The Montana Standards of Practice for Attorneys Representing Parents and Children in Dependent Neglect Cases

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Introduction

These standards are designed to provide guidance concerning high-quality legal representation for parents and children in dependent neglect (DN) cases. They were created by a team of attorneys and judges statewide with extensive knowledge about representing parents and children, and they reflect existing national standards, rules of professional conduct, statutory requirements, and commentary from experienced practitioners across Montana. Efforts have been made to note where laws, regulations, policies, and rules apply. Practitioners are responsible for learning and understanding those laws, regulations, policies, and rules as they apply to these matters before accepting representation in a DN case.

These standards are not intended, nor can they provide, a new basis for a claim of ineffective assistance of counsel or any disciplinary action against a lawyer. They are benchmarks from existing state and national standards. These standards cannot and do not redefine legal precedent establishing whether a reversible error has occurred.

The Purpose of the Standards

The filing of a petition and affidavit in a DN case significantly affects a client's constitutionally protected rights. A parent's fundamental liberty interest in the care and custody of their child is at stake. Santosky v. Kramer, 455 U.S. 745 (1982); Troxel v Granville, 530 U.S. 57 (2000); In re: C.B., 2019 MT 294, ¶ 15. Children's rights are particularly important in Montana, where the state Constitution explicitly recognizes the rights of minors. Montana Constitution, Article II, Section 15.

These standards will help you understand your duties while representing children in DN cases and provide guidance on how to do so. You will be accountable for upholding these standards as counsel for parents or children. Never accept a DN case you are not prepared to handle. "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 1.1, M.R.P.C.

Although similarities exist for attorneys who represent parents and children, there are notable differences. The duties to maintain confidentiality, provide loyal and independent representation, and advocate for the client remain the same. Citation for Children's Attorneys, MCA 47-1-105(3)(c)(i). However, where there are notable differences, these standards have sought to highlight them. In some cases, separate sections, subsections, and comments for parents and children's attorneys were created.

In DN cases, attorneys must seek to preserve, protect, and promote the client's rights, whether the client is a parent or child. In all cases, you must ensure the client has sufficient information to make informed decisions, if possible, and ethically advocate for the client's position.

Before accepting a case, an attorney must be adequately prepared and trained to protect the client's vital interests. Rule 1.1, M.R.P.C.; Citation for Children's Attorneys, MCA 47-1-105(2)&(3). Seek appropriate training and mentorship, develop knowledge and skills through experience, and consult with other practitioners when issues arise. Explore options for training offered in person, online, and in video format. The Montana Office of the State Public Defender provides opportunities for such training.

Direct Representation of Parents and Children

These standards are intended for attorneys directly representing parents and children in DN cases. Attorneys providing direct representation for a client should represent the client's articulated goals. Thus, children's attorneys owe the same duties, including loyalty, confidentiality, and competent representation, to the child as they would for an adult client such as a parent. Citation for Children's Attorneys, MCA 47-1-105(3)(c)(i).

An attorney providing direct representation is not a best interest advocate. Your function is not to assist the court with determining the child's best interest, as does a court appointed special advocate (CASA) or guardian ad litem (GAL). These standards are not intended to apply to best interest advocates.

Montana law provides parents with the right to an attorney in DN cases. 2023 law requires District Courts to also appoint counsel for all children in Montana DN cases. MCA 41-3-425(2)(b). This law eliminated judicial discretion on whether or not to provide an attorney to a child. Children in Montana now have the right to an attorney in all DN cases. If you represent a child, you should notify the parties, participants, and other attorneys about your appointment. You need to be precise about your duty to represent the child's expressed wishes and clarify that you are not a best interest advocate.

Client's Capacity and Developmental Level

Always consider the client's capacity to assist with their representation. A child's attorney must consider the client's developmental level, including their ability to communicate and understand others, age, mental health and capacity, education, cultural background, and language skills. Adult clients may also have issues that affect their ability to understand and participate in the process. When speaking with the client, consider the power imbalance between yourself as an attorney and the client. Try not to overly influence the client's decision-making.

These standards are written from a general perspective. They cannot be applied in the same manner to every client from birth through adulthood. They must be adapted on a case-by-case basis, considering the client's capabilities to understand and assist with their representation. For instance, it would not make sense for an attorney to have in-depth conversations with a pre-verbal infant or provide them with written documentation. A parent may have severe limitations with their mental capacity that could prevent them from fully

assisting with their case. However, these situations do not excuse an attorney from personally interacting with the client frequently, consistently, and regularly. You must maintain, as far as possible, a normal attorney-client relationship. Rules 1.14 & 1.6, M.R.P.C.

Format of the Standards

These standards are generally divided into the following categories:

- General Duties
- Attorney-Client Relationship with a Parent as a Client
- Attorney-Client Relationship with a Child as a Client
- Duties Concerning a Client's Diminished Capacity
- Interviewing a Child as a Client
- Investigation
- Discovery
- Case Preparation
- Handling Court Hearings and Conferences
- Specific Court Hearings
- Post-Hearing Actions
- Preparation for Appeal

Each of the above categories includes "black letter" requirements numbered and written in bold. Following the black letter standards are "actions." These actions further discuss how to fulfill the standards and are provided through bullet points. Following each action section is "commentary." The commentary outlines why specific standards are necessary and how they should be applied. Headings are provided for understanding and reference to each paragraph in the commentary sections.

General Duties

1. Obtain the training and mentoring needed to adequately represent clients.

Action:

Before representing a parent or child as a client in a DN case, be adequately prepared and continue to develop professional skills throughout your career. To do so:

- Meet or exceed any standards or qualifications required to represent parents or children in a DN case (Citation for Children's Attorneys, MCA 47-1-105(2)&(3)
- Observe proceedings and seek mentors to improve upon advocacy and enhance career development
- Continue to develop skills as you gain professional experience

- Participate in training, including information about federal and state laws, rules, policies, and regulations, family systems, abuse and neglect, trauma, and child development.

Commentary:

PREPARATION FOR REPRESENTATION: You must be adequately prepared and trained to protect the client's fundamental rights before accepting a case. The parents' fundamental liberty interests to parent their child are at stake in a DN case. Children in Montana have fundamental rights recognized by the state Constitution. Montana Constitution, Article II, Section 15. Preparation for representation should directly relate to child abuse and neglect practice. It can be part of your CLE requirements. Citation for Children's Attorneys, MCA 47-1-105(2)&(3). Training also offers a chance to network and develop relationships with other attorneys in this field of law.

OBSERVATION AND MENTORSHIP: Training may include practical options such as observing court proceedings or conferences. Mentor attorneys can help provide these opportunities and have follow-up conversations with you while you are learning. Take care not to betray a client's confidence or breach attorney-client privilege. Avoid observing attorney-client interactions where there is an expectation of privilege or privacy. Having mentors and a network of attorneys with whom you can discuss complex issues is essential to developing a practice.

OFFERING MENTORSHIP: As you gain professional experience, you may have opportunities to mentor newer practitioners. Thus, you can provide the benefit of your knowledge to less experienced attorneys. Experienced lawyers are encouraged to share their know-how with those seeking mentorship to help improve the overall quality of legal representation in Montana.

2. **Before representing clients, develop a working knowledge of relevant state and federal laws, regulations, rules, policies, and essential topics affecting parents, children, and families.**

Action:

Obtain a working knowledge of Montana state and local laws, rules, and policies as they apply to DN cases. Your knowledge should include, but not be limited to:

- Montana Minors – Child Abuse and Neglect, Title 41, Chapter 3, MCA – The most relevant state laws regarding child abuse and neglect affecting DN case practice
- Montana Rules of Professional Conduct and Opinions https://www.montanabar.org/Membership-Regulatory/Ethics-Resources/Professional-Conduct
- Montana Rules of Civil Procedure, Title 25, Chapter 20, MCA – Montana Rules of Civil Procedure apply to DN cases
- Montana Rules of Evidence, Title 26, Chapter 10, MCA - Montana Rules of Evidence apply to DN cases

- Montana Child and Family Services Policy Manual https://dphhs.mt.gov/cfsd/cfsdmanual – Policies of the Montana Child and Family Services Division (CFSD) affecting child welfare matters
- Uniform District Court Rules, Title 25, Chapter 19, MCA - There may also be local rules published specifically by jurisdictions in which you practice
- Foster Care Review Committees and Procedures, MCA 41-3-115, and ARM 37.50.401 – State law and administrative rule concerning out-of-court reviews of DN cases
- Montana Family Policy Act, Title 41, Chapter 7, MCA – Statutory policy to support and preserve families for the well-being of Montana's children, providing guidance for the state government
- Montana Rules of Evidence – Privilege, Title 26, Chapter 1, Part 8, MCA – State evidentiary rules specifically concerning privilege
- Partner and Family Member Assault, Sexual Assault, and Stalking – Victim Protection, Title 40, Chapter 15, Part 2, MCA – State laws concerning orders of protection, jurisdiction, and interstate enforcement of protection orders
- Appointment of Guardianships, MCA 41-3-444 and Title 72, Chapter 5, Part 2, MCA – The specific dependent neglect statute regarding guardianships and the general provisions regarding guardianship under Title 72
- Chaffee funding and other funding sources for foster and former foster children, Montana Chaffee Foster Care Independence Program, https://dphhs.mt.gov/cfsd/fostercareindependence/ - Assistance for foster children transitioning or who have transitioned from the foster system to independence and adulthood.
- Interstate Compact on the Placement of Children (ICPC), Title 41, Chapter 4, MCA – A compact between states concerning the placement of children in and from other states
- Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Title 40, Chapter 7, MCA – A uniform act between states for determining state child custody jurisdiction
- You may also be required to research and gain knowledge concerning domestic relations/family law, criminal law and procedure, foster care licensing, public benefits, education, disabilities, and other areas of law

Obtain a working knowledge of the federal Indian Child Welfare Act (ICWA) and Montana Indian Child Welfare Act (MICWA) to understand when and how these acts apply to DN cases in Montana. This knowledge should include, but not be limited to:

- Indian Child Welfare Act (ICWA) of 1978, P.L. 95-608, 25 USC §§ 1901-1963 – The federal law that applies to DN cases when an Indian child, as defined by ICWA, is involved
- Montana Indian Child Welfare Act (MICWA), Title 41, Chapter 3, Part 13, MCA – The Montana version of ICWA enacted into law in 2023

- ICWA Regulations, 25 CFR Part 23 – Federal regulations regarding ICWA
- Guidelines for State Courts: Indian Child Custody Proceedings, 41 FR 38864 (June 14, 2016) – Guidelines for states to apply the federal ICWA laws and regulations in state courts

Obtain a working knowledge of relevant federal laws. The following are some significant federal laws affecting child welfare. Your knowledge should include, but not be limited to:

- Family First Prevention Services Act of 2018 (FFPSA), P.L. 115-123 – Seeks to prevent unnecessary removals of children from their homes, funds preventative services by states, reduces the use of group homes for children, and supports kinship caregivers
- Preventing Sex Trafficking and Strengthening Families Act of 2014, P.L. 113-183 – Aims to prevent sex trafficking, assists older children with developing plans for adulthood, supports normalcy for children in foster homes through age-appropriate activities, and authorizes incentives for adoption and guardianships
- Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351 – Increases opportunities for children to be placed with relatives and expands adoption incentives and federal support for adoption assistance
- Foster Care Independence Act of 1999 (FCIA), P.L. 106-169 – Seeks to assist older children with independence as they leave the foster care system
- Adoption and Safe Families Act of 1997, P.L. 105-89 – Designed to reduce the time to permanency and provide for the safety and well-being of children
- Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 USC § 622 (b)(9) (1998), 42 USC § 671(a)(18) (1998), 42 USC § 1996b (1998) – Prohibits discriminatory practices by states that could delay or deny foster care and adoptive placements
- Health Insurance Portability and Accountability Act of 1996 (HIPPA), P. L. 104-191 § 264, 42 USC § 1320d-2 (relevant part) - These sections of HIPPA establish privacy rights over health care information and limit who can access or receive those records
- Public Health Act, 42 USC § 290dd-2 and 42 CFR Part 2 – Regulates the privacy rights and potential disclosure of information regarding substance use disorder
- Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272 – Authorizes appropriations for states to provide assistance for foster care and adoption, requiring states to make reasonable efforts to avoid removals and to reunify families
- Individuals with Disabilities Education Act (IDEA), P.L. 91-230 – Originally enacted in 1975 as the EHA and subsequently renamed in 1990, it requires states to provide children who have disabilities with free public education, including special educational needs and services
- Family Education Rights Privacy Act of 1974 (FERPA), 20 USC § 1232g, 34 C.F.R. Part 99 – Regulates the disclosure of educational records and grants parents access to their child's academic records

- Child Abuse Prevention Treatment Act (CAPTA), P.L. 108-36 – Reenacted and amended multiple times since its original enactment in 1974, recently by the Comprehensive Addiction and Recovery Act of 2016, P.L. 114-198, it seeks to improve state child welfare systems through the identification, prevention, and treatment of child abuse and neglect, containing requirements for states to receive federal funding
- Titles IV of the Social Security Act – Part IV-B Child and Family Services, Grants to States for Aid and Services to Needy Families with Children and for Child Welfare Services, Part IV-E – Federal Payment for Foster Care, Prevention, and Permanency
- Immigration laws relating to child welfare, child custody, and the application and acceptance of public benefits – ABA Quick Guide to Child Welfare and Immigration Law, https://www.americanbar.org/content/dam/aba/administrative/child_law/QuickGuideChildWelfareImmigration1.authcheckdam.pdf - The ABA created a reference to issues related to immigration in child welfare cases with links to more in-depth materials
- National Association of Counsel for Children: Recommendations for Representation of Children and Youth in Neglect and Abuse Proceedings, naccchildlaw.org/wp-content/uploads/2024/01/NACC-Recommendations-Final.pdf – Recommendations regarding the legal representation of children in DN cases
- The United States Children's Bureau has assembled a list of major federal legislation affecting child welfare laws available at: https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf

Be aware that the following essential topics may arise during DN cases. Obtain a working knowledge of the following areas and expand your knowledge throughout your career:

- Trauma-informed practices with an understanding of resilience and recovery
- The dynamics of child abuse and neglect, sexual abuse, trauma, grief, and attachment (Citation for Children's Attorneys, MCA 47-1-105(a)(iv)
- Communicating with clients in a developmentally appropriate manner (Citation for Children's Attorneys, MCA 47-1-105(a)(i)
- Implicit bias and its potential impact on decision-making
- Substance abuse issues and treatment (Citation for Children's Attorneys, MCA 47-1-105(a)(v)
- Mental health issues and treatment (Citation for Children's Attorneys, MCA 47-1-105(a)(v)
- Domestic violence, its treatment, and its impact on victims and children (Citation for Children's Attorneys, MCA 47-1-105(a)(v)
- The causes and treatment of child abuse
- Child welfare and family preservation services available in your community

- Available services, community resources, and treatment options for parents and children (Citation for Children's Attorneys, MCA 47-1-105(a)(vi)
- Culturally appropriate services for parents and children
- Services the state will and will not routinely pay for
- Available experts who can provide consultation and testimony
- Available investigators who can assist with case preparation
- Child attachment and bonding
- Child and adolescent development (Citation for Children's Attorneys, MCA 47-1-105(3)(a)(iii)
- Brain development
- The impact of parental separation on children
- The effect of incarceration on families
- Disability issues and accommodations
- School-related issues, including but not limited to disciplinary processes, independent education programs (IEPs), and 504 plans for children
- Special education laws, rights, and remedies
- The structure and functioning of the Montana Child and Family Services Division (CFSD)

Commentary:

MONTANA CODE ANNOTATED (MCA) TITLE 41, CHAPTER 3: It is essential for you to know and understand Title 41, Chapter 3 of the Montana Code Annotated since it contains the state laws directly related to DN cases. You cannot simply rely on mentorship, local practices, and customs to teach you how to practice child welfare in Montana. Learn the state laws in Title 41, Chapter 3, and remain current on any changes in these laws due to new legislation. Without a working knowledge of these statutes, it is unlikely you will be able to provide the client with adequate representation.

INDIAN CHILD WELFARE ACT (ICWA) AND MONTANA INDIAN CHILD WELFARE ACT (MICWA): You must understand federal ICWA wherever you practice in the United States. ICWA applies in child welfare cases throughout the country when an Indian child, as defined by ICWA, is involved. You must also have a working knowledge of the 2023 Montana Indian Child Welfare Act (MICWA). Title 41, Chapter 3 Child Abuse and Neglect, Part 13 Montana Indian Child Welfare Act, MCA. ICWA is particularly important in Montana, where Native American children comprise approximately one-third of the children in foster care. https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/montana.html. An Indian child is far more likely to be placed in foster care than other children in Montana. As such, a firm grasp of the principles of ICWA is essential. At a minimum, a practitioner should understand the following:

- The definition of an Indian child and the implications if there is a reason to know a child is an Indian child
- The diligent efforts required by the state to determine whether a child is an Indian child by actively reaching out to all potential federally-recognized Tribes
- The requirement that an Indian child can only be removed from their home on an emergency basis to prevent imminent physical damage or harm to the child
- Proper jurisdiction in either a Montana District Court or Tribal Court
- The potential transfer of the case to a Tribal Court
- The notice requirements of child custody proceedings for parents, Indian custodians, and Tribes
- The role and potential impact of an Indian custodian
- The difference between ICWA-required active efforts by the state as opposed to reasonable efforts in non-ICWA cases
- The role of a qualified expert witness (QEW) and when they are necessary
- The Tribe's right to intervene as a party
- The proper application of the standard of proof of clear and convincing evidence during a DN case and proof beyond a reasonable doubt if the case proceeds to a termination of parental rights hearing
- Placement preferences for an Indian child entering foster care, a pre-adoptive placement, and an adoptive placement.

For more information about ICWA, MICWA, and qualified expert witnesses (QEW), the Montana Court Improvement Program (CIP) has developed eLearning courses on these topics. The courses are free and can be found at cip.mt.gov through the eLearning link. Review those courses for more information regarding ICWA, MICWA, and QEWs.

STATE AND FEDERAL LAWS: A practitioner must have a working knowledge of relevant state and federal laws, rules, and regulations. Since these laws are amended and additions are made, remain current on any changes affecting your practice. This includes having a working knowledge of the relevant United States and Montana Supreme Court decisions and tracking new decisions as they become available.

LOCAL RULES: You must understand your jurisdiction's written and unwritten local rules and practices. Review the published local rules and Uniform District Court Rules related to this field of law. If possible, speak with local practitioners and observe proceedings before appearing in a new jurisdiction.

ESSENTIAL TOPICS: You will also need a basic knowledge of areas affecting parents, children, and families during a DN case, including understanding the impact of trauma, mental health and substance abuse issues, and child development. In addition, seek out service options for available treatment providers, school resources, experts, and investigators who can assist. Look

for culturally appropriate services that will benefit the client and family. Do not simply accept standard referrals from CFSD.

IMPLICIT BIAS: Implicit bias, which is a prejudice that is present, but not consciously recognized, can potentially affect a person's decision-making process, and thus, the outcome of a DN case. Everyone has them. Think about what ones you have and, when making decisions affecting your client, try not to jump to conclusions. You may want to participate in training on this topic. Avoid judging families and the client by what you would do. Instead, focus on safety and not on the style of parenting or family culture.

3. **Avoid unnecessary continuances and work to reduce delays in court proceedings.**

Actions:

Seek the most expedient and timely resolution possible while providing effective and competent representation for the client. Citation for Children's Attorneys, MCA 47-1-105(3)(c)(iv). During your representation:

- Be diligent and timely
- Do not request continuances unless it is an emergency or otherwise benefits the client's case
- Object to unnecessary, repeated, or prolonged requests for continuance by other parties

Commentary:

LIMITED TIME: Remember that timelines continue to run regardless of continuances. Undue delays may slow the reunification process and cause children to languish in foster care for extended periods. As a general rule, with some exceptions, the state must initiate termination of parental rights actions if safety concerns are not resolved when the child has spent 15 of the past 22 months in foster care. MCA 41-3-604. A limited amount of time is available for parents to accomplish the tasks needed for a family to reunify safely. Delays in establishing a treatment plan could limit the time available for parents to complete tasks. A failure to complete the services in a treatment plan is the primary reason parental rights are terminated in Montana.

4. **Cooperate and communicate regularly with other professionals, family members, kin, and care providers while maintaining client confidentiality.**

Actions:

Engage in ethical, professional, and courteous dialogue with other professionals, parties, and participants while maintaining confidentiality and professional independence. During your representation:

- Take care not to communicate with persons you know are represented by another attorney without that attorney's prior consent (Rule 4.2, M.R.P.C.)
- Communicate with other parties' attorneys to understand their positions and negotiate on behalf of the client while maintaining client confidentiality
- Where appropriate and consistent with the client's confidentiality and legal interest, consult with the child's best interest advocate, a court appointed special advocate (CASA) or other guardian ad litem (GAL)
- Communicate with child protection specialists (CPS), service providers, family members, kin, and care providers to obtain current information relevant to the DN case
- Work collaboratively with attorneys representing the client in other matters

Commentary:

PROFESSIONAL COMMUNICATION: You may often work with the same group of professionals in your jurisdiction. While doing so, you must respect the client's trust, privacy, and confidentiality. The client needs to understand that while you may have a good working relationship with other professionals, your primary duty is to the client. An attorney's reputation for integrity, hard work, and professionalism are invaluable. When a practitioner establishes themselves as a professional who can be trusted, others will tend to respond similarly. Such an attorney will be able to obtain relevant information needed to represent the client effectively and make points that other professionals will listen to respectfully. An attorney who loses their reputation for integrity and professionalism will find it hard, if not impossible, to regain it.

COMMUNICATION WITH FAMILY, KIN, AND CARE PROVIDERS: These principles also hold true for contact with the client's family, kin, and the child's care providers. Regular and credible communication with these individuals can establish trust and understanding. By doing so, you can gain valuable information and insight into the DN case and explain the client's position. Take care to protect the client's confidentiality while communicating with others. Burning bridges with these individuals by being inattentive or untrustworthy could cause irreparable harm to the client's case and your reputation.

PROTECTING PARENTAL RIGHTS: Part of protecting a parent's parental rights means including them in the decision-making process for the child while they are in foster care. Parents should participate in decisions regarding their child's well-being, placement, education, activities, culture, religion, and psychological, medical, or dental treatment. Parents should also have access to the records, reports, and information concerning these decisions. Advise them appropriately and work collaboratively with CFSD and treatment providers. If CFSD makes important decisions about the child against a parent's wishes, without the parent or restricting

parental participation and access to information, advocate for them, even if you need to bring the matter before the court.

Parent's Attorney - Attorney-Client Relationship

5. Establish initial contact with the parent as soon as possible to obtain and provide essential information.

Action:

Hopefully, you have accurate contact information for the parent when assigned or accepting a DN case. If so, contact them promptly with enough time to prepare for the pre-hearing conference, emergency protective services hearing, and all subsequent hearings. During your initial contact, your goal is to establish a meaningful attorney-client relationship that will allow you to represent the client's interests throughout the case. During your initial contact:

- Prepare for an initial meeting with the client by reviewing all available materials in advance
- Provide sufficient time for the initial contact or meeting
- Describe your role, responsibilities, and limitations as an attorney representing a parent
- Explain the allegations against the client, discuss and provide copies of relevant documents
- Define the client's rights and the confidential attorney-client relationship
- Delineate the role of each party and the importance of participating in the court process
- Explain the structure and function of Montana CFSD
- Establish expectations as far as exchanging information, providing updates, and having sufficient time to prepare for court hearings
- Confirm the best ways to reliably contact one another, including email and cell phone numbers, as well as similar contact information for other individuals who may be able to get in touch with the client if needed
- Determine whether a translator is required for effective communication
- Explore whether the child is or could be an Indian child, as defined by federal Indian Child Welfare Act (ICWA) and Montana ICWA (MICWA), and explain the ramifications
- Acquire signed releases of information for the client's records, including but not limited to medical, mental health, school, and employment records

- Discuss the facts of the case, any statements the client may have made, potential witnesses, and any other relevant information
- Obtain accurate contact information for family members or friends who could provide kinship placement, supervise family time, or be a safety resource
- Ask the client about services they may already be engaged in through CFSD or independently

Commentary:

ESTABLISH TRUST: The initial client meeting could be the most important. The parent may believe everyone is against them, including their attorney. Make it clear you do not represent CFSD, the court, other parties, or the staff of any facility where the client may be located. Establishing trust and a strong working relationship is essential in moving toward reunification. The client must understand your role is to advocate for their goals and enable them to make informed decisions.

DO NOT DELAY: Many of the most critical decisions affecting a DN case occur within the first few days after removal. Placement of the child, family time options, safety resources, and services that could minimize or alleviate the need for an out-of-home placement should be discussed at the beginning of a case.

THE CHILD WELFARE PROCESS: During this initial meeting, the parent must be informed about the child welfare process, including the role of CFSD. Clients may not realize that CFSD must make efforts to reunify the family in all but the most extreme cases. CFSD's duties generally require reasonable efforts to avoid removal and to reunify the family. Active efforts are necessary in an ICWA case. In most scenarios, having a solid working relationship with CFSD will assist the parent client with the reunification process. This conversation with the client should include information about the upcoming hearings, a timeline for the case, and what may occur between court hearings.

ICWA AND MICWA: If the possibility exists that the case may involve an Indian child as defined by federal ICWA and Montana ICWA (MICWA), detailed discussions should occur during this first meeting. *See*, 25 U.S.C. § 1903(4); MCA 41-3-1303(8). If the child is an Indian child, the standards that apply to the case are greatly affected. More importantly, ICWA status affects the rights of Indian children, families, and Tribes. Approximately a third of Montana's foster care children are currently Native American. (https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/montana.html)

THE PARENT'S RIGHTS AND RESPONSIBILITIES: You must ensure the parent understands their rights and responsibilities. As part of these early discussions, the client must understand the confidential nature of the attorney-client relationship and the impact conversations or communications with other parties, persons, participants, and treatment providers may have in waiving confidentiality. Caution the client about discussing the matter on any social media platform. Generally, you should counsel the client to work

collaboratively with CFSD. This advice may also hold true for communications with other parties, participants, and treatment providers. However, when a parent faces potential criminal charges based on alleged abuse or neglect, discuss how they can work with CFSD and others without compromising their rights concerning potential criminal matters. Such counseling could go as far as recommending that the client exercise their rights against self-incrimination and not speak with others about specific subjects.

INFORMATION SHARING: Parents have crucial information they need to share with you, including historical information about their child and family, current circumstances, and details necessary to create a path toward reunification. You must know whether the client has already started or agreed to begin services or previously entered into a voluntary protection plan. Explain that this information will likely come to light through the discovery process, and it is in the client's best interests to provide this information to you as soon as possible so that you can address it.

6. If a parent is missing, make diligent efforts to locate them.

Action:

If you don't have contact information or have inaccurate contact information, you must make diligent efforts to locate the parent. You cannot rely solely on the state's attempts to establish contact. Your efforts should include reaching out to the following sources:

- CFSD
- The client's family members and friends
- Attorneys for other parties
- Other parties, if you have permission to speak with them in advance from their attorney (Rule 4.2, M.R.P.C.)
- Internet, social media, putative father registry, local jail rosters, Department of Corrections registry

Commentary:

REPRESENTING A MISSING PARENT: It is impossible to effectively represent a client you cannot contact. You will not be able to express their current or future position to the court or collaborate with CFSD or other parties. Communication with the client is the foundation of effective representation. Ensure that the state is making appropriate efforts to locate the client.

OPTIONS: When a parent is missing, a difficult decision must be made about how to represent them moving forward. Consider representing the last known position of the client if they expressed one. If you cannot ascertain the client's position due to a lack of communication or capacity, represent their presumed interest by seeking to protect their parental rights. Take action to protect the client's rights as a parent. Try not to draw attention to the lack of communication by the client, as this could harm their case.

7. Meet and communicate with the parent frequently, consistently, and regularly about all aspects of the case.

Action:

Regular and continuing communication with clients is the basis of quality legal representation. The parent must understand you will be speaking with them frequently and expect them to reach out to you when they have something to discuss. During your representation:

- Prepare for meetings with the client by reviewing your case file, including previous notes and recently disclosed materials
- Allow for sufficient time to meet with the client
- Explain options to resolve issues through discussions, conferences, and mediation
- Set up a system to remind the client well before upcoming hearings, conferences, and meetings
- Ask the client about what forms of communication they prefer
- Communicate with the client consistently, frequently, and substantively
- Encourage the client to communicate with you when emergencies or significant events occur
- Respond promptly to communications from the client
- Discuss case planning with the client, including the development of treatment plans
- Frequently discuss the client's long- and short-term goals for the case, including any changes to those goals as the case progresses

Commentary:

PREPARATION: For attorney-client communications to be productive, the attorney must prepare by reviewing notes and court documents ahead of time. Be prepared to address areas where there may be a lack of clarity or a need for updates. If you are prepared, the parent is more likely to be at ease and believe you are adequately addressing their goals. Do not blame a lack of preparedness on an overly busy work schedule. The client may question whether you care enough about them and their case.

ADEQUATE TIME WITH THE CLIENT: Spend sufficient time with the client to prepare them and address their questions and concerns. Make sure you can proactively handle hearings, conferences, and meetings.

CASE TIMELINE: Provide the parent with a case timeline and calendar of important deadlines, events, and court appearances, and set up a system to remind them of these dates. Discuss the reasons for upcoming court dates and timelines based on state and federal law. The client must understand the importance of this timeline and the ramifications if they do not complete tasks promptly or obey court orders. They must know when the state must consider filing for termination of parental rights.

PREFERRED FORM OF COMMUNICATION: Try to accommodate the parent's wishes regarding communication between attorney and client. Whether in person, by telephone, text, email, or video chat, use a form of communication that will make the client feel comfortable. Keep in mind the confidential nature of these discussions to avoid inadvertent disclosure of confidential or privileged information.

REGULAR COMMUNICATION: You must maintain regular communication with the parent to advocate for them effectively. Rule 1.4, M.R.P.C. Gaining their trust and establishing regular contact is vital. Communication with the client must occur well before hearings and conferences to allow you and the client to prepare. Obtain detailed information concerning any statements, potential witnesses, and other relevant information. Answer any questions the client may have about the DN case or court process. They must understand you need to hear as soon as possible when significant events or emergencies occur.

CASE PLANNING: You should engage the parent in case planning. When the client has significant input into case planning, they are more likely to engage in the process and make the efforts needed for their child to return home. Discuss options the client can pursue that could increase the likelihood of reunification. Parents tend to become more invested when they have a voice in the planning.

8. Provide the parent with copies of all relevant documents except as expressly prohibited by law, rule, or court order.

Action:

As part of your duty to communicate, ensure that the parent remains informed about critical documents in the case. Provide them with these documents and discuss their ramifications. During your representation:

- Promptly provide the client with petitions, affidavits, motions, orders, reports, case plans, treatment plans, and other relevant documents
- Review essential documents with the client to ensure they understand these documents and their implications.

- Avoid disclosing prohibited information to the client, especially items that could endanger another person.

Commentary:

PROVIDE AND DISCUSS DOCUMENTS: You need to ensure the parent understands what is happening in the case. Part of this duty requires an attorney to provide the client with all relevant documents. However, your responsibility goes beyond merely providing these records. Review the documents with the client, explain their impact, and answer the client's questions.

AVOID DISCLOSING PROHIBITED MATERIALS: Occasionally, there may be prohibitions against disclosing information to the client. For instance, there might be an order prohibiting the disclosure of the other parent's location when there are allegations of domestic violence or threats of violence. Ideally, information of this nature will not be given to you. However, if prohibited information is provided, counsel and their staff must not disclose it to the parent.

9. Advocate for the parent's goals and enable them to make informed decisions about their goals.

Action:

The parent must understand their options and the practical and legal advantages and disadvantages of those options. During your representation:

- Encourage the client to express their goals throughout the case
- Vigorously pursue the client's goals within the bounds of ethics
- Explain to the client what actions may be taken to increase the likelihood of reunification with their child
- Be responsible for providing expertise and pursuing tactics and strategies to promote the client's goals

Commentary:

THE PARENT'S GOALS: Make sure the parent knows you will provide them with expertise and advice, but that they will be making informed decisions about the case goals. There may be times when you disagree with or question the client's position. If so, speak with the parent about your concerns. It is your job to advise the client, providing practical information about options, including the advantages and disadvantages of each option. Ultimately, you must pursue tactics and strategies to support the parent's goals within the bounds of ethics.

HOLISTIC APPROACH: Clients often distrust the system and feel like they have no power. Take the time to be sure they feel comfortable expressing their wishes and goals to you.

Work collaboratively with the parent. Assure them their desires for the case will be pursued zealously.

10. Act with a duty of loyalty to the parent and avoid potential conflicts of interest.

Action:

You owe a duty of loyalty to the parent to pursue their expressed wishes for the case. Take care not to violate that duty of loyalty or allow a conflict of interest to interfere with your ability to represent the client effectively. During your representation:

- Advocate for the client's interests
- Avoid potential conflicts of interest or the appearance of conflicts
- Seek to gain the client's trust by being honest, respectful, compassionate, and professional with the client
- Support the client and be sensitive to their individual needs
- Do not allow personal or professional relationships to interfere with the attorney-client relationship and your primary duty to the client

Commentary:

THE PARENT'S PERCEPTION: The court process in DN cases will likely be less formal than in other cases. Maintaining strong working relationships with the other professionals in your jurisdiction is essential. However, do not give the parent the impression those relationships are more important than your duty of loyalty to them. They need to know you believe in them and will actively advocate for them. Practitioners should not forget they must zealously advocate for the client's position, which sometimes may require an adversarial approach.

MULTIPLE PARENTS AS CLIENTS: Representing both parents in a DN case may be tempting. However, except for very rare circumstances, you should not represent both parents. The potential for a conflict of interest always exists. Even if parents initially agree on the goals for the case, that can change. Consider any potential conflicts, understanding that conflicts could arise as the case progresses. A practitioner owes a duty of loyalty to each client individually. Even if you believe conflict is unlikely, you should never proceed without informed consent from both parents. Never represent both parents when there are domestic violence allegations. If a conflict arises during a case, an attorney must generally withdraw from the representation of both parents. Rule 1.7, M.R.P.C.

11. Adhere to relevant laws and ethical obligations concerning confidentiality.

Action:

You must understand and adhere to the legal and ethical obligations concerning confidentiality when representing a parent. Rule 1.6, M.R.P.C.; MCA 41-3-205. During your representation:

- Seek to protect the client's rights to attorney-client privilege and confidentiality consistent with their goals
- Advise the client about the practicality, advantages, and disadvantages of withholding, partially withholding, or releasing privileged or confidential information
- Waive these rights only if the client agrees and believes it would be advantageous
- Request that court proceedings be closed or the courtroom cleared if necessary to protect the client's privacy and confidential information

Commentary:

THE RULES OF PROFESSIONAL CONDUCT: Protecting a parent's privileged and confidential information is required by law and the Montana Rules of Professional Conduct. Review these laws and rules to understand how they may apply to each DN case.

RELEASING CONFIDENTIAL INFORMATION: There may be practical and strategic reasons to release confidential information during a case, such as when it may be otherwise discovered during the court process. The parent must understand the nature of confidential materials and the practical impact of releasing those materials on their goals and the strategies for the case. Unless the client agrees to disclose confidential materials and understands the benefit, seek to protect confidential information.

LIMIT EXPOSURE: Sensitive information may be discussed during court proceedings. If the court has not already done so, you may need to request that all unnecessary participants be removed from the courtroom to protect the parent's privacy and confidential information.

12. Be understanding, compassionate, and appropriate with the parent.

Action:

You need to know who the parent is and what matters to them. To do so:

- Seek to understand the client's background
- Behave in a culturally appropriate manner
- Treat the client with respect and compassion
- Seek to understand the client's history of trauma

Commentary:

THE PARENT'S BACKGROUND: To represent the parent competently, learn their history and goals for the case. Seek to understand how their story, education, culture, and socio-

economic background could affect the case and how they perceive it. Remain honest and compassionate without judging the client's thoughts or actions. Avoid personal bias and the damage that could be caused by imposing your values on the client.

ISSUES FACED BY THE PARENT: Obtain a basic understanding of the issues the parent might be dealing with, including trauma, chemical dependency, mental health issues, violence, incarceration, discrimination, and poverty. Then, use this knowledge to speak with the client compassionately and appropriately. Discussions of this nature allow the client to be open with you regarding case planning. Do not traumatize the client further during this process.

INCARCERATION: Be aware of how incarceration can affect a person and learn how to provide competent representation for an incarcerated client. Ensure that regular communication occurs with incarcerated clients. Be aware of the limitations on contact with the incarcerated client and adjust your discussions accordingly. Seek appropriate services for the client in their facility. Treatment options may be challenging to find, so speak with counselors and administrators at the facility to determine what is available and how to access those services. Seek reasonable means for the client to participate in court hearings and conferences. The client may be able to appear remotely for hearings, conferences, and meetings. If an incarcerated client wants to appear for hearings physically, you should explore that option, including seeking court orders for such an appearance well before hearings occur. Keep in mind that prisoners may lose privileges when they leave their facility, so that possibility should be researched and discussed with the client ahead of time.

Child's Attorney - Attorney-Client Relationship

13. Meet with the child as soon as possible to obtain and provide essential information.

Hopefully, you have accurate contact information for the child when assigned a DN case. If so, contact them promptly with enough time to prepare for the pre-hearing conference, emergency protective services hearing, and all subsequent hearings. Your goal is to begin establishing a meaningful attorney-client relationship that will allow you to represent the child's interests throughout the case. During this process:

- Prepare for an initial meeting with the client by reviewing all available materials in advance
- Provide sufficient time for an initial meeting with the child
- Speak with the client about their safety

- Seek to determine the client's developmental level by meeting and interacting with the client; this process will likely involve more than one meeting
- Explain a lawyer's role, responsibilities, and limitations (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(i)
- Make sure the client understands that you represent their position and goals and do not represent others (Citation for Children's Attorneys, MCA 47-1-105 (3)(c)(i)
- Obtain the child's contact information, including contact information for their caregivers
- Provide the client and their caregivers with your contact information orally, in writing, and electronically
- If unable to communicate with the client due to language, age, or disability, seek to engage translators or other experts to ensure the ability to communicate with the client, if possible

Commentary:

THE CHILD'S SAFETY: Speak with the child about their safety and what they can do if they feel unsafe. The entire DN case focuses on the child's safety. Ask the client who they can talk to if they feel unsafe. Offer suggestions if they don't know who to speak with about their safety, such as teachers, service providers, a CFSD child protection specialist (CPS), and yourself. Ensure that the client speaks up if they are ever feeling unsafe.

EARLY DISCUSSIONS WITH THE CHILD: Reach out to the child as soon as possible after being assigned or accepting a case. Make an effort to speak with the client promptly and before the pre-hearing conference and emergency protective services hearing. At a minimum, meet with the client before and after each hearing, after each placement change, and in person no less than every three months. Citation for Children's Attorneys, MCA 47-1-105(3)(c)(v).

Don't use communication with resource or foster parents as a substitute for direct communication with the child. Avoid only meeting with the child in a parent's home or a foster home. You need to learn about any potential mistreatment in the home and the child is unlikely to disclose abuse while they are in that home.

If you do not have accurate contact information, ask the child protection specialist and state's attorney for that information. An initial meeting with the child could be the most important meeting. The child may have been traumatized by removal and the events surrounding removal. They may not understand what led to their removal. Many of the most critical decisions affecting the child occur within the first few days after removal. These matters may need to be discussed early to protect the client's rights. However, it is important to remember that establishing trust and rapport with the child may take

time and several meetings. Discussing sensitive subjects with the child during the early stages could be challenging and perhaps inappropriate. Avoid subjecting them to further trauma.

THE CHILD'S DEVELOPMENTAL LEVEL: You need to understand the child's developmental level to represent them effectively. A child's developmental level will determine how you interact with them. All communications with the child should be at a developmentally appropriate level. There will be clients you cannot speak with due to immaturity or diminished capacity. This initial assessment will include meeting the child and having discussions with them. It will also require you to review all relevant documents and speak with the client's relatives and friends. School records can be helpful along with any evaluations of the child that may exist. You may need to engage experts to fully assess the client's developmental level.

THE LAWYER'S ROLE: The child must know what an attorney is and what you can do for them during a DN case. Ensure the child understands your duty to maintain confidentiality, provide loyal representation, advocate for their position, and that you work for them directly. Citation for Children's attorneys, MCA 47-1-105(3)(c)(i). Explain your role, responsibilities, and limitations. Check with them to be sure the child understands these principles. Clarify that you do not represent their parents, CFSD, the court, the foster or resource family, or the staff of any facility where they may reside. Revisit these conversations throughout the case to maintain healthy attorney-client boundaries and avoid blurring the lines between being their attorney and the other professionals.

CONTACT INFORMATION: Provide the child and their caregivers with written and electronic contact information to promote ongoing attorney-client communications. Make sure you also know how to reliably reach the client and their caregivers. Create a plan for leaving messages between attorney and client and respond to messages as soon as possible.

COMMUNICATION LIMITATIONS: To adequately represent the child, you must understand their expressed wishes for the case. If barriers impede these communications, experts or translators should be brought in immediately to address those obstacles. You must still meet with the client even if they cannot communicate with you due to age, maturity, or disability. A great deal can be learned by observing the child on their own, in their residence, and interacting with others. These interactions can be particularly informative with infants and toddlers.

14. Meet and communicate with the child frequently, consistently, and regularly throughout the case.

Regular and continuing communication with clients is the foundation of quality legal representation. The child must understand you will be speaking with them frequently and expect them to reach out to you when they have something to discuss. It may take time to broach some difficult subjects when representing a child. During your representation:

- Prepare for meetings with the child by reviewing your case file, including previous notes and recently disclosed materials
- Allow for sufficient time to meet with the client
- Set up a system to remind the client well before upcoming hearings, conferences, and meetings
- Ask the client about what forms of communication they prefer
- Adopt a developmentally appropriate, trauma-informed, and culturally appropriate manner
- Over time, obtain detailed information from the child concerning the case
- Communicate with the child consistently, frequently, and substantively
- At a minimum, communicate with the client monthly, before and after every hearing, after any placement change, and with no less than one in-person meeting every three months (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(v)
- Visit the child's home, residence, and any prospective residence in advance if possible (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(viii)
- Encourage the child to communicate with you when emergencies, a change of residence, or significant events occur
- Respond promptly to communications from the client
- Inform the client about their rights in a DN case and the child welfare process in general (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(ii)
- Advise the client about the confidential nature of the attorney-client relationship
- Explain the court process, timelines, and roles of all the parties, attorneys, and participants (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(ii)
- Discuss the structure and function of Montana CFSD
- Explain ICWA and discuss any possibility of the child being an Indian child
- Discuss case planning with the child
- Frequently discuss the client's long- and short-term goals for the case, including any changes to those goals as the case progresses

Commentary:

PREPARATION: For attorney-client communications to be productive, you must prepare by reviewing notes and court documents ahead of time. Be prepared to address areas where

there may be a lack of clarity or a need for an update. If you are prepared, the child is more likely to be at ease and believe you are adequately addressing their goals. Do not blame a lack of preparedness on an overly busy work schedule. This could make the child feel like a burden, and they may question whether you care enough about them and their case.

ADEQUATE TIME: Discussions must be sufficient to proactively handle hearings, conferences, and meetings while working with other professionals. You should be a counselor and an attorney, providing advice, information, and advocacy for the child. Allow adequate time to speak with the child comfortably in a confidential manner. Spend enough time with them to address their questions or concerns. It may take the child time to relax and speak openly. Some complex subjects may require multiple meetings before the child can talk about them.

PREFERRED FORM OF COMMUNICATION: One way to help the child feel comfortable is by asking them about their preferred forms of communication. The client may like texts or video chats. They may not actively use email. Try to accommodate the child's wishes. Always be aware of the client's developmental level, considering their cultural norms and any trauma that may have affected them. Each child is an individual and must be communicated with accordingly based on their abilities and understanding of the case.

REGULAR COMMUNICATION: You must maintain regular communication with the child to advocate for them effectively. Rule 1.4, M.R.P.C. Gaining a client's trust and establishing regular contact is vital when representing a child. Over time, obtain detailed information concerning the matter, any statements, potential witnesses, and other relevant information. These discussions must happen well before hearings and conferences to allow the attorney and client time to prepare. Let the client know what to expect during hearings. After a hearing, discuss what occurred and what is expected based on the hearing. According to the National Association of Counsel for Children (NACC), at a minimum, you should speak with your client monthly and immediately after placement changes. National Association of Counsel for Children: Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings, p. 11. Ensure that you meet with them in person at least quarterly. Citation for Children's Attorneys, MCA 47-1-105(3)(c)(v). Answer any questions they may have about the case or court process. The child must understand that when significant events or emergencies occur, you need to know about these events as soon as possible.

HOME VISITS: Children can be vulnerable to their environment. Visit them in their home, foster care, or wherever they are placed, and do so every time they change residences. Citation for Children's Attorneys, MCA 47-1-105(3)(c)(viii). Observe how the child interacts with their caregivers, the home environment, and anyone else living there. Talk with them outside the home as well. They are unlikely to disclose possible mistreatment in a residence while they are there. If possible, go to prospective placements before any change in the child's residence. Speak with the foster or resource parents, assuming an attorney does not

represent them. If the child is home, get permission to speak with the parents or guardians from their attorneys in advance. Otherwise, avoid discussing the matter with them. Do not discuss the matter with a person known to be represented without the prior permission of their counsel. Rule 4.2, M.R.P.C.

CONFIDENTIAL COMMUNICATIONS: The child must understand their rights, particularly the confidential nature of attorney-client communications. Citation for Children's Attorneys, MCA 47-1-105 (3)(c)(ii). Explain to the client that they should not share these attorney-client discussions with other persons to protect confidentiality. Inform the client you will not discuss this information with others without their permission and discourage them from posting about the case on social media, explaining the hazards.

As a child's attorney, it is vital to address the potential presence of another person during conversations between you and the client. The child may want someone else to be present when they speak with you. However, the presence of a third person will generally breach the confidentiality of an attorney-client communication. You must consider and discuss this with the child.

COURT PROCESS: The child should understand the court process is intended to protect them and hopefully enable their parents to make the necessary changes so they can return home safely. For the client to understand the timing of this process, provide them with a case timeline and calendar of important deadlines, events, and court appearances. Discuss the reasons for upcoming court dates and timelines. Explain CFSD's role in the removal and reunification process. If the child might be an Indian child, explain the basics of ICWA and the importance of a court finding that a child is an Indian child.

CASE PLANNING: You should engage the child in the case planning process. Case planning significantly affects their life and they are entitled to a say in that planning. Placement, family time, and services for the family will have long-term repercussions. Thus, the child's voice must be heard by CFSD, their parents, attorneys, the CASA or GAL, and the court. Your job is to ensure the client is listened to and their thoughts are appropriately considered.

15. Consider providing the child with copies of relevant documents on a case-by-case basis except as expressly prohibited by law, rule, or court order.

As part of your duty to communicate, ensure the child remains informed about the critical documents. Discuss the ramifications of those documents with the child. During your representation:

- Consider providing the child with petitions, affidavits, motions, orders, reports, case plans, treatment plans, and other relevant documents

- Review essential documents with the client to ensure they understand those documents and the ramifications
- Avoid disclosing prohibited information to the client, especially items that could endanger another person

Commentary:

CONSIDER PROVIDING DOCUMENTS: You need to ensure the child understands what is happening in the case. Rule 1.4, M.R.P.C. Review documents with the client, explain their impact, and answer any questions. The child may want to see or have copies of the essential documents. Under these circumstances, ask the child whether they wish to review or keep copies of the documents. Remember that while a child is in foster care, others could gain access to these materials due to a lack of privacy. Consider speaking with the child about keeping the documents for them, so others don't gain access to the documents.

AVOID DISCLOSING PROHIBITED MATERIALS: Occasionally, there may be prohibitions against disclosing information to the child. If prohibited information is provided to you, do not disclose that information to the client. Make sure your staff is aware of these disclosure limitations, so they do not inadvertently provide prohibited information or documents to the client.

16. Advocate for the child's goals and enable them to make informed decisions about their goals.

As an attorney representing a child directly, you need to advise the client in a developmentally appropriate manner concerning all aspects of the DN case. The client needs to know their options and the practical advantages and disadvantages of different options. Citation for Children's Attorneys, MCA 47-1-105(3)(c)(ii). During your representation:

- Encourage the client to express their goals throughout the case
- Vigorously pursue the child's goals within the bounds of ethics
- Assure the client you will represent them zealously and respect their decisions
- Be responsible for providing expertise and pursuing tactics and strategies to promote the child's goals
- Be proactive with planning throughout the case

Commentary:

DIRECT REPRESENTATION: As an attorney directly representing a child's expressed wishes, you must understand the client is responsible for determining the case goals. You are not the best interest advocate; you are the child's attorney. Your representation should resemble the legal representation provided to adult clients. Ensure the client knows you

will provide them with expertise and advice, but they will make informed decisions about their goals for the case. Work collaboratively with the client. You must pursue tactics and strategies to support the child's goals.

HOLISTIC APPROACH: Consider the child as a whole person. Learn about their story, passions, activities, support people, and goals for life. If appropriate and with the client's consent, you can share this information with the court, CFSD, the parties, and participants. This process will give them a better understanding of the child as a young person with goals and desires for their life. The child is the best source of this information and will only disclose it if they feel comfortable and trust you as their attorney.

ZEALOUS ADVOCACY: Children are often frightened and confused and may distrust the child welfare system and process. They often feel they have no power. Take the time to be sure the child feels comfortable expressing their wishes and goals. Demonstrate and assure them you will pursue their desires for the case zealously within the bounds of ethics.

THE CHILD'S POSITION AND GOALS: Sometimes, you may disagree with or question the child's position or goals for the case, and may not believe their choices are in their best interest. Assuming the child can express their wishes, speak with the client about your concerns. Seek to counsel them about their position, but ultimately pursue the client's goals for the case. The practitioner must remember it is the client's decision to make. Citation for Children's Attorneys, MCA 47-1-105(3)(c)(ii). Be aware of the power imbalance between an attorney and a minor client. Do not overly influence the child's decision-making. Inform and advise the client, providing practical advice about options, including the advantages and disadvantages of each one.

PROACTIVE CASE PLANNING: Seek to engage the child in the case planning process as early as possible, discussing the child's placement, family time, and services for the client and family. Ask the child what they think needs to occur for them to return home safely. A child's perspective concerning their safety can be crucial to planning. A child may not want to return home. Ask them why they want or do not want to stay where they are living. These conversations need to occur outside the residence. This work will better engage the client in the planning process and assist with designing plans individualized for the family.

17. Act with a duty of loyalty to the child and avoid potential conflicts of interest.

As an attorney directly representing a child, you owe a duty of loyalty to them to pursue their expressed wishes for the case. Do not allow a conflict of interest to interfere with your ability to represent the child effectively. During your representation:

- Be an attorney and counselor for the client, advocating for their expressed wishes
- Avoid potential conflicts or the appearance of conflicts of interest
- Seek to gain the client's trust by being honest, respectful, humble, compassionate, and professional with the client

- Support the client and be sensitive to their individual needs
- Don't allow personal or professional relationships to interfere with the attorney-client relationship and your primary duty to the client

Commentary:

THE CHILD'S PERCEPTION: The court process in DN cases will likely be less formal than in other cases. Maintaining strong working relationships with the other professionals in your jurisdiction is essential. However, don't give the child the impression that those relationships are more important than your duty of loyalty to them. The child must know you believe in them and will actively advocate for them. Don't forget that you must zealously advocate for the client's position and goals, which sometimes may require an adversarial approach.

MULTIPLE CHILDREN AS CLIENTS: It is not uncommon for the courts to appoint one attorney to represent several children in a sibling group. These children should have the same interests and goals when appointed counsel. However, consider any potential conflicts that could arise as the case progresses. If you would have to represent materially adverse facts, you must withdraw. A practitioner owes a duty of loyalty to each client individually. If a conflict of interest occurs during a case, the attorney must generally withdraw from the representation of all clients. Rule 1.7 & 1.9, M.R.P.C.

HONEST AND RESPECTFUL: To establish a strong working relationship, you must be truthful with the client. Respect them as a young person. They need to trust you are working for them for this professional relationship to work. Provide loyal and independent legal representation. Advocate for the client's position. Citation for Children's Attorneys, MCA 47-1-105(3)(c)(i).

18. Adhere to relevant laws and ethical obligations concerning confidentiality.

You must understand and adhere to legal and ethical obligations concerning confidentiality when representing the child in a DN case. Rule 1.6, M.R.P.C.; MCA 41-3-205. During your representation:

- Protect the client's rights to attorney-client privilege and confidentiality consistent with their wishes and goals
- Ensure the child client understands the role of an attorney, including the duty to maintain confidentiality (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(i)
- Request that court proceedings be closed or the courtroom cleared if necessary to protect the child's privacy and confidential information

Commentary:

RULES OF PROFESSIONAL CONDUCT: Protecting a child's privileged and confidential information is required by law and the Montana Rules of Professional Conduct. You must review these laws and rules to understand how they may apply to each DN case.

LIMIT EXPOSURE: Sensitive information may be discussed during court proceedings. If the court has not already done so, you may need to request that all unnecessary participants be removed from the courtroom to protect the child's privacy and confidential information.

19. Be understanding, compassionate, and developmentally appropriate with the child.

To represent the child adequately, understand who they are and what matters to them. During your representation,

- Seek to understand the child's background
- Act in a culturally appropriate manner
- Treat the client with respect and compassion
- Seek to understand the client's history of trauma

Commentary:

THE CHILD'S BACKGROUND: Each client is different, with a unique history and needs. To represent the child competently, learn their background and goals for the case. Seek to understand how their story, education, culture, and socio-economic background could impact the case and how they perceive it. Always remain aware you are representing a child. Your work must be tailored to their developmental level. Remain honest and compassionate without judging the client's thoughts or actions. Avoid personal bias and the damage that could be caused by imposing your values on the child and their family.

ISSUES FACED BY THE CHILD: Obtain basic knowledge concerning any issues the child might face. These issues could be personal to the client or through their family, including trauma, chemical dependency, mental health, violence, incarcerated parents or family members, discrimination, and poverty. There may be subjects the child is not ready to hear or discuss. Take care not to traumatize them further through these discussions.

Duties Concerning a Client's Diminished Capacity

20. When the client can direct legal representation through their expressed wishes, maintain a normal attorney-client relationship.

Action:

When the client understands their options and can express their wishes for the case, pursue a conventional professional relationship with them. During your representation:

- Provide the client with advice and counsel them concerning their options
- In an appropriate manner, elicit the client's express wishes for the case
- Pursue the client's expressed wishes within the bounds of ethics

Commentary:

THE CLIENT'S EXPRESSED WISHES: If the client can comprehend their options and then communicate their desired outcomes for the case, you must pursue their long- and short-term goals if ethically able to do so. Explain your duties and limitations as their attorney, and if you disagree with the client, counsel them regarding your concerns and the reasons behind them. However, you cannot substitute your judgment for the client's capable choices.

21. If needed, determine whether the client has diminished capacity.

Action:

If there is a reason to question the client's capacity to make considered decisions, determine whether the client has diminished capacity pursuant to Rule 1.14 of the Montana Rules of Professional Conduct (M.R.P.C.). During your assessment:

- Consider the client's age, education, cognitive abilities, mental health, ability to communicate with and understand others, and all other relevant factors when determining whether the client has diminished capacity
- Do not presume the client has diminished capacity based solely on their age, appearance, actions, or behavior
- Understand the client may have the capacity to adequately direct some portions of their representation, but not others
- If needed, consult with other individuals, entities, and experts to assist in determining whether the client can direct their representation

Commentary:

THE CLIENT'S CAPACITY TO MAKE A CONSIDERED JUDGMENT: Do not presume the client has a diminished capacity because you disagree with their decisions. Question whether the client can make adequately considered decisions, not whether you agree with their conclusions. You cannot rely solely on the client's age, actions, appearance, or behavior to make this determination. Take into account their levels of development and maturity.

The client's capacity may also change during your representation. As clients mature or overcome obstacles, their capability to assist with their representation may improve. Alternatively, the client's capacity may decline due to a deterioration in their mental or physical health.

Remember that the client may be able to make considered decisions regarding some parts of their case, but not others. If the client can make considered decisions regarding portions of their case, follow the client's direction regarding those expressed wishes. For instance, a young child may have an opinion about child custody that an attorney should advocate for and the court should consider during proceedings. This is true even if the child cannot fully express their wishes about every aspect of a case. *See*, ABA Comment [1] to Rule 1.14, Model Rules of Professional Conduct.

ASSISTANCE WITH A DIMINISHED CAPACITY DETERMINATION: You may need to talk with the client extensively, speak with individuals who know them, or engage experts during your assessment. Experts may be necessary to review the client's mental and medical health records, evaluations, and school records. If appropriate, the client should be informed about your concerns and their input sought as much as possible. Difficult conversations with the client about their capabilities may be required.

DIMINISHED CAPACITY: Clients of all ages may be considered to have diminished capacity because of maturity and developmental levels, cognitive abilities, mental health, chemical dependency, and many other issues. Any of these factors could prevent them from making informed decisions. Nevertheless, if a client is able to assist with some parts of their representation, they should be allowed to do so. Diminished capacity is not an all-or-nothing proposition. If the client's issues are severe enough, you may need to take further actions to protect their rights.

22. If the client has diminished capacity, seek to maintain a normal attorney-client relationship as much as possible while objectively protecting their rights and interests.

Action:

If the client has diminished capacity, during your representation:

- Make a good faith effort to determine their needs and wishes and advocate accordingly
- Seek to objectively protect the client's rights and interests based on a thorough investigation of the matter
- Maintain as normal an attorney-client relationship as possible

Commentary:

PROTECT THE CLIENT'S RIGHTS AND INTERESTS: If the client has diminished capacity and cannot make a considered judgment about all or part of the case, thoroughly investigate the situation and seek to objectively protect their rights and interests. This process is not a best interest determination. Instead, consider what the client would choose if they were capable of making the decision. What rights and interests does the client have that should be protected? Speak with them to gain insight into their perspective. Try to see the case through the client's eyes, not your own. For instance, it could be appropriate for an attorney representing a non-verbal infant to advocate for treatment and case plans that may allow the infant to return to their parents safely. However, determinations of this nature need to be made on a case-by-case basis, considering the objective facts, rights, interests, and the gravity of the situation.

23. Take protective action for the client when their diminished capacity puts them at risk of substantial physical, financial, or other harm unless action is taken.

Action:

When the client's diminished capacity puts them at risk of substantial harm, if necessary, take protective actions to prevent such injury pursuant to Rule 1.14 of the Montana Rules of Professional Conduct. During your representation:

- Reveal only the information required to protect the client from substantial risk; do not reveal additional client information
- Take only reasonably necessary and the least intrusive steps, including consulting with individuals, entities, and experts who could protect the client

Commentary:

AUTHORITY TO TAKE PROTECTIVE ACTION: Implied authority for taking protective action comes from the Montana Rules of Professional Conduct (M.P.R.C.) through Rules 1.14 and 1.6. Rule 1.14 provides that when you reasonably believe the client has diminished capacity and is at substantial risk of physical, financial, or other harm, and the client is incapable of protecting their interests, you may take reasonably necessary protective actions. Protective actions could include consulting with individuals or entities who can take action to protect the client. Rule 1.14(b), M.R.P.C.

CONFIDENTIALITY: As a general rule, you must protect the client's confidentiality unless they explicitly authorize you to share confidential or privileged information. Rule 1.6, M.R.P.C. There is an exception to this rule when you take reasonably necessary protective actions for a client with diminished capacity. When you take protective action pursuant to Rule 1.14 of the Montana Rules of Professional Conduct (M.R.P.C.), you have implied

authority through Rule 1.6 to disclose information about the client. However, you must limit this disclosure to only information reasonably necessary to protect the client from substantial risk. Rule 1.14(c), M.R.P.C. Otherwise, you have a duty to protect the client's privileged and confidential information.

As an attorney representing a client's expressed wishes, you can speak with the CASA or GAL to gain insight. In doing so, do not violate the client's confidentiality**.** Rule 1.6, M.R.P.C. Speak with the client beforehand to be sure you have their permission to discuss certain matters. CASAs and GALs do not have the same duties to protect the client's confidentiality as attorneys do. Be careful about what you discuss with them.

Remember, the assignment of a CASA or GAL does not relieve you from your duty to communicate with the client and treat them with compassion, honesty, and respect. You cannot rely solely on a CASA or GAL to communicate with the client and investigate the case. You continue to have a duty to communicate with the client and to investigate the matter independently.

Child's Attorney - Interviewing the Child as a Client (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(ii)

24. Build a Trusting Relationship with the Child.

Interviewing a child or any client is the beginning of the attorney-client relationship. Developing a working relationship with the child is vital to the interviewing process. Building a trusting relationship with a client who has been abused or neglected is critical. During this process:

- Establish rapport with the child, being friendly, empathetic, understanding, honest, and professional
- Assess the client's developmental level from the beginning
- Assess the child's understanding of the truth
- Be respectful of the client, their family, and the current situation
- Be aware of your surroundings and the persona you project to the child
- Take verbal and non-verbal cues from the client
- Engage the child without being overly intrusive; ask safe questions while beginning to build a relationship
- Keep the first meeting short by asking easy-to-understand foundational questions
- Have multiple sessions with the child to continue building the relationship

- Introduce more challenging questions later in the relationship-building process; do so gradually and over time
- Always keep your promises; never make promises that cannot be kept

Commentary:

DEVELOP INTERVIEWING SKILLS: Your personal and professional experience may not have prepared you to interview and communicate with children as clients. An attorney who lacks these skills should not represent children. Interviewing and communication skills are crucial. Therefore, you should actively pursue training and information on this subject. Speaking with other practitioners and finding experienced mentors to develop these skills can also be helpful. Review the following materials to gain knowledge concerning interviewing children as clients. (Interviewing the Child Client: Approaches and Techniques for a Successful Interview, Emory School of Law, youtube.com/watch?v=OYLWkVHvgOM)

BUILDING RAPPORT: You must build rapport with the child, beginning with the first meeting. Make sure the child feels comfortable with the interview process. Seek to gain the client's trust by being honest, respectful, humble, compassionate, and professional. It is alright to explain that you are human, make mistakes, and do not know everything. Paying attention to the child's body language is essential to this interview process. Ask permission before taking any notes and explain why attorney notes are important. Focus on what the client is saying and doing.

THE CHILD'S DEVELOPMENTAL LEVEL: Understanding the child's level of development is essential to your representation. While it is unlikely you will fully grasp the client's developmental level during an initial interview, you should be able to gain some understanding by engaging with the client, reviewing documents, and speaking with the child protection specialist. Over time, having multiple meetings with the client, and perhaps with the assistance of experts and service providers, you should achieve a greater appreciation of the client's capabilities.

THE CHILD'S UNDERSTANDING OF THE TRUTH: You may need to assess whether the child understands the concept of truth. Particularly with younger or less developed children, you may need to test this concept by telling the client a clearly false statement and then one that is obviously true. For instance, you could misstate their name and then correctly say it. Ask the child when you were telling the truth. If they understand the concept, ask the child to be honest during interviews and explain why it is vital for them to be truthful with you.

AVOID BEING JUDGMENTAL: A practitioner should be respectful of the child, their family, and the situation they find themselves in. Do not express judgments about the child and their family. It is your job to seek to understand, not to judge. Insulting your client or their family is a sure means of disrupting your professional relationship with the child.

ENVIRONMENT AND PERSONA: Remain aware of your surroundings when speaking with the child. If possible, talk with them in a comfortable setting while consistently maintaining confidentiality. Consider the persona and characteristics you want to project to the child by being professional, friendly, respectful, and understanding. The environment, your demeanor and physical position relative to the child, and even your clothing can all affect their level of comfort and trust.

PHYSICAL CUES: Be aware of non-verbal communication by the child. Do they avoid eye contact or look away? How do they hold themselves or sit? Do they physically pull away from you? Are they trying to convey something through their non-verbal cues? Try to be mindful of the religious or cultural reasons that may explain these physical cues. Avoid physical contact with the child unless it is entirely appropriate and the child has explicitly consented to it. A handshake or pat on the shoulder may be usual and customary for an attorney, but it could be upsetting or even traumatizing for the child based on their experience and background.

INITIAL INTERVIEW: The initial interview with the child sets the stage for the attorney-client relationship. A practitioner should focus on getting to know the child, helping them feel comfortable, and giving them an idea of what a lawyer can and cannot do. It may take time for the child to trust you as their attorney and grasp what you have to offer.

ONGOING INTERVIEWS: It may take several interviews with the child to build rapport, so emotional or difficult questions may need to wait. It will take time to fully comprehend the child's level of development. Set aside enough time to establish this crucial relationship. Only then, ask the tough questions that need to be addressed. Experienced attorneys may use developmentally appropriate techniques to make their clients feel at ease. Attorneys may meet their clients outside their office in a park or other suitable location. Others may choose to meet in their office to clarify the attorney-client relationship. Some attorneys draw or play board games with clients while discussing the case. The child may be uncomfortable meeting with their attorney. Taking the time to make the child feel comfortable can go a long way toward establishing trust and understanding.

KEEP PROMISES: Nothing disrupts a professional relationship more than lying and failing to follow through with promises. While it may be tempting to promise a child success, some aspects of the case are out of the lawyer's and the child's control. However, you can promise to be honest and direct, and that you will do your best on their behalf. You cannot guarantee you will be able to achieve the child's goals for the case.

25. Use Clear and Direct Language with the Child.

A practitioner must use language the child can comprehend. As a child's attorney, it is essential for you to be direct and clearly express ideas. To do so, you should:

- Use simple sentence structure and language that is developmentally appropriate
- Pay attention to the language the child uses; use their words and terms
- Let the child take the lead and follow the child's lead
- Avoid negative statements, sarcasm, and legal jargon
- Let the client know you will be trying to explain some things that may be hard to understand
- Let the child know they can interrupt and ask questions if they don't understand something
- Ask the client to explain what you have said in their terms to make sure they understand

Commentary:

USE LANGUAGE APPROPRIATE FOR THE CHILD: Allow the child to guide the conversation when possible. You should listen carefully to what they say and the language, terms, and names they use. Ask for clarification of unclear words and phrases. It is okay to allow for silence when the child doesn't want to speak. You should speak so the client can understand in a developmentally appropriate manner using the client's terms when possible. Legal jargon should be avoided with all clients, especially children, because it is confusing. While being honest with the client is mandatory, being overly negative will lead the child to believe their goals cannot be achieved. You should strive to be realistic, but ensure the child remains hopeful regarding their goals for the case.

DIFFICULT SUBJECTS: The child needs to know you will try to explain some ideas that may be hard to comprehend. For instance, the client may have trouble understanding your role as their attorney. Let the child know some complicated subjects will be discussed. The child must know you want them to interrupt you at any point if they have questions or need further explanation. Ask the client follow-up questions about critical topics to ensure they understand the conversation.

26. Focus on What Matters to the Child.

As an attorney representing a child, you must pursue their expressed wishes. To do so, a practitioner must know what matters to the client. Thus, the focus of an interview should be on what the child wants. During the interview:

- Find out who and what is important to the child
- Find out what the child wants to happen with the case
- Ask the child if they need anything
- Ask open-ended questions
- Avoid assumptions about what is important to the child; let them explain in their own words

- Intervene when other parties or participants seek to subvert the child's expressed wishes

Commentary:

THE CHILD'S WISHES: It is easy to make assumptions about what is best for the child and what they want. For instance, you may think the child wants to live with their parents; they may not. Even when it is uncomfortable, you must ask them about their goals and desires for the case. Without this information, you cannot pursue the client's wishes.

AVOID LEADING QUESTIONS: Try to ask open-ended questions since your goal is to find out what the child wants, thinks, and feels. Questions suggesting an answer could lead to the child providing responses they think you want to hear, not what they honestly believe or feel. At some point, you may need to ask follow-up leading questions to clarify what the client has already said, but as a general rule, seek to avoid directed questions. As much as possible, let the child lead the discussion.

PROTECT THE CHILD'S EXPRESSED WISHES: There may be times when others overstep their bounds and attempt to override the child's thoughts and desires for the case. These individuals may have the best intentions. However, as an attorney seeking to understand and represent the client's wishes for the case, you may need to intervene. This intervention could involve interrupting and asking to speak with the individual privately regarding their demeanor and appropriateness with the child. There is an obvious imbalance of power between adults and children. Sometimes, you may need to step in to protect the child's rights to assess the situation and express their opinions about what they believe is best for them.

Investigation

27. Conduct a thorough and independent investigation. (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(vii)

Action:

You cannot rely solely on the state's investigation as a parent's or child's attorney. Take the time to speak independently with witnesses, relatives, kin, and treatment providers. During your representation:

- Investigate and seek to protect the client's medical, mental health, social and educational needs, and overall well-being (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(ix)

- Gather relevant documentation from schools, employers, medical and mental health providers, and any evaluations conducted on the child, client, or family
- Obtain reports and records from service providers
- Use releases of information when needed
- Interview individuals with knowledge about the client and their family, including but not limited to child protection specialists, neighbors, relatives, friends, school personnel, coaches, clergy, other professionals, and law enforcement
- Identify appropriate family and professional resources for the client and family
- Evaluate the state's safety concerns
- Investigate any prospective changes to the child's residence
- Consider seeking assistance from investigators or experts

Commentary:

INDEPENDENT INVESTIGATION: You cannot assume the information you receive from CFSD, treatment providers, and others is accurate. This information must be reviewed thoroughly during an independent investigation, likely requiring conversations with the client's friends, family, community members, and professionals. You need to obtain and assess all relevant documentation. It is essential to learn as much as possible about the client, their family, and kin.

CONSULT WITH THE CLIENT: Speak with the client before communicating with others to make sure they believe these conversations would be appropriate. They may have concerns or reservations regarding individuals with whom you plan to have discussions. The client could also provide insights about those individuals. As an ethical consideration, attorneys must not speak with anyone they know to be represented by counsel without their attorney's prior permission. Rule 4.2, M.R.P.C.

SAFETY CONCERNS: You should thoroughly examine the following:

- The basis of the state's safety concerns
- Whether the child could return home immediately (*See*, MCA 41-3-306(1)(a)
- Whether services or conditions can be put in place to alleviate the state's safety concerns so the child could be at home or otherwise living with a parent or parents
- If the safety concerns are genuine, what treatment or services need to be in place so the child can return home
- Whether the conditions of return appropriately address the safety concerns
- Whether any potential barriers will prevent the client and family from engaging in the services needed for the child to return home

INVESTIGATORS AND EXPERTS: An investigator or other expert may be required to complete an independent investigation. These professionals can provide expertise you may not be

able to deliver independently. To obtain information regarding local investigators, experts, preapproval procedures, and the payment process, speak with regional administrators or managing attorneys at the Office of the State Public Defender.

INVESTIGATE PLACEMENT CHANGES: Children are sometimes moved from placements for various reasons. As a parent's or child's attorney, seek information regarding any change of placement and be proactive to ensure these moves are appropriate. If possible, visit prospective placement options in advance. Citation for Children's Attorneys, MCA 47-1-105(1)(c)(viii). You can request or even seek court orders to be notified concerning any potential change of residence before it occurs. Seek the client's input and thoughts about any possible relocation of the child. Consider objecting to changes detrimental to the client's position or unsafe for the child. Advocate for the client's position concerning any potential move. You can request placement hearings when a dispute over placement cannot be resolved informally. MCA 41-3-440.

INVESTIGATE SCHOOL STABILITY FOR THE CHILD: Federal law requires that state and local child welfare and educational agencies promote stability and success for children in foster care. The Montana Department of Public Health and Human Services (DPHHS), in cooperation with the Office of Public Instruction (OPI), has developed policies and a toolkit for local schools and CFSD offices to comply with the requirements for school stability and transportation for students who are in foster care. Students in Foster Care: Toolkit for Local Education Agencies and Local Child and Family Services Agencies 2021, dphhs.mt.gov/assets/cfsd/cfsdmanual/MontanaFosterCareGuidanceToolkit.pdf. Refer to this toolkit whenever an issue arises concerning a new placement for the child that could affect the child's school placement or transportation needs.

28. Interview the client frequently and regularly as part of the ongoing investigation.

Action:

You should meet with the client as part of the ongoing investigation. During your representation:

- Ask the client how things are going and whether they have learned anything new about the case
- Speak with the client about new information they have received from other parties, treatment providers, participants, and potential witnesses
- Seek the client's input and perspective concerning recently disclosed information you have received

Commentary:

CLIENTS AS A SOURCE OF INFORMATION: The client may be a valuable part of an investigation. They can inform you about their ongoing discussions with the child protection specialist, provide insight into the importance and relevance of recently disclosed information and, as a participant in the process, give you information about how a case is progressing.

Discovery

29. Use informal discovery processes to obtain all relevant information necessary to represent the client.

Action:

As an attorney for a parent or child, try to obtain all relevant discovery through available informal practices. The informal process could help avoid the complexities and complications that may arise from formal discovery requests. During your representation:

- Obtain and review all pleadings and filings in the DN case
- Review court records in all related matters (domestic relations, criminal, protective orders, etc.)
- Review the notice of removal and the initial affidavit as soon as possible (MCA 41-3-301(1)(c) & (6)
- Learn and use local rules, customs, and practices for the exchange of discovery materials without the need for formal discovery
- Use recently enacted laws to request discovery from the state (MCA 41-3-431)
- Ensure the state and other parties provide all evidence they intend to use at hearings promptly
- Review all potential evidence, including but not limited to documentation, photographs, video, and audio recordings
- Advocate for meetings outside of court regarding case status, next steps, and outstanding issues; discuss discovery requests during these meetings
- Request and use status hearings to ensure all relevant materials are exchanged well before potentially contested hearings
- Specifically, request the documents and materials needed to represent the client

Commentary:

COURT DOCUMENTS: It is essential to review pleadings for the DN case and related cases. This evaluation of discovery is the most basic level an attorney must complete.

Understanding the pleadings in a DN case and all related matters provides the groundwork for developing further discovery and a case strategy.

NOTICE OF REMOVAL: Written notice of removal should be provided to the parents at the time of removal or as soon thereafter as possible. MCA 41-3-301(1)(b). 2023 legislation requires the notice of removal also be provided to the Office of the State Public Defender within 24 hours of a child's removal. MCA 41-3-301(1)(c). The notice should state the reasons for the child's removal, including the child protection specialist's contemporaneous thoughts about removal. It provides information regarding the right to an emergency protective services hearing and contact information for the Office of the State Public Defender, the CFSD child protection specialist, and their supervisor.

INITIAL AFFIDAVIT: The notice of removal also includes information about the parent's right to receive a copy of the initial affidavit. An often ignored statutory provision states that the parent should receive the initial affidavit within two working days of removal if possible. 2023 legislation added the Office of the State Public Defender as a recipient of the initial affidavit within two working days of a child's removal. MCA 41-3-301(6). This is the same amount of time for the child protection specialist to provide the county attorney with the initial affidavit. In practice, affidavits have rarely been given to parents within two working days of removal. Thus, as a parent's attorney, you may need to obtain the initial affidavit within two working days of removal. This affidavit could shed light on the original thoughts of the child protection specialist regarding the removal.

INFORMAL DISCOVERY PROCESS: Informal discovery could be a means of receiving all of the discovery materials needed to represent the client in a DN case. Consider what is required to present the client's case effectively. You must know the alleged facts, potential witness information and statements, other parties' positions, and service provider and expert information and opinions. Create a list of the discovery you will need. Make a decision about the discovery required on a case-by-case basis. Be familiar with all local rules, customs, and practices concerning the informal exchange of discovery materials. Some jurisdictions may have specific rules related to the exchange of discovery in DN cases. Establishing a functional working relationship with the other professionals in your jurisdiction is essential for this process to work.

EXPANSION OF INFORMAL DISCOVERY REQUESTS THROUGH 2023 LEGISLATION: 2023 law dramatically expanded parents' and their attorneys' ability to obtain discovery through an informal request and enforce those requests. Parents can request discovery from CFSD that CFSD must make available for examination and reproduction by the parents. These requests may include the following:

- Names, addresses, and statements of persons CFSD may call to testify
- Written and oral statements, reports, case notes, correspondences, evaluations, interviews, and documents produced by CFSD

- Written reports or statements of experts who have examined the child and the results of any physical or psychological examinations
- Papers, documents, photographs, videotapes, or other tangible objects CFSD may use at trial, or they obtained from or purportedly belonging to the parents
- Materials or information that tends to support, mitigate, or negate the state's case (MCA 41-3-431(1)

There is no requirement that these requests must be in writing. However, to preserve the record of your request, it should be in writing, on paper or electronically, with proof that it was provided to the state.

The 2023 law does not make such requests for discovery available to the child's attorney. However, such a request by a child's attorney would likely be honored by the state.

The law also provides for the enforcement of these informal discovery requests. If a parent requests such information and it is not provided, they may make a motion before the court, and the court shall order the production of such items. MCA 41-3-431(4). If it is brought to the court's attention that discovery requests were not complied with, the court may order any remedy it finds just, including the following:

- Ordering the disclosure of the previously undisclosed discovery
- Granting a continuance
- Finding contempt for intentional discovery violations
- Precluding the calling of a witness, offering evidence, or raising a defense (MCA 41-3-431(5)

If CFSD later discovers additional information or materials relevant to an earlier request for disclosure, CFSD must promptly notify the parents and disclose that additional information or materials. MCA 41-3-431(8).

MEETINGS OUTSIDE OF COURT: Outside of court meetings, involving the parties, attorneys, and service providers are encouraged. During these meetings, discuss discovery issues and explore the broader ramifications of the case. You may also be able to assist in developing appropriate treatment and case plans. An action plan and a schedule can be created for upcoming meetings. Ultimately, discussions can focus on what must occur for the case to be dismissed with the child safely at home. These meetings are not family engagement meetings. They are informal meetings that occur in addition to family engagement meetings.

STATUS AND REVIEW HEARINGS: You are encouraged to request frequent and regular status and review hearings before the court. Status and review hearings can provide you with updates on the case's progress. These hearings also offer an opportunity to ensure all relevant discovery materials are being exchanged. If there are discovery issues, those issues can be discussed before the judge during a status or review hearing.

OPEN FILE POLICIES – Open CFSD files are insufficient for complete discovery when an open file policy exists. You must pursue specific requests with CFSD and other lawyers. County Attorneys and Assistant Attorneys General also sometimes find it challenging to obtain all the discovery they need from CFSD, primarily because of evolving technology and the available formats for the electronic storage of those materials. For instance, text communications are not generally stored by CFSD. Be aware of Montana Supreme Court rulings regarding open file policies and discovery requests. In re: S.C., 2005 MT 241, ¶ 18-24.

30. Use formal discovery to obtain relevant information when needed.

Actions:

- Pursue formal discovery requests if necessary and renew those requests as needed
- Consider subpoenaing third-party witnesses and materials
- Oppose inappropriate and excessive discovery requests from other parties

Commentary:

INFORMAL DISCOVERY FIRST: Your goal should be to obtain all relevant materials and information through informal discovery. The informal process may open the door to discussions about reunification plans for the family and is generally more collaborative. Make every effort to receive discovery through informal means before resorting to formal discovery.

FORMAL DISCOVERY: After thoroughly exploring informal discovery options, timely and formal discovery requests may be required if other parties, participants, service providers, or third parties fail to cooperate fully. There may be times when subpoenas, interrogatories, requests for admission, depositions, and motions to compel are needed. Be aware that formal discovery can lead to inappropriate or excessive demands. When issues arise, you may need to seek the court's assistance.

THE RULES OF CIVIL PROCEDURE – The Montana Rules of Civil Procedure apply to DN cases and you must have a working knowledge of those rules. Title 25, Chapter 20 Rules of Civil Procedure, MCA. The 2023 law for requesting informal discovery from CFSD does not apply to requests for discovery from other parties, individuals, or entities. It only applies explicitly to requests made to CFSD by parents. MCA 41-3-431(1). Thus, you must have a working knowledge of the Montana rules that apply specifically to discovery. Title 25, Chapter 20 Rules of Civil Procedure, Part V. Depositions and Discovery, MCA.

SUBPOENAS – A practitioner can also seek documents, electronic records, materials, inspections, depositions, and third-party testimony through subpoenas. You should informally pursue this outside discovery first by contacting these individuals or

organizations or using releases of information from the client to obtain the desired cooperation. However, if the court's subpoena power becomes necessary, be familiar with the Montana Rules of Civil Procedure as they apply to subpoenas. Title 25, Chapter 20, VI Trials, Rule 45 Subpoena, MCA.

Case Preparation

31. Review all petitions, affidavits, pleadings, and documentary evidence.

Action:

To effectively represent a parent or child in a DN case, you must understand the documents submitted to the court and received through discovery. These documents are the foundation of the state's case. During your representation:

- Review all documents, pleadings, petitions, affidavits, reports, and evidence, including school, medical, and mental health reports, and discuss these documents with the client
- Determine the alleged basis for any removal and whether the safety concerns justify the removal of the child
- Evaluate the actions taken by CFSD to avoid any removal and reunify the family
- If the child is not home, assess the steps taken by CFSD to place the child in a kinship placement with relatives or fictive kin
- Remain up-to-date with document review throughout the DN case

Commentary:

DISCUSSING DOCUMENTS WITH THE CLIENT: While you must read and understand the court documents and discovery, discussing their content with the client is equally important. The client may have a different perspective than the person who drafted a document or made a statement in a report. They could disagree with the alleged facts or opinions given and might be able to provide valuable insight.

When the client is a child or otherwise vulnerable, you need to assess your conversations concerning court documents and discovery on a case-by-case basis. Consider what an appropriate discussion is based on their developmental level or vulnerability. If a conversation could harm the client, speak with professionals, including their therapists or treatment providers, before having these conversations. Learn how to best address complex subjects. However, you must ensure the client is informed about the facts of the case in a manner they can understand. With all clients, you need to explain the matter to

the extent reasonably necessary for them to make informed decisions. Rule 1.4(b), M.R. P.C.

THE BASIS OF REMOVAL: Whenever the child has been removed from their home, you must evaluate that removal based on the documents provided to you and the court. Question whether safety concerns were significant enough to warrant the removal. Were there other options that could have been explored to avoid a removal? Could the child return home immediately? What did CFSD do to prevent the removal? What is being done to reunify the family? Discussions with the client and other party representatives might reveal opportunities that could alleviate the need for the removal, leading to a return home.

32. Develop case theories and strategies to accomplish the client's goals. (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(ii)

Action:

Develop theories that explain the parties' perspectives, observations, and statements. In collaboration with the client, develop strategies to achieve their goals. During your representation:

- Be aware that case theories guide the attorney's preparation for discussions, meetings, conferences, hearings, and arguments
- Understand that case theories inform an attorney about the evidence that must be developed
- Develop strategies based on case theories and the client's long- and short-term goals
- Reevaluate case theories and strategies as the matter evolves

Commentary:

CASE THEORIES: Theories of the case combine legal theories with factual information to create a credible version of events supporting the client's position. In developing your case theories, carefully consider and explain the parties' and participants' observations and opinions within the legal framework. For instance, an attorney might theorize that if a parent can address their chemical dependency issues, many or most of CFSD's safety concerns regarding their parenting skills would also be resolved. This theory could be based on the parties' observations and opinions that the client has good parenting skills when not abusing drugs and alcohol. Case theories will let the attorney know what facts need further development and how to approach other parties and hearings.

DEVELOP STRATEGIES: Strategies are designed to achieve the client's short- and long-term goals for the case. For instance, a parent may want the child to return home as a long-term goal, but meanwhile live with their grandparents. In this example, the attorney could approach the grandparents and CFSD child protection specialist to propose placement with

the grandparents as a short-term remedy. The attorney could talk about what family time would look like if the child lived with the grandparents and how such a placement would benefit the child and the entire family. The attorney will need to understand the safety concerns of the child protection specialist to develop a long-term strategy for addressing those safety concerns. This strategic process will likely involve helping to create a treatment plan tailored to the family's specific needs.

REEVALUATE: Throughout a DN case, continue to evaluate your theories and strategies. Observations and opinions may change as a DN case evolves, requiring you to reconsider your views. The client's progress, or lack thereof, will modify the strategies needed to achieve their goals. Their goals may even change. Don't become overly attached to your theories or strategies. What was once a good idea may not continue to be one as the case progresses.

EXPERTS AND TREATMENT PROVIDERS: Some theories and strategies may require expertise beyond your knowledge as a legal expert. Talk with treatment providers about their reports and the client's progress or lack thereof. Ask questions when you do not understand something. Do not pretend to be an expert in everything. Consider engaging experts as consultants and potential witnesses to develop appropriate strategies.

33. Advise the client about all available options for the case. (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(ii)

Action:

While you are responsible for developing case theories and strategies, the client provides the long- and short-term goals. To do that, they need to be informed about their options. During your representation:

- Advise the client about their options and the practical and legal consequences of those choices
- Counsel the client regarding the decision-making process
- Find out what the client has determined to be their long- and short-term goals for the case
- Revisit the client's long- and short-term goals throughout the case
- Discuss case theories and strategies collaboratively with the client
- Explain options to settle or informally resolve issues through discussions, meetings, conferences, and mediation

Commentary:

PRACTICALITY OF GOALS: While the client must understand all their options for the case, they also need to know how practical they are. Some options could have serious legal

consequences in the DN case and other matters. The client needs your guidance to make informed decisions about their goals.

34. Research legal issues and make appropriate arguments.

Action:

Unique situations and legal issues may arise during a DN case. Conduct additional research to broaden and clarify your understanding of the law so you can make compelling arguments on behalf of the client. During your representation:

- Engage in additional legal research when presented with complicated or new legal issues
- Consult with experienced attorneys about legal issues and arguments
- Make reasonable and ethical legal arguments

Commentary:

LEGAL RESEARCH: You should possess a solid foundational knowledge of child welfare law. However, situations and legal issues are bound to arise requiring you to refresh your knowledge or look into unique or previously untested areas of the law. During those times, pursue legal research to protect the client's rights. Consider speaking with experienced lawyers to gain their input and insight. Be prepared to discuss these matters and make compelling arguments on behalf of the client both in and out of court.

35. Participate in out-of-court discussions designed to resolve and address issues informally. (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(ii)

Action:

You cannot rely solely on written motions and court appearances to convey the client's position to the other parties. Out-of-court discussions and meetings can establish a collaborative process to resolve issues without resorting to formal alternative dispute resolution or contested court hearings. During your representation:

- Identify areas where further discussions may be needed to resolve issues
- Pursue informal resolution of matters through conversations, meetings, and conferences
- Work collaboratively with other professionals to resolve issues

Commentary:

OUT-OF-COURT ADVOCACY: Engage in discussions outside of court to advocate on behalf of the client. Before filing court documents or attending hearings, speak with the other parties about the client's position. Advocate in a manner that demonstrates how the client's position benefits the entire family. Seek to avoid contested hearings by addressing issues outside of court if possible.

INFORMAL DISCUSSIONS AND MEETINGS: There are bound to be points of contention in a DN case, even when the parties are working collaboratively with the same general reunification goals. Consider the options available to resolve disputes without resorting to unnecessary contested hearings. Avoid overly contentious debates that could break down communication between the parties. Since it is the goal of all parties, at least initially, to safely reunify the family whenever possible, working with others is often the best way to attain the client's goals.

36. Engage in planning for treatment and the case in general, advocating for appropriate services and seeking to eliminate barriers.

Action:

Participate in case planning and the development of treatment plans to ensure these plans are well suited to the client's and family's circumstances. During your representation:

- Actively engage in case planning
- Encourage the client to engage in the case planning process
- Ensure the treatment and case plans are tailored to the client's needs and do not require excessive or unnecessary services
- Determine whether any barriers might prevent the client from completing services and work on a plan to alleviate those barriers
- Advocate for the client's positions on case planning and treatment plans
- Advise the client regarding the potential advantages and disadvantages of engaging in voluntary services early in the case
- Advocate for appropriate service referrals from CFSD as soon as possible
- Attend important conferences and meetings to advocate for the client
- Solicit experts, service providers, and social workers, if available, to assist with identifying appropriate services for the client
- Seek out potential allies in case planning, including but not limited to the child's attorney, parents' attorneys, court appointed special advocates (CASA), or guardians ad litem (GAL)
- Develop a working knowledge of available services in the community to advocate for appropriate services
- Continue to reevaluate and be involved in the case planning process throughout the entire case

Commentary:

CASE PLANNING AND TREATMENT PLANS: Case planning is more than helping to develop an appropriate treatment plan. It is the process of identifying the decisions and actions required to achieve stability and security for a child in care with the goal of the child returning home. Case planning is an ongoing process, beginning with case assignment and ending with the dismissal of the DN case.

As part of the case planning process, treatment plans should be concise and directly address safety concerns without containing excessive tasks. Throughout a case, all sorts of issues could arise and interfere with the client's ability to complete required tasks, maintain a job or housing, or hinder their ability to participate in family time. Thus, planning must continue throughout the DN case to address potential issues.

ENGAGE IN PLANNING AS AN ATTORNEY: Lawyers sometimes believe they should not be involved with developing treatment plans or case planning in general because they are not social workers. However, you must be actively involved in the case planning process throughout a DN case. As an attorney, you can ensure these plans focus on the client's needs. The goal of the case is not to create exceptional parents, but to ensure the child can safely live at home. Others occasionally forget this difference during the planning process. You can help create workable plans. Like you, the parents probably have many obligations and commitments. Find out what barriers might prevent them from completing a treatment plan, such as a lack of time, transportation, a phone or computer, or the financial ability to engage in certain services. As such, be sure the parents have a good chance of completing any tasks requested. Remember that failure to complete a treatment plan is the primary reason parental rights are terminated.

ENGAGE THE CLIENT IN PLANNING: Speak with the client about what they think they might need so the child can safely live at home. Encourage them to be actively involved in the planning process throughout the case. What do they believe will benefit them? They will be able to identify barriers that could prevent them from completing services better than anyone. The client may also have good ideas about what they need, but have been unable to access or achieve thus far. A client engaged in the planning process is more likely to buy into the process and actively participate in services, increasing the possibility of the child returning to a safe home.

VOLUNTARY SERVICES BY THE PARENT: There may be informal discussions, meetings, and conferences early in a DN case where potential services are discussed. Before these conversations, speak with the parent about possibly beginning services before a formal treatment plan is developed. If the child is placed outside the home, there is a limited time for parents to complete services before the state must consider filing for termination of parental rights. That time begins with the initial foster care placement, not when a parent's

treatment plan is signed. If a parent waits for a court-ordered treatment plan to begin services, several months could pass with nothing accomplished toward reunification.

In some cases, early services could lead to reunification sooner or provide more time to complete necessary tasks. But not always. For instance, there may be a risk if a parent agrees to engage in some services voluntarily, but fails to follow through or later decides they do not want those services to be part of a treatment plan.

ASSISTANCE WITH PLANNING: As a legal expert, you may need help developing appropriate case plans with the client. You should ask social workers, treatment providers, other attorneys, CASAs, GALs, or other experts to help design plans that are tailored for individual families. Your goal is to build a team that can work together to create plans that work for the client and family.

37. If the child is not living at home, advocate for frequent, safe, and regular family time in a family-like setting.

Action:

Preserving the parent-child bond through frequent and regular family time is essential to any reunification plan. During your representation:

- Speak with the client about their goals for family time and advocate for those goals
- Work on a plan for frequent and regular family time building toward reunification of the family
- Question the need for supervised family time to ensure that it is based on valid safety concerns
- Advocate for unsupervised family time when appropriate; otherwise, seek the lowest safe level of supervision possible
- If supervised family time is required, promote relatives, kin, family friends, and community members as potential supervisors
- Ensure that family time occurs in the most family-like setting possible
- Advocate for in-home or community family time
- Pursue a plan where parents will be able to participate in regular activities with their child, including but not limited to club and school events, family and religious activities, and medical, dental, or mental health appointments
- Seek additional parent-child contact and communication through video chats, phone calls, texts, emails, and letters

Commentary:

THE CLIENT'S GOALS FOR FAMILY TIME: Learn the client's goals for family time. A parent may have spent significant time with the child throughout their life and wants to have

contact with their child every day. A non-custodial parent may have had little contact with their child and wishes to establish a relationship. The child could be a newborn who needs to bond with their parents. Arrangements for frequent contact may have to be made to develop that critical early bond between the parents and newborn child. Discuss options for family time with the client and practical issues that are likely to arise. When you understand the client's goals, advocate for them.

FAMILY TIME PLANNING: Parents often mention family time as their biggest concern when their child has been removed from the home. They want to know when they can see their child, how their child is doing, and if they can spend more time with them. Likewise, the child may want to see their parents more and learn how their parents are doing. Frequent and regular family time increases the chances of reunification, so think creatively about how to make sure family time happens. Do not simply rely on CFSD to come up with a plan. Participate in the planning process and offer proposals that can work for the entire family.

FAMILY-LIKE SETTING: Family time should be in the most family-like setting possible. Seek family time that is as normal as possible, preferably in a home or the community. If the family has regular activities they engage in, advocate for the continuation of those activities for the benefit of everyone. Seek to reduce the stress level, and at least for a brief time, create an environment where the parents and child can interact as a family, thus helping to maintain the bond between them.

QUESTION SUPERVISED FAMILY TIME: CFSD frequently requests that family time be supervised, at least at the beginning of a DN case. You need to question this decision. Independently determine whether there are real safety issues requiring supervised family time. Supervision affects the amount and frequency of contact between the parents and child because of the limited resources available to provide supervised family time. If supervision is not necessary, advocate for unsupervised family time. Otherwise, seek out relatives, friends, and community members who could be trusted to observe family time and deal with any issue that might arise. If supervision is needed, find out what changes must be made for family time to progress to reduced or no supervision. Make sure services are available to the parents so they can make those changes.

FAMILY TIME IS MORE THAN VISITATION: While family time needs to include face-to-face visitation when it is safe, there are other ways in which parents and children can maintain contact. Advocate for text, phone, and video chat communication to expand family time. In addition, parents may remain involved in their child's education and healthcare by attending school activities, meetings, and medical and dental visits. Through these activities and participation, parents can support their child for the benefit of all.

38. Advocate for the client's position regarding the child's placement.

Action:

Placement of the child can significantly affect planning for family time and the likelihood of reunification. During your representation:

- Determine the client's position about the child's placement and advocate for that position
- Counsel the client regarding the different options for placement and the legal and practical implications of those options
- Advocate throughout the case for placement of the child at home if that is the client's goal
- Seek a kinship placement with relatives or fictive kin if that is the client's position and the child cannot immediately be placed at home

Commentary:

THE CLIENT'S GOALS FOR PLACEMENT: Many parents and children want their families to live together, but each family is unique. You cannot assume what the client wants. You must inquire about not only the client's short-term goals for placement, but their long-term goals as well. Some parents will know they need to work on a few things before their child can safely return home. They may have relatives or friends available as short-term placement options and want their child to return home when they are ready. Other parents may not understand the seriousness of their situation, have no alternatives for placement, or demand that their child be returned home. Sometimes, the child should be able to return home immediately. While placement discussions may be difficult, they must occur early and throughout the case.

PRACTICALITY: The client must understand the implications of their placement goals. How will different placement options affect their long-term goals? If a child is moved a great distance to live with relatives, how will that affect the parent-child bond and family time during the placement? Are some relatives and friends poor choices for placement due to family history or safety issues? Could an early return home when a parent is not ready lead to another removal of the child? Discuss the client's goals for placement and offer your opinions about the practicality of the various options so they can make informed choices.

KINSHIP PLACEMENT: After removing a child from their home, CFSD has a duty to seek out and place the child with extended family if possible. MCA 41-3-101(3). Montana statutory policy requires that whenever removal of a child is necessary, the child is entitled to maintain ethnic, cultural, and religious heritage whenever appropriate. MCA 41-3-101(1)(f). CFSD maintains a policy for seeking placement of children with kin. Kinship care is defined by CFSD policy to be care by a member of the child's extended family, a member of the child's or family's tribe, the child's godparents or stepparents, or a person to whom the child, child's parents, and family ascribe a family relationship and with whom the child has had a significant emotional tie that existed before CFSD's involvement with the child or

family. Child and Family Services Policy Manual 402-4. A 2023 law provides a similar statutory definition of kinship care in non-ICWA cases. MCA 41-3-450(4). Non-relative kinship placements with close family friends are called fictive kin placements. Question CFSD's efforts to place the child with extended family or other kin. Speak with the client about those efforts and additional placement options. Kinship placements can minimize the stress on the child, establish greater placement stability, and increase and improve family time between the parents and the child.

ICWA AND MICWA PLACEMENT PREFERENCES: The duty to try to place a child with relatives is critical in ICWA and MICWA cases because federal and state law establishes preferred placements with extended family. 25 U.S.C. § 1915, MCA 41-3-1329. Thus, assessing the applicability of federal ICWA and Montana ICWA (MICWA) before placement is crucial. Confirm any alleged non-ICWA status with the client as soon as possible. Do not simply rely upon CFSD reports. Discuss the importance and benefits of ICWA status with the client. If a possibility exists that the child is an Indian child as defined by ICWA and MICWA, help the client develop a family tree with as much detail as possible. If appropriate, and while maintaining client confidentiality, share this family tree with CFSD to ensure a diligent search for tribal membership or membership eligibility is completed and all relatives are explored as potential placement options.

NON-ICWA PLACEMENT PREFERENCES – 2023 law establishes similar placement preferences for children in non-ICWA cases. MCA 41-3-450. These general placement preferences for non-Indian children prioritize placements with caregivers who have similar ethnic, cultural, and religious heritage.

39. Parent's Attorney - Thoroughly prepare the parent to testify.

Action:

A parent could be a crucial witness in their case. They must be prepared to testify in the event a contested hearing occurs. That means they need to know what to expect from you, other attorneys, and the court if they are called to testify. During your representation:

- Discuss the advantages and disadvantages of the parent testifying
- Address the potential risks if the client testifies
- Prepare the parent for questions you plan to ask
- Prepare the client for the types of questions you anticipate other parties may ask
- If needed, prepare a list of written questions for the client
- Discuss the best ways to present information to the court
- Discuss the possibility that the client could be called as a witness by another party
- Familiarize the parent with the court process and setting
- Talk about the importance of being on time and appropriate attire for the court

Commentary:

DIRECT QUESTIONS: The parent must understand what questions you plan to ask them if they testify and how that testimony can benefit their position. Thoroughly review the areas you plan to address and the specific questions you will ask them. Work collaboratively with the client to develop those questions.

RISK OF VOLUNTARY TESTIMONY WITH POTENTIAL CRIMINAL LIABILITY: Speak with the parent about any possibility that their testimony could incriminate them in a criminal matter. The risk must be analyzed and discussed with the client before they choose to take the stand. If the client voluntarily testifies about a subject, they generally waive any Fifth Amendment privilege they may have concerning self-incrimination when questioned about that subject by other parties. Brown v. United States, 356 U.S. 148, 154-55 (1958). A witness who voluntarily takes the stand on their behalf cannot then claim a privilege against cross-examination on matters reasonably related to their direct testimony. McGautha v. California, 402 U.S. 183, 215 (1971).

QUESTIONS FROM OTHER ATTORNEYS: You must not only prepare the parent for the questions you will be asking, but also consider questions other parties may pose. Before meeting with the client, look at the matter from other parties' perspectives. What strategies would you pursue in their place, and what questions do you think they will ask the client? Spend time with the client reviewing the areas you expect to be addressed and specific types of questions others may ask.

THE POSSIBILITY OF THE PARENT BEING CALLED AS A WITNESS BY ANOTHER PARTY: In a Montana DN case, a parent could be called as a witness by another party. This occurs more frequently in some jurisdictions than in others. Generally, leading questions can be asked of hostile or adverse party witnesses. Title 26 Evidence, Chapter 10 Montana Rules of Evidence, Article VI. Witnesses, Rule 611(2)(c), MCA. If there is a possibility of self-incrimination when called as a witness by another party, you need to discuss how the client's rights against self-incrimination could be asserted by the client or through your objections and actions as their attorney. As a general rule, the client can maintain their Fifth Amendment rights against self-incrimination in a civil case. Kastigar v. United States, 406 U.S. 441 (1972). If the client asserts their privilege against self-incrimination when called as a witness, the court and attorneys should not comment on it. No inferences should be drawn based on that assertion of privilege. Title 26 Evidence, Chapter 10 Montana Rules of Evidence, Article V. Privileges, Rule 505, MCA.

COURT PREPAREDNESS: Preparing a parent for a court appearance is essential. While preparing a parent to testify, listen carefully to their responses to questions. Consider providing them with written questions so they can refresh their memory before any hearing and offer guidance on how to best present their responses to the court. A parent must appear to be a person who can safely care for their child; disorganized or aggressive

behavior will likely damage the client's case. They must be prepared for potentially hostile questions and difficult subjects. Make sure they answer honestly, but have an opportunity to explain their answers when needed through your questions during cross-examination or redirect. You must explain the differences between direct, cross-examination, and redirect. Make sure the parent understands what to do if there is an objection by yourself or another attorney during their testimony.

If there is time, show the parent the courtroom in advance and where the various parties, attorneys, and the judge will sit. Taking the time to prepare the client as a potential witness will help them relax and get ready for this challenging task.

40. Child's Attorney - Ensure the child has an opportunity to participate fully in the process. (Citation for Children's Attorneys, MCA 47-1-105(3)(c)(x)

Action:

You must pursue a child's rights to be heard and actively participate in and out of court. During your representation:

- Discuss ways the child can adequately participate in the process
- Familiarize the client with the court process and setting
- Discuss the best ways to present information to the court and other parties

Commentary:

MEETINGS, UNCONTESTED HEARINGS, AND STATUS REPORTS: DN cases tend to be less formal than typical criminal or civil cases, with many issues addressed in meetings and conferences outside of court. Often, hearings are uncontested and the attorneys simply make statements on behalf of their clients. Sometimes, parties are allowed to address the court directly without being subjected to an oath or cross-examination. Consider drafting a status report for the court and all other parties before hearings. Whatever format is used, prepare with the client well before any meetings, conferences, or hearings to plan for how information from the client will be conveyed to the court and parties.

ALTERNATIVES TO THE CHILD TESTIFYING: Testifying in court can be extremely difficult for adults. Subjecting a child to the harsh realities of testimony and cross-examination could cause them serious and irreparable harm. Take the time to consider how the child's statements and opinions could be presented to the court in a way that would not require them to testify.

In some hearings, hearsay evidence is explicitly allowed by statute. For instance, in show cause hearings, hearsay statements made by the affected child are admissible. MCA 41-3-432(3). In addition, there may be applicable exceptions to hearsay that would allow the child's out-of-court statements to be presented to the court for the truth of the matter

asserted in any hearings. This could include the catch-all hearsay exception, allowing for hearsay evidence when a statement not specifically covered by other exceptions has comparable circumstantial guarantees of trustworthiness. Title 26 Evidence, Chapter 10 Montana Rules of Evidence, Article VIII. Hearsay, Rule 803(24), MCA.

During permanency hearings, the court must consult with the child in an age-appropriate manner regarding the proposed permanency plan or transition plan for the child. MCA 41-3-445(4). These consultations are referred to as age-appropriate consultations; they may occur during other hearings.

The Montana Supreme Court has found that a District Court may conduct interviews with the child in DN cases using a domestic relations statute to do so. In re: M.L.H. 220 Mont. 288, 292-93 (1986); In the Matter of: T.N.-S., N.N.-S., E.N.-S., and A.N.-S., 2015 MT 117, ¶ 34. The relevant statute provides: "The court may interview the child in chambers to ascertain the child's wishes as to residence and parental contact. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case." MCA 40-4-214. This law does not require the attorneys to be present for the interview, but the court could allow it. The Montana Supreme Court has found that the parents and their attorneys are not entitled to review the interview transcript if the court does not rely on the interview in reaching its decision. However, the Supreme Court noted that due process considerations may require the disclosure of the interview transcript when the court relies upon the interview when making its ruling. In the Matter of: T.N.-S., N.N.-S., E.N.-S., and A.N.-S., 2015 MT 117, ¶ 38.

If you or another party are seeking to present evidence from the child, consider proposing that hearsay evidence be permitted or that the court interview the child in chambers in an age-appropriate manner. You can argue that such methods would be in the child's best interest as these methods will limit the injury the child would suffer if they were required to testify in court and face cross-examination.

USE OF A CASA OR GAL COURT REPORT TO THE CHILD'S ADVANTAGE: MCA 41-3-112 is one of the several reasons a CASA or GAL can become a child's attorney's best friend. The statute states that information in a report filed by the GAL or testimony regarding a report filed by the GAL is not hearsay when used to form the basis of the GAL's opinion about the child's best interests. MCA 41-3-112(4). Nothing, except the child's desire for privacy and confidentiality, keeps the child's attorney from providing a written statement to the CASA or GAL concerning the child's expressed opinions. Keep in mind that a CASA or GAL does not have the same duties regarding confidentiality as a child's attorney. Do not share information with the CASA or GAL regarding confidential communications you have had with the child without the child's expressed permission. The child can also choose to speak with the CASA or GAL, sharing facts or opinions with them, understanding that the CASA or GAL may share the information discussed with the court and other parties. This information

can assist the CASA or GAL in drafting their required reports and preparing for hearings. They can share the child's opinions and perceptions of the facts in their court report.

41. Identify, locate, and prepare other witnesses for testimony at hearings.

Action:

You must find and prepare witnesses to support the client's case. Also, be ready to deal with witnesses who may testify adversely to the client's position. During your representation:

- Work with the client to identify potential witnesses
- Attempt to locate all potential witnesses
- Contact the potential witnesses you can communicate with ethically to determine what type of testimony they are likely to provide
- Identify which witnesses could best present your case theory consistent with your strategies and the client's long- and short-term goals
- Meet and prepare those witnesses for questions you plan to ask and the types of questions you anticipate other parties may ask
- Develop strategies for cross-examining adverse witnesses
- Identify witnesses who can minimize or contradict potentially damaging testimony
- Do not anticipate that other parties will call all of their listed witnesses; be prepared to call some of those witnesses to testify on behalf of the client if necessary
- Issue subpoenas and make sure they are served on witnesses who may need one
- Discuss the importance of being on time and appropriate attire for court

Commentary:

CREATE A WITNESS LIST: Speak with the client about all potential witnesses and what those witnesses might have seen or heard. Ask the client if they have spoken with those potential witnesses and what they may have expressed to the client. Does the client know the potential witness's opinions about their situation? The goal is to identify not only witnesses who can help the client's case, but also witnesses who may produce damaging testimony. Create a list of witnesses and the potential testimony they are likely to offer.

CONTACT WITNESSES: Reach out to potential witnesses you are ethically able to contact well before any hearing. Do not speak with a represented party without first gaining permission from their attorney. Rule 4.2, M.R.P.C. Try to meet key witnesses in person to better assess them and find out what they actually observed; discuss any opinions they may have about the case.

PREPARE WITNESSES: For witnesses likely to support the client's goals for the case, try to meet them in person and prepare them to testify. The witnesses need to know what to

expect from you, the other parties, and the court. Review with them the questions you believe they will be asked by all of the parties. Discuss what to do if there is an objection during their testimony. Instruct them on how to address the court, other parties, and attorneys. If you believe a witness needs a subpoena so they can or will appear for a hearing, make sure they receive one. Remind them of the importance of honesty and offer suggestions on how they might best provide their testimony. Be sure they understand when to arrive for the hearing, the possibility of delays, the time needed to appear in court, and how to dress for court.

ADVERSE WITNESSES: You must be prepared to cross-examine witnesses who may offer damaging testimony. Review any reports they might have produced. When ethically allowed, speak with them about their observations and opinions before their testimony. You must not only prepare to cross-examine adverse witnesses, but also develop strategies to minimize the impact of their testimony and elicit helpful testimony from them. Seek to reduce any damage that their testimony may cause. If possible, find witnesses who can offer testimony that contradicts or explains adverse testimony. Also, find areas of consensus where the potentially adverse witness might agree on positive aspects of the client's case. Remember to be respectful of the witnesses during your preparation and seek to develop a rapport with them so you can speak openly and honestly, exchanging thoughts and ideas. Try to find places where adverse witnesses might agree with the client's position and goals.

42. Identify and secure expert witnesses and prepare for expert witness testimony.

Action:

You may need expert testimony to support your theories, strategies, and the client's goals for the case. Other parties may have expert witnesses, requiring you to consult with experts for the client and perhaps call them as witnesses. During your representation:

- Identify areas where expert witnesses could be helpful or necessary to present your case or counter adverse witness testimony
- Enter into agreements with and secure funding for those experts
- Prepare expert witnesses for questions you plan to ask and the types of questions you anticipate other attorneys will ask
- Ensure the client's expert witnesses provide necessary reports to other parties if required to do so by the court or Rules of Civil Procedure Title 25 Civil Procedure, Chapter 20 Rules of Civil Procedure, Part V., Rule 26(b)(4), MCA.
- Issue subpoenas and make sure they are served on your expert witnesses
- Ethically seek information concerning other parties' expert witnesses and their potential testimony
- Prepare to cross-examine and deal with testimony from the other parties' expert witnesses

Commentary:

IDENTIFY ANY NEED FOR EXPERT WITNESSES: After speaking with the client and other potential witnesses and reviewing court documents and discovery, find areas where an expert may be helpful or necessary to present the client's case. If the state or other parties have experts, ask their attorney for an opportunity to review their experts' reports and speak with their experts. If you are unable to do so through informal requests, consider asking for court assistance or pursuing formal discovery through the Montana Rules of Civil Procedure. Title 25 Civil Procedure, Chapter 20 Rules of Civil Procedure, Part V., Rule 26(b)(4), MCA. In the case of a state's expert, parents' attorneys specifically can seek disclosure through a 2023 law. MCA 41-3-431(1)(c). Consider consulting an expert about the conclusions and opinions of other parties' experts. Experts can be used not only to build the client's case, but also to counter expert testimony offered by others.

OBTAINING EXPERTS: Learn from the Office of the State Public Defender how to locate experts, gain the funds to pay for their time, and enter into an agreement with them. Develop a list of experts in various fields through research and speaking with experienced attorneys.

MEETINGS WITH EXPERTS: Experts require direction when they are engaged. You may need them to review reports you've received or evaluate a situation. Speak with them about what you want them to look at and let them know you want their honest assessments and opinions. As your expert's work progresses, talk with them about their review and decide whether you want them to produce a report. A report could be used to convince others without resorting to court testimony. However, it could also help other parties prepare to cross-examine or counter your expert if they testify. Be sure to turn over expert reports if required by the court or through the Montana Rules of Civil Procedure. Title 25 Civil Procedure, Chapter 20 Rules of Civil Procedure, Part V., Rule 26(b)(4), MCA.

PREPARE YOUR EXPERTS FOR TESTIMONY: Long before your experts are called to testify, meet with them to ask questions about their assessments, opinions, and any reports they produced. Talk to them about other testimony or evidence that may run counter to their position. Find out how the expert would explain these differences. Like other witnesses, prepare the expert for the areas you plan to address, specific questions you are likely to ask, and questions you believe other attorneys will ask. Provide them with a subpoena if you need them to appear at a particular hearing.

EXPERT REPORTS FROM OTHER PARTIES: The state will likely call upon experts to create reports during a DN case; carefully read them. These reports may be turned over routinely throughout a DN case; if not, ask for copies of experts' reports through the attorney seeking to present the expert's testimony. A judge may order these reports to be turned over before a witness is allowed to appear at a hearing. A 2023 state law has made it possible, at least for parents' attorneys, to receive expert reports from CFSD through a simple request.

MCA 41-3-431(1)(c). If you find it difficult to obtain expert reports through informal discovery requests, there is a procedure for obtaining facts known to and opinions held by other parties' experts through interrogatories and depositions. Title 25 Civil Procedure, Chapter 20 Rules of Civil Procedure, Part V., Rule 26(b)(4), MCA. Remember, experts' reports do not become evidence at hearings unless the parties stipulate to their admissibility or a proper foundation is laid for them through testimony.

CASA/GAL REPORTS: Information contained in a report filed by a CASA or other GAL or testimony regarding a report filed by that person is not hearsay when used to form the basis of their opinion about the child's best interest. MCA 41-3-112(4). However, this does not mean the state can use a CASA or other GAL to get expert opinions and reports into evidence at a hearing through the back door. When the state has failed to admit the expert's opinion or report through stipulation or laying a foundation for admissibility through appropriate testimony, the court should not consider that evidence in reaching its decision at a hearing. The information mentioned in a CASA or GAL report is only available at a hearing to demonstrate the items they relied upon to reach their opinions regarding the child's best interests. In re: I.M., 2018 MT 61, ¶ 14-22.

Handling the Court Case

43. With the client's permission and when appropriate, engage in mediation and other formal settlement negotiations to resolve issues before hearings.

Action:

Be aware of options to resolve issues through alternative dispute resolution that may be available in your jurisdiction. These methods can lead to a more collaborative process while avoiding unnecessary contested hearings. During your representation:

- Participate in formal settlement negotiations
- If available, actively participate in mediation and conferences to improve outcomes for the client
- Participate in available training for mediation and negotiation skills
- Communicate all settlement offers to the client, providing advice on the advantages and disadvantages so the client can make informed decisions
- Continue to investigate and prepare for hearings, notwithstanding ongoing settlement negotiations

Commentary:

FORMAL ALTERNATIVE DISPUTE RESOLUTION: The client must be fully informed about how issues can be resolved. In addition to informal negotiations during case preparation, your jurisdiction may have options for facilitated conferences or formal mediation. The court can

order alternative dispute resolution, including family engagement meetings, mediation, and settlement conferences. MCA 41-3-422(12). Explore these possibilities. Speak with the client about the benefits of these opportunities and, with their consent, actively pursue them. Sometimes, compromise is necessary to achieve the client's overall goals. Always keep the client informed regarding any offers to settle issues and discuss those with the client. Rules 1.4, M.R.P.C. Remember that the client decides whether to accept such offers.

CONTINUE TO PREPARE FOR HEARINGS: Even when negotiations are promising, continue to prepare for hearings. There is no guarantee that settlement discussions will bear fruit. Preparation allows you to negotiate from a position of strength. If you are not prepared for a hearing, you may not be able to get a continuance. Alternatively, if the court grants a continuance, it could further delay the resolution of issues and, thus, the reunification of the family.

44. Ensure the client understands the ramifications of any decisions to stipulate or voluntarily relinquish their rights.

Action:

If there is the possibility of the client making a stipulation or relinquishing their rights, you must be sure the client understands what they are doing and how it might affect them. During your representation:

- Make sure the client understands the consequences of any stipulation or relinquishment of their rights and that any stipulation or relinquishment is voluntary
- Provide appropriate advice to the client about their decisions and make sure they know they will be making the decisions about stipulations and relinquishments
- Investigate and candidly explain the strengths and weaknesses of the case
- Advise the client about the effects any stipulation or relinquishment of rights will have on the DN case or other legal matters

Commentary:

INFORMED AND VOLUNTARY DECISIONS: During a DN case, there will be times when the client will need to decide whether to proceed with a contested hearing, stipulate, or give up their rights. They must know all the facts, risks, and benefits before choosing. You must evaluate options thoroughly and then openly and honestly discuss them with the client, making sure they know the decision is theirs to make. Ultimately, ensure the client makes a voluntary choice and fully understands their actions.

DISCUSS DISPOSITION THROUGHOUT THE CASE: Discuss the ramifications of disposition with the client throughout a DN case. For instance, an early stipulation by a parent that the child is a youth in need of care could significantly limit the realistic options for disposition.

Thus, you cannot wait for a dispositional hearing to begin discussing these matters with the client. Disposition can also be revisited long after the initial dispositional hearing. A child could be placed with a non-offending parent later in a DN case when it becomes apparent they are willing to be the custodial parent and do not pose a safety risk to the child. *See*, In re J.S.L. and J.R.L., 2021 MT 47, ¶ 19, 28-29. Any stipulation or waiver of rights could significantly affect the options for disposition.

THE COLLATERAL IMPACT OF STIPULATIONS AND RELINQUISHMENT OF RIGHTS: Decisions made during a DN case could have an impact on the client in other matters. For instance, you must consider and discuss how the client's actions could affect criminal, domestic relations, or other legal matters. The client needs your knowledge and expertise regarding these potential collateral effects before making a decision.

These choices may also affect matters outside the court process. Adjudication, a finding that the child is a youth in need of care, can affect parents' rights concerning their employment and volunteer activities. During adjudication, the court must determine the nature of the abuse or neglect and the facts that establish the state's intervention. MCA 41-3-437(2). Montana CFSD can disclose information to individuals or entities seeking background information concerning employment-related or volunteer-related screenings of current or prospective employees or volunteers who have or may have unsupervised contact with children through employment or volunteer activities. Disclosure is limited to information that indicates a risk to children posed by the person about whom the information is sought, as determined by CFSD. MCA 41-3-205(3)(o). Thus, stipulating that the child is a youth in need of care could affect the client's employment and volunteer activities.

A stipulation that the child is a youth in need of care could effectively deny a parent the right to an administrative hearing concerning the substantiation of a CFSD report alleging child abuse and neglect. Substantiations are part of an administrative process held outside of a District Court. However, an adjudication of the child as a youth in need of care, in essence, is the equivalent of a substantiated report. *See,* ARM 37.47.615(1)(b). Thus, a stipulation or finding that the child is a youth in need of care would deny a parent with allegations of parental unfitness an administrative hearing based on the child having already been adjudicated as a youth in need of care. This outcome is not as clear when the parent involved is a non-offending parent with no allegations of unfitness concerning them in the petition or affidavit.

It is important to note that an adjudication need not occur for a CFSD report of child abuse or neglect to be substantiated. A substantiation determination may occur through an administrative process without a corresponding District Court action. The Administrative Rules of Montana (ARM) hold the following:

(4) It is the policy of the department (CFSD) that any report of child abuse or neglect that is determined as substantiated may be disclosed to persons or entities requesting background checks on potential employees or volunteers who may have unsupervised access to children.
(5) Substantiated reports may be relied upon by the department (CFSD) to deny a person a foster care license, daycare license, or employment in any field where a person has or may have unsupervised contact with children. ARM 37.47.611(4)-(5).

Thus, a parent may not have a DN case, but still have substantive rights curtailed solely through the administrative process. A substantiated finding could affect a parent's employment, options to volunteer, and ability to obtain a foster care or daycare license.

45. File all appropriate motions, briefs, status reports, and responses.

Action:

You need to file written motions, briefs, status reports, and responses during DN cases to present your arguments and preserve the client's appellate rights. During your representation:

- If appropriate, draft motions and briefs in support of the client's position
- If helpful, file status reports with the court regarding the client's progress
- File timely responses to motions and briefs from other parties
- Use legal research to support motions and briefs
- Make compelling and convincing arguments in support of motions and briefs
- Preserve issues for appeal by creating a complete record

Commentary:

MOTIONS AND BRIEFS: There are times when other parties will not agree with the client's position after attempting to resolve issues outside of court. When this occurs, consider researching and drafting court pleadings on behalf of the client. If an issue is important, written motions and briefs detailing the client's position should be presented to the court and other parties. Set the stage for your next court appearance. If no hearing is upcoming, request a hearing on your pleadings if the issue is time-sensitive.

STATUS REPORTS: Provide the court and all other parties with status reports concerning the client's progress, if helpful. Seek to confirm the veracity of any information you provide to the court. A positive status report will allow the court and others to learn about the work the client has been doing instead of hearing only the state's concerns. Status reports can be particularly important in contentious cases. They can be provided even if the court has not

requested one. They are beneficial when a hearing has not been held in some time or to lay the groundwork for an upcoming hearing.

TIMELY RESPONSES: File timely written responses to pleadings from others in advance of hearings. The court needs to know your client's position before a hearing. Pursuant to the Montana Rules of Civil Procedure, you have 14 days to file a response to motions and briefs from other parties. A failure to respond in a timely manner could result in a ruling against your client. Title 25 Civil Procedure, Chapter 20 Uniform District Court Rules, Part 1 Rules, Rule 2, MCA.

PREPARATION: After thoroughly researching a legal issue, prepare an ethical argument favorable to the client. An attorney cannot assert or controvert an issue unless there is a basis in law and the assertion is not frivolous. Minimally, there must be a good faith argument for extending, modifying, or reversing existing law. Rule 3.1, M.R.P.C. Whether outside of court, in writing, or during a hearing, make your points in a clear, concise, organized, and compelling manner. Address any adverse legal authority in a way that ethically distinguishes your case factually or legally. Rule 3.3, M.R.P.C. Consult with the client before filing a motion and discuss the risks and benefits of such an argument on their behalf.

PRESERVE ISSUES FOR APPEAL: If you make a legal argument, preserve that argument and the issue for appeal in the event your client needs it. Although DN cases are often less formal than other proceedings, make sure any legal argument benefitting the client becomes part of the record. You can do so through oral argument on the record and by preparing pleadings and briefs. Provide the court with legal citations supporting your assertions. If testimony or other evidence is needed to bolster your argument, ensure that the testimony or evidence becomes part of the court's record. If the court does not allow supporting testimony or evidence to be presented, make an offer of proof on the record. The offer of proof should include the content and nature of what that testimony or evidence would have been. Title 26 Evidence, Chapter 10 Montana Rules of Evidence, Article 1, Rule 103, MCA.

46. Be prepared for and actively participate in all court hearings and conferences.

Action:

The minimum standard for handling court cases requires you to appear at all court hearings and conferences, prepared and on time, ready to participate actively. During your representation:

- Appear on time and prepared for all court hearings and conferences
- Actively participate in all hearings and conferences on behalf of the client

- Prepare for the possibility of multiple hearings occurring during the same court appearance
- In advance, inform the parties and court about any plans to contest or not contest court hearings
- Explore the potential applicability of ICWA and MICWA and be prepared to address the implications and requirements if they apply
- Throughout the case, discuss the child's best placement options, quality family time, and services designed to reunify the family
- Be aware of the implications of a parent's status as a non-offending non-custodial parent

Commentary:

COURT APPEARANCES: It is essential for you to attend all hearings and conferences ready to proceed. If you cannot do so for a valid reason, let the client, court, and other parties know as soon as possible. Seek continuances only when necessary. Remember that your preparation, demeanor, professionalism, and interaction with others will have a direct impact on how the client is perceived. Seek to represent the client in a manner that will benefit them.

ACTIVE PARTICIPATION: Actively participate in court hearings. You cannot simply sit back and let others dictate the form and nature of hearings. The client needs your voice to be heard on their behalf. Be sure to offer the client's perspective on the matters at hand.

MULTIPLE HEARINGS DURING A COURT APPEARANCE: It is not uncommon for more than one hearing to be held during the same court appearance. Learn the local practices for hearings in your jurisdiction, and be ready for all potential hearings that may occur during a court appearance. For instance, show cause, adjudication, and disposition are sometimes addressed in some courts during the same appearance. This is particularly true when parents do not contest emergency protective services, the child's status as a youth in need of care, and temporary legal custody. Some jurisdictions treat dispositional hearings as treatment plan hearings and expect the parties to have worked on a treatment plan beforehand.

However, do not simply accept local practice if the process denies the client their rights to a fair proceeding. If separate hearing dates benefit the client, be prepared to argue for that. Have citations available for such arguments.

APPRISE THE PARTIES AND COURT ABOUT ANY PLANS FOR CONTESTED HEARINGS: If you plan to contest a hearing, let the parties and court know well beforehand. Contested hearings are considerably longer and the court will need to set aside time for them. Parties must prepare witnesses and make sure those witnesses are available. Failure to notify

other parties and the court may result in rescheduling the contested hearing on the anticipated date. It could frustrate the court and lead to a less collaborative approach by the state and other parties. Alternatively, if your plans change about contesting a hearing, also let the other parties and court know in advance. Witnesses could be called off and others could use the time for different purposes. Remember to be professional throughout a DN case.

APPLICATION OF ICWA AND MICWA IN COURT HEARINGS: Maintaining up-to-date knowledge of federal ICWA and Montana ICWA (MICWA) is essential. Approximately one-third of children in foster care in Montana are Native American. This is a disproportionately high number when compared with the general population.

ICWA and MICWA apply to child custody proceedings when an Indian child is involved. Child custody proceedings include any action, other than emergency proceedings, that may result in a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. 25 U.S.C. § 1903(1); 25 C.F.R. § 23.2; MCA 41-3-1303(3)(a). ICWA and MICWA define an Indian child as a person under 18 who is a member of a federally recognized Tribe or eligible for membership and the biological child of a member of a federally recognized Tribe. 25 U.S.C. § 1903(4); MCA 41-3-1303(8). Even if the ICWA status of a child has not been confirmed, but there is a reason to know the child may be an Indian child, the child should be treated as an Indian child unless and until proven otherwise. 25 C.F.R. § 23.107; MCA 41-3-1306(4). CFSD must exercise due diligence to determine whether a child is an Indian child. 25 C.F.R. § 23.107(b)(1); MCA 41-3-1306(1). Make sure you speak with the client about any Native American ancestry.

ICWA and MICWA status can significantly affect court hearings. The standards of proof for the state are higher than in non-ICWA cases. 25 U.S.C. § 1912(e) & (f); MCA 41-3-1320. There are specific notice requirements for parents, Indian custodians, and the Tribe for child custody proceedings. 25 U.S.C. § 1912(a), 25 C.F.R. §23.11(a); MCA 41-3-1311. Qualified expert witness (QEW) testimony is required for those proceedings. MCA 41-3-432(1), 25 U.S.C. § 1912(e) & (f); MCA 41-3-1318. Active efforts by the state, as opposed to reasonable efforts, are required to prevent the child's removal and reunify the family. 25 U.S.C. § 1912(d); MCA 41-3-1319. If the child is removed from the home or adoption is contemplated, there are explicit placement preferences for the child. 25 U.S.C. § 1915; MCA 41-3-1329. ICWA standards apply to the entire case, including both parents, even if only one parent is a tribal member.

PLACEMENT, FAMILY TIME, AND SERVICES: Placement of the child, family time, and services for parents and the child significantly affect a family's ability to reunify. The child should be placed in a home where they can thrive. Family time must be regular and high-quality to maintain and build the family's bond. Services and treatment must be accessible and designed to address the reasons why the case was brought before the court. Because case status can change and evolve, address these subjects frequently throughout a DN case at meetings and conferences, during each court hearing, and until the dismissal.

NON-CUSTODIAL NON-OFFENDING PARENTS: If you represent a parent, it is essential to focus on whether there are allegations against the client in the petition and affidavit. A non-custodial non-offending parent is a parent whose actions or inaction did not cause the child to be removed from the home. There will be no allegations against a non-custodial non-offending parent in the petition and affidavit. Montana does not require a finding that each parent is unfit for the state to establish court jurisdiction through adjudication. The court only needs to find that the child is a youth in need of care, meaning the child is being or has been abused, neglected, abandoned, or is at substantial risk of being abused or neglected as a result of an act or omission by a parent or guardian. A child is not adjudicated as a youth in need of care "as to" a specific parent. MCA 41-3-102(7) & (36); In re K.B., 2016 MT 73, ¶ 19.

A parent has a fundamental constitutional right to care for their child if they are willing and fit to do so. Stanley v. Illinois, 406 U.S. 645 (1972); In re E.Y.R., 2019 MT 189, ¶ 27. When a non-custodial non-offending parent is involved, CFSD should determine if there would be an imminent safety risk to the child if placed with that parent. This does not mean that CFSD should conduct a full investigation or that a treatment plan should be issued for that parent. CFSD should conduct child welfare and criminal background checks. They should speak with the non-custodial non-offending parent about their living circumstances and confirm the information provided. If there are concerns about the child's safety after completing the initial investigation, CSFD can pursue a more robust investigation. If concerns persist about imminent safety risks to the child if placed with the non-custodial non-offending parent, CFSD can ask the court for additional investigative authority through MCA 41-4-428(3)(b). In re E.Y.R., 2019 MT 189, ¶ 29.

If an investigation as described above does not reveal an imminent safety risk to the child if placed with a non-custodial non-offending parent, and there is no good cause to deny placement with them, then that parent has a constitutional right to the care and custody of their child. In re B.H., 2020 MT 4, ¶ 43. Montana statutory law explicitly provides dispositions in which the child can be placed with a non-custodial non-offending parent, with the case either dismissed or continuing. MCA 41-3-438(3)(c)&(d). These potential dispositions can affect a DN case throughout since disposition could be revisited long after the initial dispositional hearing. In re J.S.L. and J.R.L., 2021 MT 47, ¶ 19, 28-29. Attorneys have been found to have provided ineffective assistance of counsel when they failed to adequately pursue placement with a non-custodial non-offending parent. In re E.Y.R., 2019 MT 189; In re B.H., 2020 MT 4. Thus, you need to speak with the client about the potential impact of a non-offending non-custodial parent early and throughout a DN case.

47. Cross-examine witnesses offered by the state and other parties.

Action:

In addition to presenting direct evidence on behalf of the client, minimize, counter, and refute the state's case and perhaps that of other parties. During your representation:

- Understand the importance of preparing for cross-examination
- Learn how to impeach witnesses effectively
- Participate in available training for cross-examination
- Prepare to challenge non-testimonial evidence
- Question the opinions presented by the state and other parties

Commentary:

GOALS FOR CROSS-EXAMINATION: Plan for the cross-examination of each witness presented by other parties. What do you hope to accomplish through your cross-examination? Do you need to cross-examine every witness? Generally, cross-examination should be brief and concise, and you need to know when to stop. Do not waste time by reemphasizing testimony detrimental to the client. Take advantage of leading questions to control the witness's testimony. If at all possible, avoid open-ended questions that could damage the client's case.

If you aim to discredit a witness, you could focus on their lack of qualifications or ability to see or perceive a situation. You may bring their lack of objectivity, inconsistencies, and mistakes to light. Are there important points or concessions you could gain through an adverse witness? Are there areas that were avoided or skipped over during the presenting party's direct examination that you could explore to create a more complete picture? Cross-examination has been described as an art form. Speak with and observe talented cross-examiners and enroll in coursework and training on this subject.

NON-TESTIMONIAL EVIDENCE: Long before a hearing, review all available non-testimonial evidence and know how you will deal with it. Has the presenting party laid a sufficient foundation for its admissibility? Is the evidence relevant to a contested issue in a hearing? How can you use the evidence to the client's advantage? If necessary, prepare legal research, motions, and briefs in anticipation of this evidence being presented.

OPINIONS: Be aware of when a witness offers their opinion, as opposed to facts or observations. Should their opinion be admissible? If not, object to the opinion if it harms the client's case. There are strict limitations on what opinions a lay witness can offer. If the witness is an expert, are they qualified to provide an opinion on the subject matter being questioned, or have they strayed beyond their area of expertise? Consider options for questions designed to undermine the credibility of a witness's opinions.

48. Present direct testimony and evidence favorable to the client.

Action:

In addition to cross-examining other parties' witnesses, be prepared to offer direct evidence on behalf of the client. During your representation:

- Learn how to present witness testimony effectively
- If representing a child, consider alternative means of allowing them to be heard
- Participate in available training for the presentation of testimony and other evidence
- Understand how to offer documents, photographs, and other objects into evidence
- Be familiar with the applicable court rules and local customs, including the admissibility of evidence commonly presented at these hearings
- If appropriate, and with the client's informed consent, present favorable evidence and testimony from the client who has been previously prepared for direct and cross-examination
- If available, provide favorable evidence and witness testimony from individuals previously identified and prepared for direct and cross-examination.
- If appropriate, present expert testimony favorable to the client and to rebut adverse expert testimony
- Seek stipulations for the admissibility of evidence
- Consider pursuing a contested hearing in which the parties stipulate to all or a portion of the facts (MCA 25-7-602)

Commentary:

THE CLIENT'S CASE: You cannot simply react to what the state and other parties offer. Be prepared to present the client's case directly. Make sure you have witnesses and evidence to advocate for your client's long- and short-term goals. Anticipate what the state and other parties' objectives for hearings will be and plan accordingly. Be prepared to present evidence and testimony through the client and other witnesses. As a child's attorney, be sure you have considered and designed different ways of letting them be heard other than through direct testimony. Ensure the individuals who will be testifying will be present at court by providing them with accurate dates and times to attend and subpoenas if necessary.

PRESENTING TESTIMONY AND EVIDENCE: You must not only know the Montana Rules of Evidence, but also understand the written and unwritten local rules and procedures. Do not simply accept local practices that could be detrimental to the client. Be prepared to argue and cite authority when local practices may deny the client their rights to a fair process. Each jurisdiction and courtroom has a way of handling DN hearings. How are witnesses

presented and evidence offered? If you are new to a jurisdiction, speak with experienced local counsel and, if possible, observe hearings before handling a case in that jurisdiction. Trial advocacy requires not only experience, but also mentorship and training. Take the time to seek educational opportunities for presenting direct and redirect testimony.

STIPULATION: Evidence may be admissible through stipulations by the parties. Stipulations can be used to avoid unnecessary testimony during a hearing and allow the parties and court to focus on disputed facts and arguments. Stipulations can go as far as stipulating to all of the facts during a hearing and only arguing over the impact of those facts on the legal decision before the court. MCA 25-7-602.

49. Make appropriate evidentiary objections when needed.

Action:

During contested hearings, listen carefully. Object to questions and evidence that should not be allowed if detrimental to the client. During your representation:

- Pay close attention to questions being asked, answers being given, and evidence being presented
- Make objections when appropriate and beneficial to the client

Commentary:

THE COURT RECORD: If objections to other parties' arguments, testimony, or evidence are needed, do so on the record to protect the client's right to a fair hearing and for a potential appeal. While DN hearings are often less formal than other civil or criminal hearings, you must establish a complete and appropriate record. If there is a valid reason to object and it benefits the client's position, do so. The court could rule in your favor and, if not, may give less weight to any evidence elicited. You will also create a proper record should the client need to appeal.

50. Request the opportunity to make an opening statement and closing argument.

Action:

Opening statements and closing arguments are a chance to provide the court with a view of the law and evidence from the client's perspective. During your representation:

- Understand how an opening statement can shape how the judge will begin to consider the hearing
- Use closing arguments to summarize points favorable to the client and question the evidence presented by other parties

- Offer a compelling version of events

Commentary:

CASE ROADMAP: Some jurisdictions may not expect or encourage opening and closing statements. However, opening statements and closing arguments provide an opportunity to give the judge a roadmap of how the law and evidence lead to a ruling favorable to the client. Be prepared with a theme encompassing your theories, strategies, and the client's goals for the case. Lay out facts that are helpful to the client, but also try to address negative points. Tell a compelling story. Take these opportunities to persuade the judge to rule in the client's favor. Remember, during closing, you can argue reasonable inferences based on the evidence presented during the hearing.

Specific Court Hearings and Conferences

51. Pre-Hearing Conferences (PHC)

Action:

Pre-hearing conferences, sometimes called PHCs, are not court hearings. Judges don't participate in pre-hearing conferences. Pre-hearing conferences provide an early opportunity to discuss essential topics regarding the child's placement, family time, services, and conditions of return. During your representation:

- If possible, review the initial petition and affidavit before the conference
- If possible, speak with the client before the pre-hearing conference about placement, family time, and services
- Explain the process of a pre-hearing conference to the client
- If appropriate, propose plans that would allow the child to return home immediately or soon
- Seek to develop an initial plan for placement, family time, and services in collaboration with other parties that could lead to the reunification of the family
- Question CFSD about what it asserts should occur for the child to return home safely and why CFSD makes such an assertion

Commentary:

THE PURPOSE OF PRE-HEARING CONFERENCES: A pre-hearing conference focuses on important issues concerning parents and their children early in a DN case. Pre-hearing conferences are not court hearings and should not resemble them. Instead, they are facilitated discussions before the first court appearance. They often are the parties' first opportunity to discuss critical topics. Per 2023 law, pre-hearing conferences should be available to parents, guardians, and custodians in all DN cases in Montana within five days

of a child's removal. MCA 41-3-307(1). Trained facilitators who are impartial and objective lead the conference by promoting an open and neutral environment. They are employed by the Court Improvement Program, part of Montana's judicial branch, and not by any of the parties, including CFSD. In Missoula and Mineral counties, the Fourth Judicial District, standing masters facilitate conferences. Judges do not attend pre-hearing conferences. The primary goals of pre-hearing conferences are to establish trust between the parties and begin meaningful discussions to plan for the DN case. Pre-hearing conference facilitators provide structure by focusing on the critical topics of:

- placement of the child
- family time
- services to address safety concerns
- conditions of return (MCA 41-3-307(4)

ADVOCACY DURING PRE-HEARING CONFERENCES: During pre-hearing conferences, advocate for the client's position about the child's placement, family time, and services that address the state's safety concerns. Family services should not be excessive or unnecessary. Question the state regarding the conditions of return. If appropriate, argue for the child to return home at the time of the pre-hearing conference. Could conditions be put in place so the child can return home immediately or in the near future? With the client's permission, talk about services they would be willing to begin voluntarily. Challenge the need for supervised family time if that is being sought. Discuss relatives, kin, or family friends who could help with placement or family time. If contested issues remain after a pre-hearing conference, bring those issues to the court's attention during the emergency protective services hearing and subsequent hearings. The client should not have to wait for a dispositional hearing or the signing of a treatment plan before beginning to work toward reunification. Reasonable efforts, or active efforts in an ICWA case, to reunify the family are required even before a DN case is filed. Ensure that CFSD is held to those standards, beginning with the pre-hearing conference and continuing throughout the DN case.

THE SETTING FOR PRE-HEARING CONFERENCES: From 2015-2023, pre-hearing conferences were offered as part of a Court Improvement Program pilot project in certain judicial districts. During that time, pre-hearing conferences were traditionally held in a conference or jury room at a District Court. Although some jurisdictions continue to hold pre-hearing conferences in person at a courthouse, most are now held remotely through video conferences. When a DN case is opened, a pre-hearing conference must be made available for the parents and guardians. MCA 41-3-307(1). In many jurisdictions, the parties, as well as the PHC facilitators and scheduler, have to work collaboratively with each other to coordinate pre-hearing conferences. The style and location of pre-hearing conferences may depend on local practices. Notice for these early conferences and any links needed to participate remotely are provided shortly before a pre-hearing conference. Local practice often dictates how this notification happens since no statutory guidance is provided for scheduling pre-hearing conferences. *See*, MCA 41-3-307. There is a short window for you

to be assigned as counsel for a parent or the child, review the documents, speak with the client, and prepare for the pre-hearing conference and emergency protective services hearing. Thus, it is essential to begin working on a case as soon as possible.

PARTICIPANTS: The parties and their attorneys should attend pre-hearing conferences so the discussions are productive. The parents or guardians, their legal counsel, the county attorney or assistant attorney general, and a child protection specialist from CFSD must be included by law. MCA 41-3-307(2). Foster parents, treatment providers, relatives, support persons, and CASAs or GALs may also be present at the pre-hearing conferences.

PRE-HEARING CONFERENCES ARE AN OPPORTUNITY: Pre-hearing conferences allow you and the client to have early discussions with CFSD and the other parties. You can begin making plans together for the reunification of the family. Take advantage of this opportunity. What needs to be discussed with the judge at the emergency protective services hearing? Can the child return home now or soon with a plan in place for their safety? If not, what needs to happen before the child can go home safely? What are the best placement options for the child? Are there relatives or family friends available to care for the child? What is being done to verify ICWA status? Has paternity been legally established? How have the parents and child been doing since the case was filed? Do they need anything? What can be done to maintain or develop a bond between the child and their family through services and family time?

For more information about pre-hearing conferences, the Montana Court Improvement Program (CIP) has developed eLearning courses for facilitators and stakeholders, including attorneys. Those courses are available and free for anyone. They can be found through an eLearning link on CIP's website at cip.mt.gov.

52. Emergency Protective Services (EPS) Hearings

Action:

An emergency protective services hearing, sometimes called an EPS hearing, is an excellent time to engage with the client and contest the child's removal. During your representation:

- Review the initial petition and affidavit as soon as possible
- If possible, speak with the client before the hearing, specifically about the removal of the child
- Explain the process of an emergency protective services hearing to the client
- If the client wishes, challenge the need for the removal of the child
- Provide the client with their rights concerning this hearing and the DN case generally

Commentary:

THE PURPOSE OF EMERGENCY PROTECTIVE SERVICES HEARINGS: The statutorily stated purpose of an emergency protective services hearing is for the court to determine whether a continued out-of-home placement of the child is needed. MCA 41-3-306(1)(a). These hearings should occur within five business days of the child's removal, allowing parents to contest the child's removal early in a DN case. MCA 41-3-306(1)(a). Emergency protective services hearings should follow a pre-hearing conference. Even with the short preparation time, this is an excellent opportunity to hold the state to its burden of proving the child's removal should continue. Make every effort to challenge the child's removal at this point if the client wishes. Keep in mind the possibility of mounting a more complete challenge at show cause and adjudication hearings.

REQUIRED COURT FINDING UPON REMOVAL: 2023 law requires CFSD to provide specific information in the initial affidavit regarding the risks of allowing the child to remain at home and the potential harm of removal. Make sure the state has met those requirements. The District Court then must determine whether the risk of allowing the child to remain at home substantially outweighs the harm of the removal. MCA 41-3-427(1)(c)(ii). This court decision must be made during emergency protective hearings and any other hearings in which the court determines the appropriateness of the child's removal.

NOTICE OF REMOVAL AND AFFIDAVIT: 2023 law has established requirements for the early disclosure of the notice of removal and initial affidavit. CFSD should provide a copy of the notice of removal to the Office of the State Public Defender (OPD) within 24 hours of removal. MCA 41-3-301(1)(c). The initial affidavit should be provided not only to the county attorney and parents, if possible, but now also to the Office of the State Public Defender within two working days of a child's removal. MCA 41-3-301(6). These materials and your conversations with the client could provide a basis for challenging the child's removal at the emergency protective services hearing.

OTHER POTENTIAL SUBJECTS ADDRESSED AT AN EMERGENCY PROTECTIVE SERVICES HEARING: In addition to the child's removal, other topics may be regularly addressed during emergency protective services hearings. If the court decides an out-of-home placement should continue, the judge must establish guidelines for visitation and review options for kinship placement. MCA 41-306(4). In addition, the court may recommend an early treatment plan if the parents, guardian, or custodian are agreeable. MCA 41-306(5). Other possible topics for discussion during an emergency protective services hearing may include, but are not limited to allegations in the petition and affidavit, emergency protective services, temporary investigative authority, adjudication, disposition, in-home safety planning, and conditions of return.

Before the 2023 Legislature passed the law requiring statewide emergency protective services hearings, the initial court appearances in courts not piloting emergency protective services hearings were show cause hearings. These hearings are held about 20 days after petitions and affidavits are filed with the District Court. Emergency protective services

hearings are designed to expand due process rights in Montana through much earlier initial court appearances. Thus, emergency protective services hearings may be an excellent opportunity for early discussions about other items, including the child's placement, family time, and referrals for services for the client and family. If the client wishes, discuss the possibility of stipulating to the relief being sought by the state. Alternatively, you could focus on the possibility of working towards reunification and dismissal immediately or within a short time.

EARLY CONTACT WITH THE CLIENT: It is crucial to review documents and meet with the client as soon as possible to take advantage of pre-hearing conferences and emergency protective services hearings. Emergency protective services hearings have great potential for increasing parental rights in DN cases if used properly. Find out as much as possible about the child's removal before the hearing. Ensure that parents understand their rights for this hearing and the DN case in general. Obtain the client's contact information and schedule meetings with them well before subsequent hearings.

ICWA AND MICWA: An Indian child, as defined by federal ICWA and Montana ICWA (MICWA), can only be removed from their home on an emergency basis to prevent "imminent physical damage or harm" to the child. 25 C.F.R. § 23.113; MCA 41-3-1325(1). Active efforts are required to prevent the removal of an Indian child from their home. 25 U.S.C. § 1912(d); MCA 41-3-1319. As an emergency proceeding, an emergency protective services hearing is not a child custody proceeding requiring formal notice of the hearing or qualified expert witness testimony. 25 C.F.R. § 23.2; MCA 41-3-306(7)&(8). However, efforts should be made by the state to notify the client and Tribe regarding the emergency protective services hearing.

If the child is an Indian child or could be an Indian child as defined by ICWA and MICWA, there are a few areas you should focus on during an emergency protective services hearing. Were active efforts, as opposed to reasonable efforts, made to prevent the child's removal? Was the removal made to prevent imminent physical damage or harm to the child? What is being done to confirm or deny the child's eligibility for ICWA status?

REASONABLE EFFORTS DEFINED: Reasonable efforts are required to avoid the removal of non-Indian children. However, 2023 Montana law redefined reasonable efforts, effectively increasing what the state must do to avoid removing a child and reunifying the family. MCA 41-3-423(1). Reasonable efforts have been redefined using examples of active efforts from federal ICWA regulations. *See*, 25 C.F.R. § 23.2. Thus, the standard for reasonable efforts is now similar to the active efforts standard required in ICWA cases.

53. Show Cause Hearings

Action:

A show cause hearing allows the client to contest the relief requested by the state in their initial petition and continue challenging the child's removal. During your representation:

- Explain to the client all of the relief being asked for by the state in their petition and the purpose of a show cause hearing
- Review and discuss with the client any court orders that were issued after the filing of the petition and affidavit and the emergency protective services hearing
- Determine whether the client wants a contested show cause hearing and make a timely request for a contested hearing if they do want one
- Expand your review of efforts made by CFSD to avoid the removal of the child
- When able, challenge the material facts and accuracy of the information contained in the initial petition and affidavit
- Speak with the client about the importance of this hearing and its impact on long-term issues, including, but not limited to the child's placement, family time, and services for the client and family
- Advocate for the client's position on the placement of the child
- Challenge unnecessary supervision and restrictions on family time
- Continue to speak with the client about the services they may be willing to engage in voluntarily
- Discuss relatives, kin, or other adults who could be placement options for the child, provide supervision for in-home care by a parent or parents, be a safety resource in the home, or supervise family time

Commentary:

RELIEF REQUESTED BY THE STATE: In a petition filed with the court, the state can ask for the following:

- immediate protection and emergency protective services
- temporary investigative authority
- temporary legal custody
- long-term custody
- termination of the parent-child legal relationship
- appointment of a guardian, and
- a determination that preservation or reunification services need not be provided (MCA 41-3-422(1)(a)

The state can request any of these options or a combination of these options in a petition to the court. Immediate protection, emergency protective services, and temporary investigative authority are the usual focus of a show cause hearing.

ORDERS OF IMMEDIATE PROTECTION AND EMERGENCY PROTECTIVE SERVICES: After the state files a petition and affidavit seeking immediate protection and emergency protective services, the court will review those documents and decide whether to grant that relief. Probable cause is required to establish the need for immediate protection and emergency protective services. Clear and convincing evidence is necessary for those findings in an ICWA case. MCA 41-3-422(5). Courts typically issue such orders within a few days of the filing of petitions and affidavits. Any order that allows for the removal of a child must include a finding that having the child continue to reside with a parent or parents is contrary to the child's welfare, that out-of-home placement is in the child's best interest, and the risk of allowing the child to remain in the home substantially outweighs the harm of removal. MCA 41-3-427(5).

CHALLENGING EMERGENCY PROTECTIVE SERVICES: In addition to emergency protective services hearings, show cause hearings continue to provide an opportunity to contest the child's removal. Meet with the client following an emergency protective services hearing to discuss the option for a contested show cause hearing. The client has a right to contest the show cause hearing because their fundamental liberty rights to parent their child are at stake.

During a show cause hearing, the parents have a right to present testimony. The court may consider "all evidence," including hearsay evidence from the affected child. MCA 41-3-432(3). The standard of proof during a show cause hearing is generally probable cause, with clear and convincing evidence required in ICWA cases. MCA 41-3-422(5).

Advise the client regarding the risks and benefits of a contested show cause hearing. Consider whether a contested hearing will contribute to unnecessary early conflicts in the case. Could the show cause hearing be a good opportunity to introduce the client to the judge and have the judge interact with the client? Ultimately, obey the client's wishes to contest the hearing since it is their right. A contested show cause hearing typically challenges the factual basis for the court's initial granting of emergency protective services.

At a show cause hearing, the judge must decide whether the child can be immediately returned home and, if not, why continued care of the child at home would be contrary to their best interest and welfare. The court must also determine whether CFSD made sufficient efforts to prevent the child's removal or make it possible for the child to return home safely. During a contested show cause hearing, question whether reasonable, or active efforts in an ICWA case, were made to avoid removal. Parent's attorneys should try to counter any evidence presented that the removal was necessary and provide scenarios where the child could return home safely. Remind the court that the threshold for a child's removal and whether a child can return home depends on whether the child would be safe at home. However, also be prepared to argue that returning home is in the child's best interest since the state will likely pursue that issue.

TIMING OF AND REQUEST FOR A CONTESTED SHOW CAUSE HEARING: Show cause hearings should occur within 20 days of the filing of the initial petition and affidavit in a DN case. Difficulties serving the parents and ICWA notification requirements for this child custody proceeding may lead to delays in the timing of a show cause hearing. MCA 41-3-432(1).

To have a contested show cause hearing, the client should request that hearing within 10 days following their service of the petition and affidavit. MCA 41-3-427(d). Consider asking for a contested show cause hearing at the emergency protective services hearing. Request a contested show cause hearing in writing within 10 days of service if the client wants one. Otherwise, you could lose the opportunity. Courts have granted contested show cause hearings when more than 10 days have elapsed, but do not take that risk, if possible. If there is a good reason for the delay in making a request, be sure to request a contested hearing and ensure the reasons for any delay become part of the court record.

TEMPORARY INVESTIGATIVE AUTHORITY: If granted by the court, temporary investigative authority gives Montana CFSD the power to conduct a more in-depth investigation. It does not provide CFSD with temporary legal custody. However, the child may remain out of the home due to emergency protective services otherwise provided by the court.

The judge may grant temporary investigative authority for up to 90 days during a show cause hearing when the state requests it and meets its burden of proof. MCA 41-3-433. The parties may also stipulate to temporary investigative authority. The court does not grant temporary investigative authority based solely on a review of the petition and affidavit. There must be a hearing to grant temporary investigative authority, whether or not that hearing is contested. The standard of proof for temporary investigative authority is generally probable cause, or clear and convincing evidence in ICWA cases. MCA 41-3-422(5) & MCA 41-3-432(2).

Temporary investigative authority may give you and the other parties time to resolve the safety issues that brought the matter before the court. The state may seek to dismiss the case if those issues are resolved during temporary investigative authority. However, the state could later pursue temporary legal custody if the safety issues are not fully addressed.

Consider negotiating for or agreeing to temporary investigative authority with the client's informed consent if the state is willing to work with the client and hold off pursuing temporary legal custody. Be realistic when considering whether there are actual benefits from temporary investigative authority or whether it will unnecessarily delay the case. Are there risks associated with temporary investigative authority? Is it possible that temporary investigative authority could actually strengthen the state's case?

PLACEMENT, FAMILY TIME, SERVICES, AND CONDITIONS OF RETURN: Discussions should have already begun regarding the child's best placement options, appropriate family time, services for the client and family, and conditions for return. There may have been meetings, a pre-hearing conference, and an emergency protective services hearing in which

these matters were discussed. If not, consider setting up a meeting with the parties and their attorneys to talk about these subjects before the show cause hearing. There should be an initial plan for placement, family time, and services if the child has not been returned home by this time. Discussions about these topics should continue throughout the DN case.

ICWA AND MICWA: As a non-emergency foster care placement hearing, a show cause hearing is the first child custody proceeding under federal ICWA and Montana ICWA (MICWA). Therefore, the formal notice and qualified expert witness (QEW) requirements of ICWA and MICWA apply to a show cause hearing. Notice must be provided to the Tribe by registered or certified mail at least 10 days before the show cause hearing. 25 U.S.C. § 1912(a), 25 C.F.R. §23.11(a); MCA 41-3-1311(2)(a)&(3). Montana law generally requires personal service in DN cases for parents, guardians, or other persons or agencies having legal custody. MCA 41-3-422(7); MCA 41-3-1311(2)(b). Since personal service is considered a higher standard of service than mail, parents and Indian custodians should expect to be served personally. They may also be served by registered or certified mail. In addition to the 10-day notice requirement, the parents, Indian custodian, or Tribe can request an additional 20 days to prepare for the show cause hearing. 25 U.S.C. § 1912(a); MCA 41-3-1311(3). To maintain an out-of-home placement, a QEW is required to testify that continued custody of the Indian child by a parent or Indian custodian is likely to result in serious emotional or physical injury to the child. 25 U.S.C. § 1912(e); MCA 41-3-432(1)(b). The standard of proof for the state is clear and convincing evidence in an ICWA case. 25 U.S.C. § 1912(e); MCA 41-3-422(5). Active efforts are required to prevent removal and to reunify the family. 25 U.S.C. § 1912(d); MCA 41-3-1319.

If the child is an Indian child, ensure that notification of the Tribe, parents, and any Indian custodians is completed with verification filed with the court. If appropriate, contest whether active efforts were made to prevent removal and whether active efforts have begun to reunify the family. Also, if appropriate, contest the qualified expert witness (QEW) testimony that continued custody by a parent or Indian custodian would likely result in serious emotional or physical harm to the child. Ensure the standard of clear and convincing evidence is used. If ICWA status has not been verified, be sure Montana CFSD is making diligent efforts to determine whether a child is an Indian child.

54. Adjudication Hearings

Action:

At an adjudication hearing, the client can challenge whether the child is a "youth in need of care," meaning they have been abused, neglected, or abandoned. MCA 41-3-437(2); MCA 41-3-102(36). Child abuse and neglect are defined as abandonment or an actual or substantial risk of physical or psychological harm to a child through the acts or omissions of a parent or guardian. MCA 41-3-102(7). During your representation:

- Explain the definition of youth in need of care to the client and its importance to this hearing and the DN case in general
- If the client wishes, challenge the information, testimony, and evidence presented by the state to prove the child is a youth in need of care
- Question whether CFSD provided services that would have allowed the child to remain at home
- Investigate what reasonable efforts, or active efforts in an ICWA case, CFSD has made to safely reunify the family, including but not limited to looking into in-home care and home-based services
- Learn about actions the client has taken to alleviate the state's safety concerns since the show cause hearing
- Determine whether CFSD has made reasonable efforts, or active efforts in an ICWA case, to evaluate relatives and fictive kin as in-home care providers, placement options, or family time supervisors
- Challenge any unnecessary supervision and restrictions on family time

Commentary:

YOUTH IN NEED OF CARE: An adjudication hearing determines whether the child is a youth in need of care and, therefore, whether the court should have jurisdiction over the DN case. A youth in need of care is a minor who has been abused, neglected, abandoned, or is at substantial risk of abuse or neglect by a parent or guardian. MCA 41-3-102(36); MCA 41-3-102(7). The standard of proof for an adjudication hearing is generally a preponderance of evidence, or clear and convincing evidence in an ICWA case. The Montana Rules of Civil Procedure and Montana Rules of Evidence apply to adjudication hearings. MCA 41-3-437(2). Hearsay evidence from the affected child is admissible only "according to the Montana Rules of Evidence." MCA 41-3-437(3).

The client has the right to an adjudication hearing and can decide whether they want a contested hearing. During a contested adjudication hearing, a parent's attorney must be prepared to counter evidence that the child has been abused, neglected, abandoned, or is at substantial risk of abuse or neglect. If the judge determines the child is a youth in need of care, the court will take jurisdiction and set a dispositional hearing. If the court determines the child is not a youth in need of care, the DN case should be dismissed, and the child returned home.

TIMING OF AN ADJUDICATION HEARING: An adjudication hearing should be held within 90 days of the show cause hearing. An adjudication hearing could occur during the same court appearance as the show cause hearing. MCA 41-3-437(1). A dispositional hearing may also occur during the same court appearance as the adjudication hearing. In that event, the adjudication and dispositional hearings must be bifurcated. MCA 41-3-438(2). Separate hearings are necessary if there is a contested adjudication hearing due to the rules of admissibility for the different hearings. Hearsay evidence is generally allowed in show

cause and disposition hearings. However, the Montana Rules of Evidence apply to the admissibility of hearsay evidence in an adjudication hearing.

NON-OFFENDING PARENTS: A non-offending parent is a parent with no allegations against them in the initial petition. As an attorney representing such a parent, some considerations must be addressed in advance. Are there advantages or disadvantages to the child being found to be a youth in need of care? Could there be ramifications to a non-offending parent due to adjudication? Does the client want to be the child's long- or short-term custodial caregiver? These discussions with a non-offending parent must occur well before the adjudication hearing.

ICWA AND MICWA: Adjudication hearings are a foster placement child custody proceeding requiring testimony from a qualified expert witness (QEW) that continued custody of the Indian child by a parent, parents, or Indian custodian is likely to result in serious emotional or physical injury to the child. 25 U.S.C. § 1912(e); MCA 41-3-432(1)(b). Assuming the parents, Indian custodian, and Tribe were already properly served before the show cause hearing, no additional formal service of process is required by federal ICWA. However, Montana ICWA (MICWA) requires service of any petition other than the initial petition and any petition for termination of parental rights must be served on the Tribe by first class mail or another means designated by the Tribe's agent. MCA 41-3-1311(2)(d). If other petitions are filed in an ICWA case, make sure the Tribe is properly served. As with all foster placement hearings involving an Indian child, Montana CFSD must demonstrate active efforts to avoid removal and reunify the family. 25 U.S.C. § 1912(d); MCA 41-3-1319. The state must prove by clear and convincing evidence that the Indian child is a youth in need of care. 25 U.S.C. § 1912(e); MCA 41-3-422(5).

If appropriate, continue to contest whether active efforts are being made and whether custody of the Indian child by the parents or Indian custodian is likely to result in serious emotional or physical injury. Ensure the standard of clear and convincing evidence is observed when the court determines whether the Indian child is a youth in need of care.

COLLATERAL RAMIFICATIONS OF A FINDING THE CHILD IS A YOUTH IN NEED OF CARE: Adjudication could affect a parent's rights concerning their employment and volunteer activities. It can also impact a parent's ability to be licensed to provide daycare and foster care. Montana CFSD may disclose information to employers and volunteer organizations seeking background information about individuals who have or may have unsupervised contact with children through those entities. This disclosure is limited to information that indicates a risk to children posed by the individual, as determined by CFSD. MCA 41-3-205(3)(o).

55. Dispositional Hearings

Action:

At a dispositional hearing, the court will decide whether the child can live with a parent or parents, have a non-custodial parent evaluated as a placement option, provide temporary legal custody to CFSD or another person, or potentially grant an older child limited emancipation. MCA 41-3-438(3). During your representation:

- Explain the options for disposition to the client
- If the client wishes, challenge the factual basis for any request to continue to place the child outside the home
- Learn what actions the client has taken to alleviate the state's safety concerns since the adjudication hearing
- Explore whether the state has appropriately considered placement with a non-custodial parent
- Investigate what reasonable efforts, or active efforts in an ICWA case, CFSD has made to safely reunify the family since the last hearing

Commentary:

OPTIONS FOR DISPOSITION: If the judge finds the child is a youth in need of care, a dispositional hearing must be held to determine what will happen with the child temporarily. The court has the following options for disposition:

- Permit the child to remain with a custodial parent or guardian subject to the conditions and limitations the court may prescribe;
- Order CFSD to evaluate a non-custodial parent or guardian as a placement option;
- Place the child with a non-custodial parent;
- Allow for limited emancipation of a child who is 16 years or older; or
- Grant temporary legal custody to CFSD, a licensed child-placing agency, or a nonparent relative or other individual found to be qualified to care for the child. (MCA 41-3-438(3)

In most DN cases, the court grants temporary legal custody to CFSD. However, you can take this opportunity to explore other options. Is there a good argument for the child returning home immediately? If a parent has been making progress in resolving safety concerns, emphasize the progress made since the removal and argue for a return home. This can be a good reason to encourage a parent to engage in appropriate services early in a DN case. Has CFSD made its required efforts to alleviate the need for the child's removal? If not, emphasize this to the court and seek greater efforts by CFSD. Is a non-offending non-custodial parent available for the child to live with? If so, speak with the client about this option and the advantages and disadvantages of such a placement. Keep in mind that hearsay testimony is admissible in dispositional hearings. MCA 41-3-438(2)(a).

TEMPORARY LEGAL CUSTODY: Temporary legal custody granted to CFSD provides CFSD with the authority to make legal decisions on behalf of the child during temporary legal custody. It does not mean parental rights are terminated. If temporary legal custody is granted to CFSD, they will have temporary custody of the child for up to six months. MCA 41-3-442(2). The state may seek additional temporary legal custody by asking the court for an extension. There could be multiple extensions, but each can be no longer than six months. MCA 41-3-442(4). Consider seeking shorter periods for extensions of temporary legal custody if the child is living at home.

DISMISSAL: You can pursue an in-home safety plan while the DN case continues. The child can live with a parent or parents while the state has temporary legal custody. CFSD's efforts to reunify the family must begin as soon as they become involved. If the return home goes well, the state may seek dismissal of temporary legal custody and the DN case. State law provides that the court shall dismiss a DN case on the motion of a party, or on its own motion, in any case in which all of the following criteria are met:

(1) A child who has been placed in foster care is reunited with the child's parents and returned home;

(2) The child remains in the home for a minimum of six months with no additional confirmed reports of child abuse or neglect; and

(3) CFSD determines and informs the court that the issues that led to its intervention have been resolved and that no reason exists for further intervention or monitoring. (MCA 41-3-424)

However, the court also retains the discretion to dismiss the DN case at any point the court determines the child is safe at home.

TIMING OF DISPOSITIONAL HEARINGS: A dispositional hearing should be held within 20 days of the adjudication hearing. Sometimes, adjudication and dispositional hearings are held during the same court appearance. When this occurs, the hearings must be bifurcated, so there are two distinct hearings. The dispositional hearings should follow the adjudication hearing. Hearsay evidence is admissible at a dispositional hearing, but is not generally permissible during an adjudication hearing. MCA 41-3-438(2)(a). In an adjudication hearing, hearsay statements from the affected child are only "admissible according to the Montana Rules of Evidence." MCA 41-3-437(3). Thus, if the client is seeking contested hearings, these hearings must be bifurcated so excessive hearsay evidence is not admitted during the adjudication hearing.

EXTENSIONS OF TEMPORARY LEGAL CUSTODY: The court can grant additional periods of temporary legal custody for up to six months if the state makes a timely request. MCA 41-3-442(4)(a). The judge can extend temporary legal custody based on a determination that

dismissing the petition would create a substantial risk of harm to the child or would be detrimental to the child's well-being. MCA 41-3-442(1).

ICWA AND MICWA: If the state is pursuing foster placement of an Indian child, the dispositional hearing is a child custody proceeding in which federal ICWA and Montana ICWA (MICWA) apply. Testimony from a qualified expert witness (QEW) that continued custody by the parents or Indian custodian is likely to result in serious emotional or physical harm is required each time the state seeks temporary legal custody or an extension of temporary legal custody for an Indian child, unless the child has returned to the parents or Indian custodians care. Active efforts continue to apply to the state's removal and reunification efforts. 25 U.S.C. § 1912(d); MCA 41-3-1319. The standard of proof for the state continues to be clear and convincing evidence. 25 U.S.C. § 1912(e); MCA 41-3-422(5).

56. Treatment Plans

Action:

Treatment plans should be designed to address the reasons for state involvement so the child can live with or return to a parent, parents, or guardian. There may be a treatment plan hearing, but a treatment plan hearing is not required by statute. A child may be returned home while a parent is still working on a treatment plan. During your representation:

- Explain the importance of treatment plans to the client
- Review proposed treatment plans with the client as soon as possible for reasonableness, potentially excessive tasks, and to identify potential barriers to success
- Challenge the state concerning any unreasonable provisions and excessive tasks requested in a proposed treatment plan
- If necessary, formally object to inappropriate provisions and excessive tasks
- Consider drafting a proposed treatment plan on behalf of the client or specific changes to the state's proposed treatment plan
- If necessary, request a treatment plan hearing to address your concerns and be prepared to present testimony, evidence, and argument

Commentary:

THE PURPOSE OF TREATMENT PLANS: The goal of a treatment plan should be to resolve the safety concerns that brought the case before the court. Treatment plans should be specifically and narrowly tailored to the needs of the client and their family. A parent may

agree to the terms of a treatment plan by reviewing the plan and signing it. The court can order treatment plans for parents or guardians if the court has found the child is a youth in need of care, or if the parents or guardians admit or stipulate to the facts in the initial petition. MCA 41-3-443(1). A treatment plan must contain the following:

- identification of the problems or conditions that resulted in abuse or neglect of the child
- treatment goals and objectives for each condition or requirement established in the plan
- If the child has been removed from the home, the plan must include conditions or requirements that must be established for the safe return of the child to the family (conditions of return)
- the projected time necessary to complete each of the treatment objectives
- specific treatment objectives that clearly identify the separate roles and responsibilities of all parties (parents or guardians, CFSD, etc.) addressed in the plan, and
- signatures of the parent, parents, or guardian, unless the plan is ordered by the court (MCA 41-3-443(2)

Treatment plans may also contain CFSD's right to enter the child's home to assess compliance with treatment plans, require medical, mental health, or substance abuse evaluations and counseling, and restrict contact with specific individuals due to safety concerns. MCA 41-3-443(3). However, due to 2023 legislation, treatment plans may not include drug testing requirements unless the court finds substance use contributed to the child's removal or contributes to the child remaining out of the home. MCA 41-3-443(4).

CLIENT INVOLVEMENT IN THE DEVELOPMENT OF TREATMENT PLANS: The court may order a treatment plan without the signature of a parent or guardian. However, parents or guardians should have an opportunity to review proposed treatment plans and consider signing or seeking modifications before any court order. CFSD's policy is that a written court-ordered treatment plan should be developed in conjunction with the child's parents. CFSD Policy 303-1, page 2 of 9. Parents should be able to help develop and benefit from the services and treatment offered through a treatment plan. However, do not allow excessive tasks to be added to a treatment plan since a failure to fulfill a treatment plan could lead to the termination of parental rights. Informal discussions and meetings, conferences, and family engagement meetings provide you with an opportunity to actively involve the client in the process of developing a treatment plan. Active involvement in developing a treatment plan will better engage parents.

APPROPRIATE TREATMENT PLANS: Treatment plans should address the state's reasons for involvement while not adding excessive and unnecessary tasks. CFSD must, in good faith, develop and implement a treatment plan designed to preserve the parent-child

relationship and the family unit. In re C.K., 2022 MT 27, ¶ 31. Each task should relate to a specific allegation against a parent or guardian. Treatment plans should be based on those allegations and tied to the basis for jurisdiction. When a parent is disabled, an appropriate treatment plan considers those disabilities and customizes a treatment plan to meet the parent's needs. In re X.M., 2018 MT 264, ¶ 19. Challenge add-on tasks that are not based on facts alleged or are based merely on supposition by the state. Specifically, beware of requests for psychological assessments or evaluations when there are no allegations of mental health issues.

Avoid formula plans that repeat boilerplate language from treatment plans in other cases. Challenge requirements for the client to "follow all recommendations" of service providers since you do not know what those recommendations will be or whether they will be reasonable. Learn who the service providers are in your jurisdiction and seek to establish a professional relationship with them. Are there service providers that can address multiple safety concerns? Services with these providers could lead to more efficient and consistent treatment for the client. Are there certain treatment providers who have repetitive or common issues when providing services to clients? If so, seek referrals to more reliable treatment providers. If the client has already begun or completed a portion of the tasks requested, that should be noted in the treatment plan. Timelines for the completion of services need to be realistic. Avoid timelines that suggest that a task or tasks should have been completed before or immediately after the signing of the plan. You must ensure the treatment plan is something the parent, parents, or guardian can complete so the case can be dismissed in a timely manner.

CONDITIONS OF RETURN: If the child has been removed from their home, the treatment plan must contain conditions of return designed so the child can safely return home. MCA 41-3-443(2)(b). It should be clear to the client through understandable language what needs to occur for the child to return home. If it is unclear, seek to modify the treatment plan so you and the client know what tasks must be completed for reunification.

CONTEST UNREASONABLE AND EXCESSIVE PROPOSED TREATMENT PLANS: Failure to complete a treatment plan is the primary reason parental rights are terminated in Montana. If the state chooses to proceed with a termination of parental rights hearing, partial completion of a treatment plan is not enough to avoid termination. In re D.F., 2007 MT 147, ¶ 30. Completing a treatment plan does not guarantee the reunification of the family. Parental behavior must also be modified successfully so the child can safely return home. MCA 41-3-443(6)(d). A failure to contemporaneously contest the appropriateness of a treatment plan during a DN case generally waives the right to do so on appeal. In re H.R., 2012 MT 290, ¶ 10.

You must review the proposed treatment plan with the client and ensure it appropriately addresses the reasons for state involvement without requiring excessive tasks. If the proposed treatment plan is unreasonable, seek a modification from the state immediately.

If the state refuses to make the proposed changes, promptly object to the proposed treatment plan in writing and request a treatment plan hearing. There is no statutory requirement for a court to automatically schedule treatment plan hearings, so you may need to request treatment plan hearings in some jurisdictions. Consider ensuring there are treatment plan hearings in all DN cases, so the court and all parties are on the same page concerning expectations. Provide specific objections and offer suggestions to the state and court on how the treatment plan could be altered. Consider drafting an alternative proposed treatment plan for the court. Be prepared to present testimony and other evidence regarding an appropriate and reasonable treatment plan at a treatment plan hearing. This process could require you to engage and prepare expert testimony concerning the services a parent may need to address the reasons for CFSD involvement.

TIMING OF TREATMENT PLANS: Discussions between the parties concerning potential treatment plans can begin at any point. When the court grants temporary legal custody, a treatment plan must be ordered within 30 days of the dispositional hearing unless there is a good reason not to order one. MCA 41-3-443(7). For instance, there is no reason to develop a treatment plan for a non-offending parent with no allegations against them. Courts sometimes set treatment plan hearings independently, and some schedule treatment plan hearings regularly. You can request a treatment plan hearing if they are not regularly scheduled in your jurisdiction. Some courts sign the plan without a hearing when no one contests a proposed treatment plan. Thus, if you need to object to a proposed treatment plan, do so promptly.

57. Placement Hearings

Action:

If the parties cannot agree about the child's placement, the court can determine where the child will live. MCA 41-3-440. There may be a placement hearing during a DN case, but a placement hearing is not required by statute. During your representation:

- Pursue the client's long- and short-term goals for the child's placement
- If you cannot reach an agreement with the other parties concerning placement, request a placement hearing
- Argue that the client's placement goals are safe and in the best interest of the child and family

Commentary:

SETTING PLACEMENT HEARINGS: Placement hearings are not explicitly required by statute. However, Montana law provides that the court shall settle any disputes between the parties

regarding the child's placement. MCA 41-3-440. If you cannot reach an agreement with CFSD and the other parties through meetings, conferences, and informal discussions, request a placement hearing.

OPTIONS FOR PLACEMENT: The court can place the child with the custodial parent if it is safe to do so. Placement with a custodial parent is the first option for disposition. MCA 41-3-438(3). If it is unsafe for a child to live with a custodial parent, Montana statutory policy requires that CFSD place the child with a non-custodial parent or extended family when it is in their best interest. MCA 41-3-101(3); MCA 41-3-450. CFSD policy prioritizes placement with non-custodial parents. Child and Family Services Policy Manual 304-1, page 1 of 13. A non-custodial parent has a fundamental constitutional right to care for their child if they are fit to do so. Stanley v. Illinois, 405 U.S. 645(1972), In re E.Y.R., 2019 MT 189, ¶ 27. Thus, if a parent is fit to care for the child, the child should be placed with that parent because they have a constitutional right to care for their child. Placement with a fit parent cannot be denied solely because someone believes the child would be better off elsewhere.

CFSD policy defines placements with relatives to include kin who are not actual relatives. Kinship placements can consist of not only extended family, but also members of the child's or family's Tribe, the child's godparents or stepparents, or persons to whom the child, child's parents, and family ascribe a family relationship and with whom the child has had a significant emotional tie that existed before CFSD's involvement with the child or family. Child and Family Services Policy Manual 402-4, page 1 of 20. Kin who are not actual relatives are called fictive kin. 2023 law defines fictive kin similarly to CFSD policy as a person to whom the child's parents and family ascribe a family relationship and with whom the child has a significant emotional tie that existed before CFSD's involvement. MCA 41-3-450(4). Montana statutory policy requires that whenever the removal of a child is necessary, the child is entitled to maintain ethnic, cultural, and religious heritage whenever appropriate. MCA 41-3-101(1)(g). Thus, relative and kinship placement options are a priority.

If it is difficult to identify or locate a child's relatives, request that CFSD pursue a Seneca Search. A Seneca Search is an online tool that searches various databases and produces a summarized report. Child and Family Services Policy Manual 304-1, pages 3 & 4 of 13. Only after exploring relative and kinship placement options should non-relative or non-kinship placement options be considered.

A child in a DN case cannot be placed in a youth assessment center, youth detention facility, detention center, or other facility intended or used for the confinement of adults or youth accused or convicted of criminal offenses. MCA 41-3-440.

ICWA AND MICWA PLACEMENT PREFERENCES: There are specific placement preferences when an Indian child, as defined by federal ICWA and Montana ICWA (MICWA), is placed in foster care, pre-adoption, or adoption. However, if an Indian child's Tribe has an

established set of placement preferences, those placement preferences should be applied instead of the general placement preferences listed in ICWA and MICWA. 25 U.S.C. § 1915(c); MCA 41-3-1329(4).

The following ICWA and MICWA placement preferences in numerical order apply for foster care and pre-adoption placements of an Indian child.

1. A member or members of the Indian child's extended family,
2. A foster home licensed or approved by the Indian child's Tribe,
3. An Indian foster home approved by the state of Montana, or
4. An Indian institution approved by the Indian child's Tribe. 25 U.S.C. § 1915(b); MCA 41-3-1329(2).

There are slightly different placement preferences when an Indian child is being adopted due to the permanency of adoption. The following ICWA and MICWA placement preferences in numerical order apply for the adoption of an Indian child.

1. A member or members of the Indian child's extended family,
2. Other members of the Indian child's Tribe, or
3. Other Indian families. 25 U.S.C. § 1915(a); MCA 41-3-1329(3).

A court may depart from ICWA and MICWA placement preferences if there is a good cause, but the court is not required to do so. Good cause to depart from placement preferences may be based on the following:

- A request by one or both parents after reviewing all placement options,
- A request from an Indian child of sufficient age and capacity,
- Sibling attachments that can be maintained only through a particular placement,
- Extraordinary physical, mental, or emotional needs for an Indian child, or
- Unavailability of suitable placement after a diligent search. 25 C.F.R. § 23.132(c); MCA 41-3-1329(8)(c).

Good cause to depart from ICWA and MICWA placement preferences may not be based on the following:

- Socio-economic status of one placement option relative to another (25 C.F.R. § 23.132(d); MCA 41-3-1329(8)(d), or
- Solely on ordinary attachment or bonding with a non-preferred placement that flowed from time spent in a non-preferred placement that was made in violation of ICWA. 25 C.F.R. § 23.132(e).

NON-ICWA PLACEMENT PREFERENCES IN MONTANA: 2023 law specifies placement preferences for non-Indian children similar to those established for Indian children under ICWA and MICWA. MCA 41-3-450.

The following placement preferences in numerical order apply for foster care and pre-adoption placements of a non-Indian child in Montana.

1. A member of the child's extended family, including fictive kin,
2. A licensed foster home within the child's community with similar ethnic, cultural, and religious heritage,
3. A licensed foster home with similar ethnic, cultural, and religious heritage, or
4. An institution for children approved by CFSD suitable for the child's needs. MCA 41-3-450(3)(b).

The placement preferences of the child, parents, or guardian must be considered for foster care or preadoptive placement of a non-Indian child. MCA 41-3-450(3)(c).

There are slightly different placement preferences when a non-Indian child is being adopted due to the permanency of adoption. The following placement preferences in numerical order apply for the adoption of a non-Indian child.

1. A member of the child's extended family, including fictive kin,
2. A member of the child's community with similar ethnic, cultural, and religious heritage, or
3. A family with similar ethnic, cultural, and religious heritage. MCA 41-3-450(2).

When appropriate, the placement preferences of the child, parents, or guardian must be considered. MCA 41-3-450(2)(b).

Good cause to depart from non-ICWA placement preferences may be based on the following:

- Parents or a guardian have reviewed the placement preference options and requested a different placement,
- A child of sufficient age and capacity asks for a different placement,
- Sibling attachment can only be maintained through a particular placement,
- The child has extraordinary physical, mental, or emotional needs requiring a particular placement, or
- A suitable placement is not available after a diligent search. MCA 41-3-451(1).

Good cause does not exist to depart from the placement preferences based on the socioeconomic status of one placement relative to another. MCA 41-3-451(2).

58. Permanency Hearings

Action:

At a permanency hearing, the court will evaluate the permanency plan for the child and family. During your representation:

- Explain to the client the potential options for permanency
- If the client wishes, challenge the basis of any permanency plan which moves from reunification with a parent or parents to another option
- Stay in contact with the client throughout the case to determine what actions the client has taken to alleviate the state's safety concerns
- Assist the client in overcoming barriers to completing their treatment plan
- Investigate what CFSD has done to make it possible for the client to complete services and treatment
- Determine what sort of disruption the child's removal has caused the family and child

Commentary:

OPTIONS FOR PERMANENCY PLANS: Permanency hearings allow you to argue for plans that meet your client's long-term goals for the case. They also provide the parties with an opportunity to update the court.

Permanency plan options for the child are:

- reunification with the child's parent or guardian,
- permanent placement with a non-custodial parent or guardian, superseding any existing custody order,
- adoption,
- appointment of a guardian, or
- long-term custody, if the child is in a planned permanent living arrangement and specific court findings are established as required by the relevant statute. (MCA 41-3-445(8)

The parties and the court generally seek to reunify the child with a parent or parents, or a guardian. If that is not possible, they try to find the most permanent and appropriate long-term placement for the child. The judge evaluates whether the permanency plan is the most suitable option. During a permanency hearing, you must be prepared to present testimony and evidence to support the client's position if necessary and to argue for the client's long-term goals.

TIMING OF PERMANENCY HEARINGS: These hearings generally occur yearly and focus on long-term plans for the child and family. Permanency hearings should occur no later than

12 months after the initial court finding that the child has been subjected to abuse or neglect or 12 months after the child's first 60 days of removal from the home, whichever comes first. After the initial permanency hearing, a permanency hearing should occur every 12 months while the case remains open. A permanency hearing is not required if the DN case is dismissed, the child is adopted or placed in a guardianship, has remained at home, or has returned to a parent or guardian. If the court finds in a severe case that reunification efforts are unnecessary, a permanency hearing should be held within 30 days of that court determination. MCA 41-3-445(1).

CONCURRENT PLANS: Concurrent planning is the process of working toward one legal permanency goal, such as reunification, while at the same time establishing an alternative permanency goal. Two simultaneous plans should begin when a child enters the child welfare system. Thus, there must be primary and concurrent permanency plans.

Generally, parents' attorneys will seek a primary plan of reunification with a parent or parents. CFSD must also simultaneously work on a concurrent plan in case a return home does not occur. MCA 41-3-102(9); MCA 41-3-423(6). They cannot wait for reunification plans to fail before engaging in alternative permanency planning. Otherwise, the child's permanency could be delayed significantly. It is crucial for parents' attorneys to explain concurrent planning to the client so they do not misunderstand the process. Without such an explanation, a parent could be confused by the state making plans for the possibility of the child not returning home when the parent is doing well and working hard on their treatment plan.

Concurrent planning is an opportunity to argue for a secondary plan other than adoption. Guardianship may be a better option for the child. It can be as permanent as adoption and subsidized by Montana. Guardianships are not as easily undone as some may allege. Research shows they do not result in worse outcomes for children and can be appropriate for children of all ages, not just older children. *See the concurring opinion*, In re A.B., 2020 MT 64, ¶ 42-59. Due to historical practices of removing a disproportionate number of Indian children from their homes and placing them with non-native adoptive families, guardianship is often the culturally appropriate outcome if an Indian child, as defined by ICWA and MICWA, cannot safely return home.

AGE APPROPRIATE CONSULTATION: During permanency hearings, the court must consult with the child in an age-appropriate manner regarding the proposed permanency plan or transition plan for the child. MCA 41-3-445(4). These consultations are not discretionary. They are a statutory requirement of permanency hearings.

The court could interview the child in chambers to ascertain the child's wishes regarding residence and parental contact, with or without counsel present. However, the court must ensure that a record of the interview is created. In the Matter of: T.N.-S., N.N.-S., E.N.-S., and A.N.-S., 2015 MT 117, ¶ 34 & 38; MCA 40-4-214. Interviews of the child in chambers

may occur throughout a DN case. These interviews allow the child's attorney to provide the child's viewpoint without subjecting them to testimony and cross-examination.

CONTINUE TO BE INVOLVED THROUGHOUT THE CASE: Your jurisdiction may or may not have regularly scheduled status or review hearings following the dispositional hearing. Several months may go by without a hearing. During that time, you must stay on top of the matter. Make sure you maintain regular, consistent, and frequent contact with the client about how they are doing. Have any changes or barriers occurred that could impede or delay reunification? Ensure CFSD is making the required efforts to reunify the family. Find out how the removal has affected the client, parents, child, and family. Request status or review hearings if they are not regularly scheduled in your jurisdiction. Don't let months pass without apprising the court of issues and seeking to resolve those issues before the state considers filing a petition to terminate parental rights.

59. Termination of Parental Rights Hearings

Action:

When the state files a petition for termination of parental rights, you must inform the client of their options and then actively pursue the client's goals. During your representation:

- Negotiate options with the state to avoid or have them withdraw their petition to terminate parental rights
- Discuss options and ramifications for any petition to terminate parental rights, including but not limited to trial, negotiation, settlement, and voluntary relinquishment
- Contest the statutory grounds for termination of parental rights
- Dispute any presumption that termination of parental rights is in the child's best interest (MCA 41-3-604)
- Question whether CFSD made the efforts necessary to safely reunify the family and prevent the need for termination
- Renew earlier challenges to the appropriateness of the treatment plan

Commentary:

REASONS FOR THE STATE NOT TO FILE A PETITION TO TERMINATE PARENTAL RIGHTS: There is a presumption when a child has been in foster care for 15 of the past 22 months that termination of parental rights is in the best interest of the child. MCA 41-3-604(1). However, there are exceptions to this rule. The state does not have to file a petition if:

- The child is being cared for by a relative,

- CFSD has not provided the services considered necessary for the safe return of the child to their home, or
- CFSD has documented a compelling reason, available for court review, for determining that filing a petition to terminate parental rights would not be in the best interests of the child. (MCA 41-3-604(1)

Compelling reasons not to file a petition can include a lack of sufficient grounds to file a petition or that termination of parental rights is not in the child's best interest. MCA 41-3-604(2).

Discuss with the state why filing a termination petition is not a good idea. Point out weaknesses in their case. Are there insufficient grounds to move forward with termination at this point? Is the child placed with a relative? Montana has a high number of relative placements. Have the parents made progress and need a little more time to complete services? Did the parents receive necessary and timely services? Is guardianship a better option? These discussions can continue even if the state files a termination petition, which could give the parents more time to complete services so the child can return home safely.

PETITION TO TERMINATE PARENTAL RIGHTS: A new petition must be filed with the District Court for the state to proceed with a termination of parental rights action. MCA 41-3-422(1)(a)(v) & 607(1). The parents, guardians, and other custodians must be formally served with the new petition. Previous service of earlier petitions is not sufficient. MCA 41-3-422(6)(a).

INFORM THE CLIENT ABOUT THEIR OPTIONS: If the state files for termination of parental rights, the client needs to know their options. Take the time to meet with the client and renew plans for the case. Do they want a contested termination of parental rights trial? Is there an option to negotiate with the state for guardianship? Is mediation possible? Are there things the client can do to eliminate the state's desire to pursue the termination of parental rights? Alternatively, the best option could be a voluntary relinquishment of parental rights. Under those circumstances, conversations about the proposed adoptive placement and perhaps future contact with the child should occur in advance of any relinquishment.

If you represent the child, they may want to contest the termination of parental rights. However, they could want parental rights to be terminated. They may have good reasons for feeling either way. In any case, you must pursue ethical strategies designed to achieve the child's goals for a termination of parental rights hearing.

CHALLENGE THE STATE'S CASE: If the client decides to contest the termination of parental rights hearing, you must challenge the state's case. In most termination of parental rights cases, the state must prove the child was adjudicated a youth in need of care, the parents did not complete an appropriate and timely treatment plan, and the conditions rendering the parent unfit are unlikely to change in a reasonable amount of time. MCA 41-3-609(1).

The standard of proof is higher in a termination of parental rights case than in earlier foster care hearings. In a non-ICWA matter, clear and convincing evidence is required to terminate parental rights, and the state must prove that reasonable efforts were made to reunify the family and that those efforts were unsuccessful. MCA 41-3-609(1). The court gives primary consideration to the conditions and well-being of the child. MCA 41-3-609(3).

If possible, try to prove the treatment plan is inappropriate and excessive. Efforts to challenge an unreasonable treatment plan must begin long before a termination of parental rights hearing. Ideally, you and the client should have been involved with developing a treatment plan early in the DN case. Any challenges to a treatment plan should have been initiated before the court signed the treatment plan.

Argue that termination of parental rights would not be in the child's best interest or serve their well-being. MCA 41-3-604. Seek to demonstrate that a parent is presently fit to care for the child. If a parent continues to have issues, show how those issues will be resolved quickly within a reasonable amount of time.

ICWA AND MICWA: Termination of parental rights hearings are child custody proceedings under federal ICWA and Montana ICWA (MICWA). Qualified expert witness (QEW) testimony that continued custody of the Indian child by the parents or Indian custodian will likely result in serious emotional or physical harm to the child is necessary to terminate these rights. 25 U.S.C. § 1912(f); MCA 41-3-1318(1). Termination of parental rights hearings require additional formal service on parents or Indian custodians and the Tribe. The state cannot rely upon its earlier notice for the foster placement hearings. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111; MCA 41-3-1311.

The standard of proof during an ICWA termination of parental rights hearing is higher than the standard in an ICWA foster care placement hearing and a non-ICWA termination of parental rights hearing. The burden of proof for the state in a termination of parental rights trial involving an Indian child is proof beyond a reasonable doubt. 25 U.S.C. § 1912(f); 25 C.F.R. § 23.121(b); MCA 41-3-1320(2). The state must prove active efforts by the state to prevent removal and reunify the family were unsuccessful before parental rights can be terminated. 25 U.S.C. § 1912(d); MCA 41-3-1319(1).

Be sure the parents, Indian custodian, and Tribe were all properly notified and that the state is held to the higher standard of proof of beyond a reasonable doubt. Continue to challenge the basis of qualified expert witness opinions and active efforts by the state to reunify the family. Reasonable or passive efforts are not enough in an ICWA case. Challenge any assertion that the parents or Indian custodian were unsuccessful in pursuing their treatment plan tasks to reunify the family.

Post-Hearing Actions

60. Prepare proposed findings of fact, conclusions of law, and orders that benefit the client.

Action:

Proposed findings and orders are opportunities to persuade the court that the evidence should lead to a ruling on behalf of the client. During your representation:

- Prepare proposed drafts the court can use to rule favorably for the client
- Be sure to file timely proposed drafts
- Understand how proposed drafts on behalf of the client can frame the case and rulings for the judge
- Review any proposed drafts prepared by other attorneys and seek modification if needed

Commentary:

PREPARE DRAFT FINDINGS AND ORDERS: Preparing proposed findings and orders is an additional means of showing the judge how their ruling could legally and reasonably favor the client's position. By engaging in the preparation of these drafts before a hearing, you can organize your thoughts and plans for the hearing. Lay out the evidence in a manner that logically concludes with a finding on behalf of the client. Address not only clearly favorable evidence, but points that may appear contrary to the client's position. Make an effort to file your proposed drafts before other parties.

OBJECTIONS TO INACCURATE DRAFTS: Review the state's and other parties' proposed findings and orders as soon as you receive them. If you discover their proposed findings and orders contain errors or inaccuracies, discuss them immediately with the submitting party's attorney. Seek agreements on amendments and modifications before the court signs these documents. If needed, formally object to these proposed rulings. For instance, if evidence was not presented on a particular subject, do not let it appear in a finding or court order that the court considered such evidence during a hearing. Seek to avoid these types of mistakes from becoming part of the court's record.

61. Review all findings of fact, conclusions of law, minute entries, and court orders to ensure clarity and accuracy.

Action:

You must review all minute entries, court findings, and orders to ensure they accurately reflect what occurred and are clear enough for the client and others to understand. During your representation:

- Review all minute entries, court findings, and orders to ensure they accurately reflect the events preceding them
- If needed, seek amendments to minute entries, court findings, and orders so they are clear and accurate
- Consider filing proposed modifications or amendments with the court
- If there is an undue delay, request court findings and orders

Commentary:

REVIEW MINUTE ENTRIES AND THE COURT'S SIGNED FINDINGS AND ORDERS: Immediately after receiving minute entries and the court's findings and orders, review those documents for accuracy. Be sure those documents are clearly understandable without contradictions or clerical errors. These documents are the record of the court's critical decisions in the DN case. The record must be accurate, clear, and understandable if the client needs to appeal.

SEEK MODIFICATIONS AND AMENDMENTS: If there are errors or inaccuracies in minute entries or court findings and orders, speak with the other parties' representatives to see whether you can jointly approach the court about modifying the document. If they are unwilling, file pleadings with the court seeking corrections.

REQUEST ORDERS AND RULINGS: If there is an undue delay between a hearing and the court's findings or order, ask the court for those findings and orders. DN cases should be a high priority. Delays in findings and orders may dramatically affect the client's ability to proceed with the case. For instance, a delay in receiving a treatment plan will reduce the amount of time a parent has to fulfill the requirements of that plan before the state is obliged to consider filing for termination of parental rights. A delay with a termination order could significantly delay the completion of an adoption or guardianship for the child. Findings and orders should be finalized quickly.

62. Review the hearings, findings, and court orders with the client.

Action:

Meet with the client following hearings to discuss what occurred. Follow up with the client by reviewing written findings and court orders with them to ensure they understand the outcome and ramifications. During your representation:

- Meet with the client after all hearings to discuss those court appearances to ensure the client understands what happened
- Be sure to meet with the client after the court signs their findings and orders to review them with the client
- Assist the client with their efforts to comply with any court orders

Commentary:

MEET WITH THE CLIENT AFTER HEARINGS: Meet with the client as soon as possible after each hearing. Ensure there are no misunderstandings about what occurred during the hearing and what decisions may have been made. If the client needs to do something based on the decisions made during a hearing, be sure they understand the tasks they need to accomplish and the ramifications if they do not.

REVIEW SIGNED FINDINGS AND COURT ORDERS WITH THE CLIENT: After thoroughly reviewing the court's signed findings and orders, meet with the client to review those documents. Be sure they fully understand the decisions and any implications from the rulings. Again, ensure the client knows what is expected from them based on these documents. Explain the possible outcomes if they do or do not complete any required tasks.

ASSIST THE CLIENT WITH COMPLIANCE: After making sure the client understands their duties from any hearings, findings, and court orders, create plans with the client on how they will complete their tasks. Discuss any barriers they may face and how those issues could be overcome. Offer your perspective and encouragement. If appropriate, approach CFSD and other parties seeking their assistance on behalf of the client. Collaboration with others may help the client overcome obstacles and complete their tasks.

Preparation for Appeal

63. Consider and discuss the possibility of an appeal with the client.

Action:

If parental rights are terminated, or an otherwise adverse final judgment is entered, protect the client's rights to an appeal. Discuss the option for an appeal with the client, providing your considered opinion. During your representation:

- Counsel the client about their rights to an appeal
- Discuss the possibility of an appeal with the client

- Speak with the client about the strengths and weaknesses of appellate issues and any ramifications of an appeal

Commentary:

TIMING OF AN APPEAL: In Montana, a DN case cannot be appealed until there is a final judgment. Title 25 Civil Procedure, Chapter 21 Rules of Appellate Procedure, Part 1 Rules, Rules 4 and 6, MCA. However, a writ to the Montana Supreme Court could be sought during a DN case if there is purely a legal question and either the District Court is proceeding under a mistake of law causing a gross injustice or there is a constitutional issue of statewide importance. Title 25 Civil Procedure, Chapter 21 Rules of Appellate Procedure, Part 1 Rules, Rule 14(3), MCA. The practical impact of these rules is that the vast majority of appeals in DN cases are brought before the Montana Supreme Court when parental rights have been terminated with a judgment entered. There have also been some appeals when a DN case was dismissed with the child placed with one parent, but not the other. *See*, In re D.H., 2022 MT 37; In re J.S.L. and J.R.L., 2021 MT 47.

In child abuse and neglect proceedings under Title 41, Chapter 3, a Notice of Appeal must be filed with the Clerk of the Montana Supreme Court within 30 days of the date of entry of judgment or order from which an appeal is taken to preserve the client's right to appeal. Title 25 Civil Procedure, Chapter 21 Rules of Appellate Procedure, Part 1 Rules, Rule 4 (5)(a)(i), MCA. Thus, it is crucial for an attorney to speak with the client as soon as possible after the termination of parental rights or other adverse entry of final judgment. Due to these time constraints, the possibility of an appeal should be addressed with the client before termination proceedings or any potentially adverse dismissal. Ensure the Notice of Appeal is adequately provided to all party representatives, including the child's attorney and GAL, if they are attorneys.

CONSIDER APPEALABLE ISSUES: Evaluate the case for issues that could be appealed. Which issues have the greatest likelihood of success? Seek to preserve appealable issues throughout a DN case. Create a clear record of the client's contentions through your motions, objections, and arguments. Before and after a termination proceeding or other adverse judgment, reevaluate your actions.

DISCUSS THE POSSIBILITY OF AN APPEAL WITH THE CLIENT: Before a termination of parental rights hearing and as soon as possible following the final hearing involving the client in a DN case, speak with the client about the possibility of an appeal. Ensure the client is fully aware of the short timeline for initiating an appeal. Share with them your thoughts and evaluation of the issues, providing your opinions about the strengths and weaknesses of an appeal.

64. If the client wants to appeal, ensure all necessary steps are taken to preserve the client's rights to an appeal.

Action:

In the event the client wants to pursue an appeal, ensure the client's rights to pursue an appeal are protected. During your representation:

- If the client wishes to pursue an appeal, assist them in the process of obtaining qualified counsel to pursue an appeal as soon as possible
- Learn and understand the Office of the State Public Defender's process for referring the matter to the Appellate Defenders Division and filing a Notice of Appeal and Substitution of Counsel
- Speak with appellate counsel, sharing your evaluation and thoughts concerning an appeal

Commentary:

ASSIST THE CLIENT PURSUING AN APPEAL: If the client wants to pursue an appeal, you have a duty to assist the client in pursuing an appeal. This will likely involve a referral to the Appellate Defender Division of the Office of the State Public Defender. Be sure to learn and understand the process for assisting the client with pursuing an appeal through the Appellate Defenders Division. Typically, you will need to file the Notice of Appeal and Substitution of Counsel, and the Appellate Defender Division will take over the matter when there is an appropriate referral.

SHARE IDEAS WITH APPELLATE COUNSEL: As an attorney during the DN case, you are likely to have insights into the matter that appellate counsel will not be able to gain by simply reviewing the court record and transcripts. Work with appellate counsel to fully develop issues for appeal. Speak with them about when the client may have been denied fair process. Also, discuss when timelines or laws may have been ignored or violated. Share your thoughts about the motions or arguments you may have made and why you did so. Make yourself available for further discussions as the appellate process progresses.