present in court and prepared to testify. Additionally, it is important that the agency attorney is comfortable cross-examining witnesses when the other parties present their cases.

18. In jurisdictions in which a jury trial is possible, participate in jury selection and drafting jury instructions

Commentary: Several jurisdictions around the country afford parties in child welfare cases the right to a jury trial at the adjudicatory or termination of parental rights stages. Agency attorneys in those jurisdictions should be skilled at choosing an appropriate jury, drafting jury instructions that are favorable to the agency's position, and trying the case before individuals who may not be familiar with child abuse and neglect issues.

19. Request the opportunity to make brief opening and closing arguments when appropriate

Action: When permitted by the judge, the agency attorney should make opening and closing arguments in the case to set the scene and ensure the judge understands the issues.

Commentary: In many child abuse and neglect proceedings, attorneys do not make opening and closing arguments. However, these arguments can help shape the way the judge views the case and therefore can help the attorney. Argument may be especially needed, for example, in complicated cases when information from expert witnesses should be highlighted for the judge, in hearings that take place over a number of days, or when there are several children and the agency is requesting different things for each of them.

20. Prepare or help prepare proposed findings of fact, conclusions of law, and orders when they will be used in the court's decision

Action: Proposed findings of fact, conclusions of law, and orders can be prepared before a hearing. When the judge is prepared to enter his or her ruling, the judge can use the proposed findings or amend them as appropriate. Once the order is made, the agency attorney should ensure a written order is entered and provided to the agency.

Commentary: By preparing the proposed findings of fact and conclusions of law, the agency attorney has the opportunity to frame the case and ruling for the judge. This may assure accurate orders are entered that meet federally mandated requirements, such as reasonable efforts findings. It may also result in orders that favor the agency, preserve appellate issues, and help the agency attorney clarify desired outcomes before a hearing begins. The agency attorney could provide the judge with the proposed findings and orders on a computer disk or electronically when the judge requests. When a judge prefers not to receive these proposed findings and orders, the agency attorney should not be required to provide them.

C-5 Post Hearings/Appeals:

21. Follow all court orders pertaining to the attorney for the client/agency

Commentary: There may be times the judge orders an agency attorney to do something, such as file a termination of parental rights petition by a certain date. The agency attorney must comply with such orders, or appeal them as appropriate.

22. Review court orders to ensure accuracy and clarity and review with agency when necessary

Action: After the hearing, the agency attorney and caseworker should each review the written order to ensure it reflects the court's verbal order. If the order is incorrect, the attorney should take whatever steps are necessary to correct it. If the order is correct but controversial, the caseworker is unhappy with it, or the caseworker has trouble understanding what is required, the agency attorney should review it with the caseworker and/or the caseworker's supervisor and potentially the agency's administrator and the attorney's supervisor. Follow whatever conflict resolution system is developed (see D-1 below). The agency attorney should counsel the agency to follow the order until a stay or other relief is secured.

23. Take reasonable steps to ensure the agency complies with court orders

Action: The agency attorney should monitor the agency's efforts to implement the order and answer any questions the caseworker may have about the agency's obligations under the order.

Commentary: Obligations 22 and 23 illustrate the importance of the agency attorney's role outside the courtroom. The attorney should help the agency understand and follow through with the court's orders to protect the agency, but more importantly to ensure the agency provides the best possible services for children and families as ordered by the court.

24. Consider and discuss with the agency the possibility of appeal

Action: The agency attorney should consider and discuss with the agency caseworker and supervisor the possibility of appeal when a court's ruling is contrary to the agency's position or interests. The decision to appeal should be a joint one between the attorney and agency staff and must have an appropriate legal basis.

Commentary: When discussing the possibility of an appeal, the attorney should explain both the positive and negative effects of an appeal, including the impact the appeal could have on the child's best interests. For instance, if a judge made a poor decision that could negatively impact the child's future and his or her chance at permanency, an appeal should be taken. Conversely, an appeal might unnecessarily delay a case or make "bad law" for future cases in which the agency participates. The agency attorney should not decide against an appeal because of concern about the trial judge's reaction. *See* section E-2, 10 for a discussion of appellate strategy.

25. If a decision is made to appeal, timely file the necessary post-hearing motions and the notice to appeal paperwork

Action: The agency attorney should carefully review his or her obligations in the state's Rules of Appellate Procedure. The attorney should timely file all paperwork, including requests for stays of the trial court order, transcript and case file. The appellate brief should be clear, concise and comprehensive and also timely filed. If arguments are scheduled, the attorney should be prepared, organized and direct. In jurisdictions in which a different attorney than the trial attorney handles the appeal, the agency attorney should identify issues that are appropriate for appeal and work with the new attorney on the appeal. As the attorney who handled the trial, the agency attorney may have insight beyond what the new attorney could get by reading the trial transcript.

Commentary: Appellate skills differ from the skills most agency attorneys use day-to-day. The agency attorney may wish to seek guidance from an experienced appellate advocate when drafting the brief and preparing for argument. An appeal

can have a great deal of impact on the trial judge who heard the case and in trial courts throughout the state.

26. Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending

Action: If the state court allows, the attorney should always request an expedited appeal. In this request, the attorney should provide information about why the case should be expedited such as any special characteristics about the child and why delay would be personally harmful to this child. The request for an expedited appeal should always be considered.

Commentary: Appeals can delay the court process. Every effort should be made to move the child's case forward. The attorney should take great care during the appellate process to do so.

27. Communicate the results of the appeal and its implications to the client/agency

Action: The agency attorney should communicate the result and its implications to the agency. If, as a result of the appeal, the agency needs to take action in the case, it should be instructed to do so. If, as a result of the appeal, the attorney needs to file any motions with the trial court, the attorney should do so.

D. Ethical and Practice Considerations

D-1 Ensure a conflict resolution system is created

Action: The agency attorney and agency should jointly develop a conflict resolution system to cover attorney-caseworker conflict and conflicts among caseworkers.⁹

Key principles of the system should include: 1) the attorney and caseworker (or two caseworkers) should start with a face-to-face meeting to try to resolve the conflict; 2) if there is no resolution, the system should delineate how each should go up their respective chains of command; and 3) the system should set out examples of issues that are legal and those that are social work decisions, understanding that most issues will need to be resolved jointly. The system should incorporate timeframes for resolution so as not to delay a case. The agency attorney should prepare a caseworker before court so that conflicts do not surface in front of the judge.

Commentary: A conflict resolution system should be in place before conflict occurs. The attorneys and caseworkers should work as a team to reach the best outcomes for children and families.

D-2 Understand and comply with state and federal privacy and confidentiality laws

Action: The agency attorney must understand and comply with state and federal privacy and confidentiality laws, including releases of information and protective orders. The agency attorney should also develop protocols with the agency to help the agency access confidential information from external sources when needed for the case. Such methods might include obtaining court orders to access the necessary information.

Commentary: Because the child welfare system directly impacts the lives of children and families, there are numerous aspects of the system that are regulated by confidentiality laws and procedures. For example, the identity of the child, parents, and reporters, as well as treatment records and HIV status of any of the parties, must all be kept confidential. Additionally, the agency attorney should be aware of any HIPPA (medical records) or FERPA (education records) issues that arise. The agency attorney should thoroughly understand these laws to help the agency develop procedures, for example, concerning redacting confidential information from case files for discovery, and following them.

D-3 Initiate and maintain positive working relationships with other professionals in the child welfare system

Action: Because of the crucial role the agency attorney plays in the child welfare system, he or she should build relationships with the other professionals in the system. These include, but are not limited to:

- Judges
- Court staff
- Opposing counsel
- Child advocates, both attorney and nonattorney
- Criminal prosecutors
- CASAs
- Child Advocacy Centers
- Multidisciplinary Teams/Child Fatality Review Teams
- Key service providers
- Medical and mental health professionals
- School staff
- Other local child-centered organizations

Commentary: Maintaining positive relationships with other professionals will benefit the agency on individual cases as well as during times of reform. When these community members believe their opinion is valued and they are an integral part of the child welfare system as a whole, they will lend their support in different ways, such as when the agency seeks legislative support or buy-in for new projects.

D-4 Play an active role in deciding whether the child should testify and/or be present in the courtroom during hearings

Action: The agency attorney should consult with the caseworker and the child's attorney or GAL to decide whether the child should be present and/or testify at a hearing. It is important to consider the child's wishes, any possible effects of the testimony and the child's developmental ability to handle cross-examination. The agency attorney and child's attorney should decide together who will present the child's testimony. If the child is represented by an attorney (including an attorney serving as a guardian ad litem), the agency attorney may not speak with the child directly without the permission of the child's attorney, because the child is not his or her client.¹⁰ Questions posed to the child should be clear and asked with the child's ability to understand in mind.¹¹ Consider requesting an *in camera* hearing, excluding the parents from the courtroom, or videotape for the child's testimony.

Even when the child is not testifying, there may be a benefit to having the child present in court.¹² For example, the child's presence may help the judge focus specifically on the child's needs, and the child may understand how the court makes its decisions. The basis of the decision concerning the child's presence in court should be any state law concerning the child's right to be in court and the child's safety, best interests, and emotional well-being. The agency attorney and caseworker, in coordination with the child's attorney or GAL, should consider whether being in court will be helpful to the child, whether he or she may want to be a part of the proceedings, and whether the child's presence will advance the position of the agency.

Commentary: Generally, the child should be present at substantive hearings because the proceeding concerns the child's life and the child's input must be considered. If the child can handle being in court, his or her presence is important because the judge and other parties should have the opportunity to become acquainted with the child as an individual.¹³ This may have an important tactical impact on the case. For example, it is more difficult to continue a case when the judge actually sees the child getting bigger and older and remaining in foster care with no status change. However, if the child will be traumatized by the experience, he or she should not be present in court.

Deciding whether to call the child as a witness can be difficult. There could be a conflict between the caseworker's judgment and the agency attorney's recommendation on strategy to win a case. For example, in a sexual abuse case, the caseworker may believe it would be too difficult for the child to testify, whereas the attorney may think that without the child's testimony the judge would dismiss the case. In this type of situation, the attorney and caseworker should resolve the issue before court and may need to use the conflict resolution system as set forth in D-1 above. If the child is called to testify during the agency's case in chief, opposing parties and the judge may agree to allow the child's attorney to conduct the direct examination to make the child more comfortable. The judge may also agree to hear the child in chambers so the child does not have to testify in front of the parents. In a civil action there is no absolute right to confrontation

and if the parents' attorneys are present to hear the child's testimony, generally the parents' rights are considered to be protected.

E. Administrative Responsibilities

E-1 Obligations of Agency Attorney Managers¹⁴

1. Clarify attorney roles and expectations;
2. Determine and set reasonable caseloads for agency attorneys;
3. Develop a system for the continuity of representation;
4. Provide agency attorneys with training and education opportunities;
5. Create a brief and forms bank;
6. Ensure the office has quality technical and support staff;
7. Develop and follow a hiring practice focused on hiring highly qualified candidates;
8. Develop and implement an attorney evaluation process;
9. Advocate for competitive salaries for staff attorneys;
10. Act as advisor, counselor and trainer for the agency;
11. Work actively with external entities to improve the child welfare system.

Commentary: In general, this section applies to attorneys in an organized office setting, not one attorney government law offices or solo practitioners.

E-2 Fulfilling Agency Attorney Manager Obligations

1. Clarify attorney roles and expectations

Action: The agency attorney manager, with the agency administration, should clearly set expectations for the agency attorneys. This may include:

- written job descriptions;
- responsibilities concerning work with the caseworkers; and
- protocols for assigning tasks and delineating timeframes.¹⁵

The agency attorney manager should ensure the agency attorneys perform their required tasks and ensure the agency understands and performs its roles.

Commentary: For agency attorneys to provide the best possible representation, both the attorneys and agency must understand their roles and responsibilities. There should be a collaborative approach. The agency attorney manager plays a key role in fostering this teamwork and clarifying each participant's obligations.

2. Determine and set reasonable caseloads for agency attorneys¹⁶

Action: An agency attorney manager should determine reasonable caseload levels for the agency attorneys and then monitor the attorneys to ensure the maximum is not exceeded. Consider a caseload/workload study, review written materials about

such studies, or look into caseload sizes in similar counties to accurately determine the ideal caseload for attorneys in the office. Be sure to have a consistent definition of what a “case” is – a family or a child. When assessing the appropriate number of cases, remember to account for all agency attorney obligations, case difficulty, the time required to thoroughly prepare a case, support staff assistance, travel time, level of experience of attorneys, and available time (excluding vacation, holidays, sick leave, training and other non-case-related activity). If the agency attorney manager carries a caseload, the number of cases should reflect the time the individual spends on management duties.

Commentary: High caseload is considered one of the major barriers to quality representation and a source of high attorney turnover. It is essential to decide what a reasonable caseload is in your jurisdiction. How attorneys define cases and attorney obligations vary from place-to-place, but having a manageable caseload is crucial. One study found that a caseload of 40-50 active cases is reasonable, and a caseload of over 60 cases is unmanageable.¹⁷ The standards drafting committee recommended a caseload of no more than 60.

3. Develop a system for the continuity of representation

Action: The agency attorney manager should develop a case assignment system that fosters ownership and involvement in the case by the agency attorney. The office can have a one-attorney: one-case (vertical representation) policy in which an attorney follows the case from initial filing through permanency and handles all aspects of the case. Alternatively, the cases may be assigned to a group of attorneys who handle all aspects of a case as a team and are all assigned to one judge or one group of caseworkers.

Commentary: Agency attorneys can provide the best representation for the agency, and therefore get the best results for children, when they know a case and are invested in its outcome. Additionally, having attorneys who are assigned to particular cases decreases delays because the attorney does not need to learn the case each time it is scheduled for court. Rather, the attorney has the opportunity to monitor action on the case between court hearings. This system also makes it easier for the agency attorney manager to track how cases are handled.

4. Provide agency attorneys with training and education opportunities

Action: The agency attorney manager must ensure that each agency attorney has the opportunity to participate in training and education programs. When a new agency attorney is hired, the agency attorney manager should assess that attorney’s level of experience and readiness to handle cases. The agency attorney manager should develop an internal training program during which the new attorney will be paired with an experienced “attorney mentor” who will work with the new attorney. The new attorney should be required to: 1) observe each type of court proceeding (and mediation if available in the jurisdiction), 2) second-chair

each type of proceeding, 3) try each type of case with the mentor second-chairing, and 4) try each type of proceeding on his or her own, with the mentor available to assist, before the attorney can begin handling cases alone.

Additionally, each attorney should be required to attend [fill in number of hours, at least 12] hours of training before beginning, and [at least 10 hours] of training every year after. Training should include general legal topics such as evidence and trial skills, and child welfare-specific topics, such as:

- Relevant State, Federal and Case Law, Procedures and Rules
- Agency Policies and Procedures
- Available Community Resources
- Legal Permanency Options
- Termination of Parental Rights Law
- Adoption Subsidies
- Child Development
- Child-Centered Communication
- Legal Ethics as it Relates to Agency Representation
- Negotiation Strategies and Techniques
- How Domestic Violence Impacts Children in the Child Welfare System
- Appellate Advocacy
- Immigration Law as it Relates to Child Welfare Cases
- Education Law as it Relates to Child Welfare Cases
- State and Federal Benefit Programs Affecting Children in Foster Care (e.g., SSI, SSA, Medicaid)
- Understanding Mental Illness
- Issues Arising from Substance Abuse
- Understanding the Impact of Out-of-Home Placement on Children
- Basic Principles of Attachment Theory
- Options for Presenting Children's Testimony
- Sexual Abuse
- Dynamics of Physical Abuse and Neglect and How To Prove It
 - Shaken Baby Syndrome
 - Broken Bones
 - Burns
 - Failure To Thrive

Commentary: Agency attorneys should be encouraged to learn as much as possible and participate in conferences and trainings to expand their understanding of developments in the child welfare field. While agency attorneys are often overworked and do not have extra time to attend conferences, the knowledge they gain will be invaluable. The philosophy of the office should stress the need for ongoing learning and professional growth. The agency attorney manager should require the attorneys to attend an achievable number of hours of training that will match the training needs of the attorneys. The agency, court and

Court Improvement Program¹⁸ may have training money available that the agency attorney manager may be able to access to defray costs of agency attorney training. Similarly, the agency attorney manager should reach out to the state and local bar associations, area law schools or local Child Law Institutes to learn about available education opportunities. Further, the agency attorney manager should ensure the attorneys have access to professional publications to stay current on the law and promising practices in child welfare.

5. Create a brief and forms bank

Action: Develop standard briefs, memoranda of law and forms that attorneys can use, so they do not “reinvent the wheel” for each new project. For example, there could be sample discovery request forms, motions, notice of appeal, and even petitions. Similarly, memoranda of law and appellate briefs follow certain patterns that the attorney could copy and only have to fill in the specific facts of a case. These forms and briefs should be available on the computer and hard copy and should be maintained in a central location.

6. Ensure the office has quality technical and support staff

Action: The agency attorney manager should advocate for high quality technical and staff support. The agency attorney must have adequate and operational equipment to do the high level job described in these standards. Additionally, quality staff support is essential. The office should employ qualified legal assistants and administrative assistants to help the agency attorney. The agency attorney manager should create detailed job descriptions for these staff members to be sure they are providing necessary assistance. For instance, a qualified legal assistant can do research, help draft petitions, schedule and help prepare witnesses and more.

Commentary: The agency attorney cannot do a good job when he or she spends a lot of time trying to get the copy machine to work. The attorney must at least have access to a good quality computer, voice mail, fax machine and copier to get the work done efficiently and with as little stress as possible. Also, by employing qualified staff, the attorney will be free to perform tasks essential to quality representation.

6. Develop and follow a hiring practice focused on hiring highly qualified candidates

Action: The agency attorney manager should give a great deal of attention to hiring the best attorney possible. The agency attorney manager should form a hiring committee made up of managing and line agency attorneys and possibly an agency representative. Desired qualities of a new agency attorney should be determined, focusing on educational and professional achievements; experience and commitment to the child welfare field; interpersonal skills; diversity and the

needs of the office; writing and verbal skills; and ability to handle pressure. Advertising the position widely will help draw in a wider group of candidates. The hiring committee should set clear criteria for screening candidates before interviews and should then conduct thorough interviews and post-interview discussions to choose the candidate with the best skills and strongest commitment. Reference checks should be done before making an offer.¹⁹

Commentary: Hiring high quality attorneys is essential to raising the level of representation and the level of services the agency receives. The agency attorney job is difficult. There are many tasks to complete in a short time. Since the agency attorneys often move the rest of the system, strong, committed attorneys can drastically improve the system.

8. Develop and implement an attorney evaluation process

Action: The agency attorney manager should develop an evaluation system that focuses on consistency, constructive criticism, and improvement. Some factors to evaluate include: moving cases to permanency in a timely manner; preparation and trial skills; ability to work with agency and other professionals; and ability to work as a team player. During the evaluation process, the agency attorney manager should consider observing the attorney in court, reviewing the attorney's files, talking with colleagues and agency representatives about the attorney's performance, having the attorney fill out a self evaluation, and meeting in person with the attorney. The evaluation should be based on information, which the agency attorney manager will need to collect.²⁰

Commentary: A solid attorney evaluation process helps attorneys know what they should be working on, what management believes are priorities, what they are doing well and where they need improvement. If a positive process is created, the attorneys will feel supported in their positions and empowered to improve.

9. Advocate for competitive salaries for staff attorneys

Action: Agency attorney managers should advocate for salaries for the agency attorneys that are competitive with other government attorneys in the jurisdiction. To recruit and retain experienced attorneys, salaries must compare favorably with similarly situated attorneys.

Commentary: While resources are scarce, agency attorneys deserve to be paid a competitive wage. They will not be able to stay in their position nor be motivated to work harder without a reasonable salary. High attorney turnover may decrease when attorneys are paid well.

10. Act as advisor, counselor, and trainer for the agency²¹

Action: The agency attorney manager must ensure that the agency is receiving high quality representation both inside and outside the courtroom. No matter what model of representation, agency attorneys should be sure agency staff is fully informed about legal matters and fully prepared for court and policy decisions. The agency attorney manager should, therefore, develop protocols concerning such issues as:

- communication, such as regular office hours at the agency and timely responses by attorneys to agency telephone calls and emails;
- information sharing;
- conflict resolution;
- attorney-client work product and confidentiality issues; and
- dealing with media and high profile cases.

The agency attorney manager should be sure there is a system in place for reviewing all court orders and communicating the results with the agency.

The agency attorney manager should work with the agency to develop an overall strategy for appeals. It should identify the list of issues that will be most important and appropriate to appeal. It should include an internal system for bringing potential appeals to the agency attorneys and agency attorney manager's attention. The agency attorney manager should then be ready to pursue the strategy when appropriate cases arise.

The agency attorney manager should help prepare all federal reviews and implement any program improvement plans that result.

The agency attorney manager should ensure there is a process for agency legal training. As part of the process, the agency attorney manager could design materials, with samples, to help caseworkers prepare for court and provide testimony. Agency training could occur during formal, new hire training, at brown bag lunches or during after-hours courses. Topics could include, for example:

- overviews of state and federal laws;
- writing appropriate court reports and case plans;
- testifying in court;
- the trial and appellate court processes; and
- the need for and steps to complete acceptable searches for absent parents.

Commentary: Regardless of whether the agency attorney represents the agency or the state, the caseworkers often have the information needed to put together a strong case. Therefore, the attorneys and caseworkers must meet and communicate regularly. This could involve having office hours when the caseworkers can visit and ask questions or designating an attorney to take caseworkers' telephone calls. Similarly, the better the caseworkers and agency staff understand the law and legal process, the easier it is for them and the agency

attorneys to do their jobs well. The agency attorney manager should be responsible for developing a system for training the agency staff as well as protocols to improve the working relationships between the agency and agency attorneys.

11. Work actively with external entities to improve the child welfare system

Action: The agency attorney manager should act as a liason between the agency and outside entities involved in the child welfare system. For example, the agency attorney manager should meet regularly with the court and the state Court Improvement Program to improve issues concerning court administration. The agency attorney manager (or designee) should sit on all multidisciplinary committees charged with improving court functions or other aspects of the system. The agency attorney manager should be in regular contact with agencies, such as local hospitals or schools, that employ people who are frequently called as witnesses and who do work with the same population of children. Doing so can build strong relationships and improve the care the children receive from all of the involved agencies. The agency attorney manager should reach out to agencies such as law enforcement and treatment facilities that have information or documents often needed for litigation.

Commentary: The agency attorney manager should be visible in the community and provide a positive face for people to associate with the agency and agency attorney's office. The agency attorney manager should understand the many issues the agency faces and help resolve some of these through work with the court and other involved entities.

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Diane Bennett, Lead Deputy County Counsel, Santa Clara County, California

Bruce Boyer, Director and Clinical Professor Loyola University Chicago, and Chair, ABA Standing Committee on the Unmet Legal Needs of Children

Diane Garrity, Partner, Serra, Garrity & Masiowski, LLC and former General Counsel, New Mexico Children, Youth and Families Department

Marguerite Gualtieri, Child Advocate Staff Attorney Support Center for Child Advocates, and Co-chair of the ABA Section of Litigation Children's Rights Litigation Committee.

Connie Hickman Tanner, Director of Juvenile Courts, Arkansas

Virginia Peel, General Counsel Massachusetts Department of Social Services

Marvin Ventrell, Executive Director, National Association of Counsel for Children

Howard Davidson, Director, ABA Center on Children and the Law

Mark Hardin, Director of Child Welfare, ABA Center on Children and the Law

Cecilia Fiermonte, Assistant Director, ABA Center on Children and the Law

Kathleen McNaught, Assistant Director, ABA Center on Children and the Law

Moreen Murphy, Staff Director, ABA Standing Committee on the Unmet Legal Needs of Children

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¹ Model Rules of Prof'l Conduct R. 1.13 (Organization as Client).

² Model Rule 1.13(Organization as Client).

³ Model Rule 1.13(Organization as Client), cmt. 9&10.

⁴ Renne, Jennifer. "Conflicts of Interest." *Child Law Practice* 2004 (not yet published).

⁵ Model Rule 1.1 (Competence).

⁶ Model Rule 1.4 (Communication).

⁷ Model Rule 2.1 (Advisor).

⁸ Model Rule 1.3 (Diligence).

⁹ Model Rules 1.2 (Scope of Representation) and 1.13, cmt, 3.

¹⁰ Model Rule 4.2 (Communication with Person Represented by Counsel).

¹¹ *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Case*. D-5 – D-9. Washington, DC: 1996.

¹² NACC Recommendations for Representation of Children in Abuse and Neglect Cases. III A 6. Denver, CO: National Association of Counsel for Children , 2001.

¹³ *Id.*

¹⁴ Model Rule 5.1 (Responsibility of Partners, Managers and Supervisory Lawyers).

¹⁵ Laver, Mimi. Chapter 8, "Agency Attorneys and Caseworkers: Working Well Together," *Foundations for Success Strengthening Your Agency Attorney Office*. Washington, DC: American Bar Association, 1999.

¹⁶ Model Rules 1.1 (Competence) and 1.3 (Diligence)

¹⁷ Segal, Ellen. *Evaluating and Improving Child Welfare Agency Legal Representation: Self Assessment Instrument and Commentary*. Washington, D.C.: ABA National Legal Resource Center for Child Advocacy and protection, 1990, 17.

¹⁸ The Court Improvement Program (CIP) is a federal grant to each state's (as well as the District of Columbia and Puerto Rico) supreme court. The funds must be used to improve child abuse and neglect courts. States vary in how they allocate the dollars, but it typically involves training, benchbooks, pilot projects, model courts and information technology systems for the courts.

¹⁹ Laver, Mimi. Chapter 2, "So You're Hiring? A Guide to Choosing the Best Candidate," *Foundations for Success Strengthening Your Agency Attorney Office*. Washington, DC: American Bar Association, 1999.

²⁰ Laver, Mimi. Chapter 4, "Getting the Most from Performance Evaluations," *Foundations for Success Strengthening Your Agency Attorney Office*. Washington, DC: American Bar Association, 1999.

²¹ Model Rule 2.1 (Advisor).