

PROPOSED GUIDELINES FOR APPOINTED COUNSEL FOR PARENTS IN ABUSE AND NEGLECT CASES IN JUVENILE COURT

Submitted by the Supreme Court Commission on Children in the Courts to
the Nebraska Supreme Court
June 15, 2007

A. OBJECTIVES AND SCOPE OF THE STANDARDS

1. The objective of these standards is to ensure high quality legal representation for all parents facing adjudication in the juvenile court for abuse or neglect.
2. These standards apply from the time of appointment and extend to all stages of every case in which the State of Nebraska has filed a petition on the parents for abuse and neglect and counsel has been appointed.
3. Counsel for the accused parents shall receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. Counsel shall have the right to have such services provided by persons independent of the prosecution.
4. Counsel shall have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

B. QUALIFICATIONS OF APPOINTED COUNSEL FOR PARENTS IN ABUSE AND NEGLECT CASES ¹

1. These standards shall be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.
2. The appointing or assigning authority should insure that every attorney representing a parent in an abuse and neglect case:
 - a. has obtained a license or permission to practice law in the State of Nebraska; and
 - b. demonstrates a commitment to providing zealous advocacy and high quality legal representation in the defense of parents; and
 - c. demonstrates knowledge and understanding of the relevant state and federal law, both procedural and substantive, governing abuse and neglect cases; and
 - d. demonstrates understanding of the specialized knowledge regarding parents involved in the child welfare system; and

¹ Determination of attorney qualifications for these appointments is made by the courts. See sec. G.3 of these standards.

- e. demonstrates skill in the management and conduct of negotiations and litigation; and
 - f. demonstrates skill in legal research, analysis, and the drafting of litigation documents; and
 - g. demonstrates skill in oral advocacy; and
 - h. demonstrates skill in the investigation, preparation, and presentation of evidence bearing upon mental status and competence; and
 - i. demonstrates skill in the elements of trial advocacy, such as cross-examination of witnesses, and opening and closing statements.
3. New attorneys who have not been engaged in the practice of law for a sufficient time as to be able to demonstrate the above qualifications may be eligible for appointments if they are engaged in the practice of law with other attorneys, at least one of whom supervises the work of the appointed attorney, if they have completed education or training relevant to the representation of parents in the child welfare system, or if the new attorney has one year of experience.

C. QUALIFICATIONS FOR APPOINTED COUNSEL REPRESENTING PARENTS IN CRIMINAL COURT

See the Standards for Appointed Counsel in Capital, Other Felony, and Misdemeanor Cases

D. COMPENSATION FOR ASSIGNED COUNSEL FOR PARENTS IN ABUSE AND NEGLECT CASES

- 1. In compensating assigned counsel in all cases, there shall be no distinction between rates for services performed in and outside of court, and the rate shall be paid for any time the attorney spends traveling in fulfilling his/her obligations to the client.
- 2. In compensating assigned counsel in all cases, there shall be no flat fees or caps on compensation.
- 3. Assigned counsel shall be compensated for all hours reasonably necessary to provide quality legal representation as documented in fee applications submitted by the attorney.

E. REIMBURSEMENT FOR EXPENSES AND AUTHORIZED EXPENDITURES

- 1. In all cases involving appointed counsel, counsel shall be reimbursed for reasonable expenses necessary to provide quality legal representation

as documented in fee applications submitted by the attorney. These expenses include, but are not limited to: mileage, lodging, meals, long distance telephone calls, photocopying, postage, faxes, depositions, service of process fees, collect telephone calls from the client, interpreters for foreign languages and for the visually or hearing impaired, and non-expert witness fees and expenses.

2. In all cases involving appointed counsel, costs of medical and psychiatric evaluations, expert witness fees, and investigative services shall be paid only if ordered and approved by the court. When seeking such an order the hearing shall be *ex parte*, exempt from the prohibition of Rule 3.5 Nebraska Rules of Professional Conduct, without the aid or participation of a prosecuting attorney, and the order shall be sealed until the conclusion of the case.

3. Expenditures for investigative, expert, or other services for a person who has retained private counsel for trial or appeal when the person is unable to pay for the services and such services are necessary to prepare and present an adequate defense are eligible for reimbursement from the county if the defendant is determined to be indigent.

F. STANDARDS FOR MAINTAINING LISTS OF ELIGIBLE ATTORNEYS REPRESENTING PARENTS, THE APPLICATION PROCESS, AND PROCESS FOR APPOINTMENT

1. Each County or Separate Juvenile Court Judicial District within the State of Nebraska shall adopt, by majority vote of the juvenile or county court judges within the district, a systematic and publicized plan for providing assigned counsel, which shall include a method of distributing assignments of attorneys in abuse and neglect cases. The method used shall include a registration procedure. A copy of the plan required by this standard along with the roster of eligible attorneys shall be sent to the Nebraska Supreme Court.

2. As nearly as possible, assignments shall be made in an orderly way to avoid patronage and its appearance, and to assure fair distribution of assignments among all whose name appear on the roster of eligible attorneys. Ordinarily, assignments should be made in the sequence that the names appear on the roster of eligible attorneys. Where the nature of the allegations or other circumstances require, an attorney may be appointed because of his or her special qualifications to serve in the case, without regard to the established sequence. Departures from assignment by the established sequence shall be made when such departure will protect the parent's constitutional right to the effectiveness of counsel and may be made when efficient administration of assignments so requires.

3. Inclusion in or removal from a roster of qualified attorneys shall be by majority vote of all county or juvenile court judges within the district. The roster of attorneys should be periodically revised and specific criteria for removal should be adopted.
4. The rosters shall be maintained by both the Clerk of the County Court and the Clerk of the Separate Juvenile Court.

H.. STANDARDS RELATING TO CASELOADS AND WORKLOADS

1. Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of high quality representation or lead to the breach of professional obligations.
2. No court shall require defender organizations, assigned counsel, nor contractors for services to accept caseloads that will, in the best professional judgment of the appointed organization or attorney, lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

I. TRAINING

1. All attorneys who accept court appointments to represent parents in abuse and neglect cases shall be encouraged to participate in relevant basic and advanced training as offered. The training may be in the form of video or online training as well as seminars and conferences.
2. The Supreme Court Administrator's office, utilizing Court Improvement funds, should make low cost, accessible training available for court appointed parents' counsel. Basic training and advanced training curricula should be developed and regularly offered at various places in the state.
3. Basic training should include the following topics:
 - a. Overview of the juvenile court system
 - b. Role and duties of counsel for parents
 - c. Relevant state and federal statutes and case law
 - d. Child maltreatment in the context of other factors
 - i. Substance abuse
 - ii. Mental health problems

- iii. Domestic violence
 - e. How to work with HHS, caseworkers, the GAL, etc.
 - f. Central Registry
4. Advanced training topics should include:
- a. How to represent addicted or substance abusing clients (especially methamphetamine users)
 - b. Paternity issues
 - c. Federal Indian Law including ICWA and state law related to Native Americans
 - d. Understanding mental illness
 - e. Legal permanency options and reasonable efforts findings
 - f. Termination of parental rights law
 - g. Appellate advocacy
 - h. Immigration law in child welfare cases
 - i. Dynamics of sexual abuse, physical abuse, and neglect, including:
 - i. Shaken baby syndrome
 - ii. Broken bones
 - iii. Burns
 - iv. Failure to thrive
 - v. Munchausen's Syndrome by Proxy

Comment

The following is adapted from the ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases:

Basic Obligations: The parent's attorney shall:

General:

- 1. Be encouraged to attend relevant jurisdiction-specific training before accepting a court appointment to represent a parent in an abuse or neglect case.**
- 2. Acquire sufficient working knowledge of all relevant federal and state laws, regulations, policies, and rules.**
- 3. Understand and protect the parent's rights to information and decision making while the child is in foster care.**
- 4. Actively represent a parent in the pre-petition phase of a case, if permitted within the jurisdiction.**
- 5. Avoid continuances and work to reduce delays in court proceedings unless there is a strategic benefit for the client.**
- 6. Cooperate and communicate regularly with other professionals in the case.**

Relationship with the Client:

- 7. Advocate for the client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel.**
- 8. Act in accordance with the duty of loyalty owed to the client.**

9. Adhere to all laws and ethical obligations concerning confidentiality.
10. Provide the client with contact information in writing and establish a message system that allows regular attorney-client contact.
11. Meet and communicate regularly with the client well before court proceedings. Counsel the client about all legal matters related to the case, including specific allegations against the client, the case plan, the client's rights in the pending proceeding, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with case plans.
12. Ascertain whether court ordered services have been provided in a timely fashion.
13. Work with the client to develop a case timeline and tickler system.
14. Provide the client with copies of all petitions, court orders, case plans, and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule or court order.
15. Be alert to and avoid potential conflicts of interest that would interfere with the competent representation of the client.
16. Act in a culturally competent manner and with regard to the socioeconomic position of the parent throughout all aspects of representation.
17. Take diligent steps to locate and communicate with a missing parent and decide representation strategies based on that communication.
18. Be aware of the unique issues an incarcerated parent faces.
19. Be aware of the client's mental health status, be prepared to assess whether the parent can assist with the case, and, where appropriate, request the appointment of a guardian ad litem..

Investigation:

20. Conduct a thorough and independent investigation at every stage of the proceeding.
21. Interview the client well before each hearing, in time to use client information for the case investigation.

Informal Discovery:

22. Review the child welfare agency case file.
23. Obtain all necessary documents, including copies of all pleadings and relevant notices filed by other parties, and information from the caseworker and providers.

Formal Discovery:

24. When needed, use formal discovery methods to obtain information.

Court Preparation:

25. Develop a case theory and strategy to follow at hearings and negotiations.
26. Timely file all pleadings, motions, and briefs. Research applicable legal issues and advance legal arguments when appropriate.
27. Engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available.
28. Aggressively advocate for regular visitation in a family-friendly setting.
29. With the client's permission, and when appropriate, engage in settlement negotiations and mediation, family group conferencing, pre-hearing conferences and other alternate dispute resolution processes to resolve the case.
30. Thoroughly prepare the client to testify at the hearing.
31. Identify, locate and prepare all witnesses.
32. Identify, secure, prepare and qualify expert witness when needed. When permissible, interview opposing counsel's experts.

Hearings:

- 33. Attend and prepare for all hearings, including pretrial or prehearing conferences.**
- 34. Prepare and make all appropriate motions and evidentiary objections, including requests for no-reasonable efforts findings.**
- 35. Present and cross-examine witnesses, prepare and present exhibits.**
- 36. Request the opportunity to make opening and closing arguments.**
- 37. Prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision or may otherwise benefit the client.**

Post Hearings/Appeals:

- 38. Review court orders to ensure accuracy and clarity and review with client.**
- 39. Take reasonable steps to ensure the client complies with court orders and to determine whether the case needs to be brought back to court.**
- 40. Consider and discuss the possibility of appeal with the client.**
- 41. If the client decides to appeal, timely and thoroughly file the necessary post-hearing motions and paperwork related to the appeal and closely follow the Rules of Practice and Procedure in the Supreme Court and Court of Appeals.**
- 42. Communicate the results of the appeal and its implications to the client.**