

NOTICE OF COMMENT PERIOD

On May 25, 2017, the Supreme Court Commission on Children in the Courts submitted proposed practice guidelines for attorneys in juvenile court pursuant to 2016 Neb. Laws, L.B. 894, now codified at Neb. Rev. Stat. § 43-272(5) (Reissue 2016). The Nebraska Supreme Court directed that the proposed practice guidelines be published for a public comment period.

The Nebraska Supreme Court invites interested persons to comment on the proposed practice guidelines. Anyone desiring to comment on the proposed practice guidelines should do so in writing to the office of the Clerk of the Supreme Court and Court of Appeals, P.O. Box 98910, Lincoln, Nebraska 68509-8910, or via e-mail to ashley.nolte@nebraska.gov, no later than July 5, 2017.

The full text of the proposed amendments is available below, or a hard copy may be obtained from the office of the Clerk of the Supreme Court and Court of Appeals upon request.

Practice guidelines for attorneys in juvenile court.

(A) General Purpose, Objectives, and Scope.

The purpose of these guidelines, setting forth practice standards for all attorneys who practice in juvenile court, is to ensure high quality legal representation by all attorneys appearing before the juvenile court.

These standards also acknowledge that the goal of juvenile court is to ensure the rights of juveniles; to promote the best interests, safety, permanency, and rehabilitation of children and families; and to provide fair hearings where parties' rights are recognized and enforced, consistent with Neb. Rev. Stat. § 43-246.

These standards are meant to be read in conjunction with the court rules regarding guardian ad litem and are not intended to replace or supersede those rules.

Nothing in these guidelines shall interfere with a person's right to retain counsel of his or her choosing.

(B) Appointment and Qualifications.

(1) Court appointments shall be made in compliance with the transparent process for appointment of counsel required by Neb. Ct. R. §§ 6-1704 and 6-1467. A copy of the current local rules regarding the appointment of counsel in juvenile cases shall be sent to the Nebraska Supreme Court.

(2) A list of attorneys shall be maintained as provided in Neb. Ct. R. § 6-1704. A list of attorneys who may be expected to accept appointments in juvenile cases shall be maintained by the district and separate juvenile courts as provided in Neb. Ct. R. §§ 6-1704 and 6-1467 and a copy of the same shall be sent to the Nebraska Supreme Court annually.

(3) Courts shall appoint attorneys trained under this section when available; provided, however, that if the judge determines that an attorney with the training required herein is unavailable within the county, he or she may appoint an attorney without such training and the attorney must agree to complete the required training within thirty (30) days of the appointment.

(4) In appointing an attorney to a particular case, the court shall consider the complexity of the case and the attorney's training, experience, and ability. When feasible, the duties of appointed counsel should be personal to the appointed lawyer and should not normally be delegated to another person or lawyer. It is the responsibility of the attorney making such arrangements to ensure that the attorney who assumes his or her duties is qualified as provided by these guidelines.

(C) Advancing Goals of Juvenile Court.

All attorneys practicing in juvenile court must work to advance the goals of the juvenile court as set forth in Neb. Rev. Stat. § 43-246. With respect to the unique responsibilities of the individual roles, the following shall be observed:

(1) Defense counsel for juveniles:

(a) Counsel must elicit the client's point of view and encourage full participation.

(b) Counsel must use developmentally appropriate language to explain confidentiality of attorney-client relationship; role of counsel; role of parents, guardians, or custodians; objectives of representation; options, including diversion, detention, and possible pleas; next procedural steps; and, how to contact counsel.

(c) Counsel should make an effort to have meaningful consultation with the client prior to all hearings, including detention hearings.

(d) Counsel should prepare for the detention hearing by conducting as much investigation as possible prior to the hearing to obtain information that can be used to support the client's expressed interests.

(e) Counsel must advise client using developmentally appropriate language.

(f) When appropriate, counsel shall seek records concerning the client's mental health, educational background and/or abilities, documents detailing school achievement and discipline, positive community or extracurricular activities, employment, involvement in the child welfare system, and prior police and court involvement.

(g) Counsel must communicate every plea offer extended to the client.

(h) Counsel must be aware of and exercise due diligence and explain in a developmentally appropriate language the probable short-term and long-term consequences, as well as collateral consequences which could result from a plea.

(i) Counsel must ensure that any acceptance of a plea is made knowingly, intelligently, and voluntarily.

(j) Prior to informing a client's parent, guardian, or custodian of a plea offer, counsel should discuss and disclose the plea offer with the client and get the client's impressions first and the client's permission to disclose the plea offer to the client's parent, guardian, or custodian.

(k) In developmentally appropriate language, counsel must communicate what is expected to happen before, during, and after the adjudicatory hearing.

(l) Counsel shall explain to the client how and when to communicate with counsel during the hearing.

(m) Counsel shall analyze all potential prosecutorial evidence for admissibility problems and be prepared to object to evidence on applicable grounds of inadmissibility and prejudice.

(n) Counsel must communicate in developmentally appropriate language the advantages and disadvantages of the client's right to testify.

(o) Counsel should present evidence of material defenses, which may include capacity based on age and concepts of adolescent development.

(p) Counsel must argue for the least restrictive dispositional plan that is individualized, appropriate, and tailored to the offense and not be overly expansive.

(q) Counsel must be aware of potential out-of-home placement options and should visit programs and facilities to acquire knowledge to enable counsel to advocate for the client.

(r) Counsel must explore dispositional options with the client and should not recommend a disposition to the court without the client's consent.

(s) Counsel must advise the client about standard dispositional conditions the court is likely to impose and be prepared to challenge their imposition if they are unrelated to the offense or client's needs.

(t) When appropriate, counsel should confer with the client's parent, guardian, or custodian to explain the dispositional process and inquire about the willingness of the parent, guardian, or custodian to support the client's proposed disposition alternatives.

(u) Counsel must disclose the terms of the predisposition investigation report with the client, request a copy prior to the hearing, and involve the client in the review of the report.

(v) Counsel must advise the client concerning the disclosure of the client's record and the legal mechanisms available to seal the record.

(w) Counsel must assist in postadjudication legal needs of the client by providing zealous representation in hearings and matters which include, but are not limited to, further disposition hearings, revocation hearings, modification of terms of probation hearings, hearings for the purpose of committing the client to the Youth Rehabilitation and Treatment Center, investigating safety and well-being complaints in institutions, and problems that may require a new placement option.

(2) County attorneys:

(a) Prosecutorial Responsibility--The primary duty of the county attorney is to seek justice while fully and faithfully representing the interests of the State. While the safety and welfare of the community, including the victim, is their primary concern, county attorneys should consider the special circumstances and rehabilitative potential of the juvenile in a delinquency, ungovernable, or Neb. Rev. Stat. § 43-247(3)(c) case, or of a parent, guardian, or custodian in a Neb. Rev. Stat. § 43-247(3)(a) case to the extent they can do so without unduly compromising their primary concern.

(b) Screening Juvenile Cases--The county attorney or a designee should review all cases and first determine whether the facts of the case are legally sufficient. If the facts of the case are not legally sufficient to warrant action, the matter should be terminated or returned to the referral source pending further investigation or receipt of additional reports. The county attorney or designee should review all legally sufficient cases to

decide whether a case will be diverted, formally petitioned with the juvenile court, or transferred to criminal court.

(c) Diversion--The county attorney or his or her designee should be responsible for recommending which cases should be diverted from formal adjudication. No case should be diverted unless the county attorney reasonably believes that he or she could substantiate the criminal, ungovernable, Neb. Rev. Stat. § 43-247(3)(c), or delinquency charge against the juvenile or the allegations in a Neb. Rev. Stat. § 43-247(3)(a) petition against the parent, guardian, or custodian by admissible evidence at a trial. To the extent possible, when determining the conditions of diversion, county attorneys should consider the individual treatment needs of the juvenile in order to tailor services accordingly.

(d) In determining whether to file formally or to offer pretrial diversion or mediation, the county attorney should follow Neb. Rev. Stat. §§ 43-274 and 43-276.

(e) Transfer to Criminal Court--The transfer of cases to criminal court should be reserved for the most serious, violent, and chronic offenders. County attorneys should make transfer decisions on a case-by-case basis and take into account the individual factors set forth in Neb. Rev. Stat. § 43-276.

(f) Plea Agreements--The decision to enter into a plea agreement should be governed by the interest of justice under all of the circumstances and the purposes of the juvenile court as set forth in Neb. Rev. Stat. § 43-246. The county attorney should also consider the juvenile, parent, guardian, or custodian potential for rehabilitation.

(g) Prosecutor's Role in Adjudication--At the adjudicatory hearing, the county attorney should assume the traditional adversarial role of a prosecutor, acting in the best interests of justice and community safety.

(h) Disposition--The county attorney should take an active role to the extent possible in the dispositional hearing and make a recommendation consistent with community safety to the court after reviewing reports prepared by county attorney staff, the human services department, the probation department, and others. In making a recommendation, the county attorney should seek the input of the victim and consider the rehabilitative needs of the juvenile in delinquency, ungovernable, or Neb. Rev. Stat. § 43-247(3)(c) cases or parent, guardian, or custodian in Neb. Rev. Stat. § 43-247(3)(a) cases, provided that they are consistent with community safety and welfare.

(i) Victim Impact--The county attorney should consider the victim's input at all phases of the case. At the dispositional hearing, the county attorney should make the court aware of the impact of the juvenile's conduct on the victim and the community.

(3) Attorneys representing a parent, guardian, or custodian in juvenile court:

(a) The attorney has an ethical obligation to act competently because all parents, guardians, and custodians, despite pending allegations, are entitled to effective assistance of counsel.

(b) The attorney must understand and protect the rights of the parent, guardian, or custodian to information and decisionmaking while the child is in foster care.

(c) The attorney must provide the client with copies of all petitions, court orders, service plans, and other relevant case documents, including reports regarding the child except when expressly prohibited by law, rule, or court order.

(d) The attorney must make diligent steps to locate and communicate with a missing parent, guardian, or custodian and decide representation strategies based on that communication.

(e) The attorney must be aware of the unique issues an incarcerated parent, guardian, or custodian faces and provide competent representation to the incarcerated client, including, but not limited to, the challenges for communication and issues related to self-incrimination.

(f) The attorney must be aware of the client's mental health status and be prepared to assess whether the parent, guardian, or custodian can assist with the case.

(g) The attorney must engage in case planning both in and out of court and advocate for appropriate social services for the parent, guardian, or custodian.

(h) The attorney must aggressively advocate for regular visitation or parenting time in a family-friendly setting.

(i) The attorney must consider and discuss the possibility of appeal with the parent, guardian, or custodian.

(4) Counsel representing agencies:

(a) Agency representation is not required for all juvenile cases in which the agency is an interested party.

(b) Once counsel for the agency has entered an appearance (either by appearing in person or with the filing of an entry of appearance), then agency's counsel is entitled to recognition as an attorney of record in the case and has a responsibility to appear and/or respond, as any other attorney of record, until leave is granted, if desired, to allow agency counsel to withdraw his or her appearance.

(c) The agency's attorney role is to represent the agency and advocate for the agency's position when none of the other parties will be doing so.

(d) The agency's attorney shall have a firm understanding of and perform the agency's role in the particular case and in directing and implementing juvenile court orders, and knowledge of all available and relevant therapeutic, rehabilitative, and accessible resources available in the community and how to obtain needed services that are the responsibility of the agency.

(e) Depending on each case, file motions and request hearings, as appropriate and necessary, when agency personnel directly involved in the case request such involvement.

(D) Duties.

(1) Consultation with client.

(a) The phrase "consultation with client" generally means meeting in person unless prohibited or made impracticable by exceptional circumstances as set forth in this section.

(b) Attorneys should consult with their client as soon as possible after being retained or appointed and as necessary thereafter.

(c) Attorneys should consult with their client when

(i) The client requests;

(ii) The attorney has received notification of any emergency, or other significant event, or change in circumstances; and

(iii) Prior to any hearing at which substantive issues affecting the client's legal interest are anticipated to be addressed by the court.

(iv) Any attorney for a juvenile should make every effort to see the juvenile in his or her placement at least once, with respect to each such placement.

(d) Where an unreasonable geographical distance is involved between the location of the client and his appointed attorney, the appointed attorney should explore the possibility of obtaining from the court an advance determination that the court will arrange for payment or reimbursement of the attorney's reasonable expenses in connection with the travel to meet with the client.

(e) Exceptional circumstances generally include, but are not limited to, those situations where an unreasonable geographical distance is involved between the location of the attorney and his or her client. Where such exceptional circumstances exist, the appointed attorney should attempt consultation with the client by other reasonable means, including, but not limited to, telephonic or other electronic means, assuming that the client is of sufficient capacity to participate in such means of communication and there are no other barriers preventing such communication. Where consultation by telephonic or other electronic means is also not feasible, the appointed attorney should seek direction from the court as to any other acceptable method by which to accomplish consultation with the client.

(2) Participation in court hearings.

(a) County attorneys, attorneys for parents, guardians, custodians, and juveniles shall attend all court hearings unless excused by the court. All other attorneys should attend as requested by their client.

(b) Where an attorney is unable or unavailable to attend a hearing due to reasons such as personal illness, emergency, involvement in another court hearing, or absence from the jurisdiction, such attorney should make proper arrangements for an attorney to attend the hearing. It is the responsibility of the attorney making such arrangements to ensure that the attorney who assumes his or her duties is qualified as provided by these guidelines.

(c) Attorneys should advocate for their clients to be present at all court hearings as appropriate and should take steps where necessary to ensure such attendance on the part of the client.

(3) Duty to provide quality representation.

(a) Any attorney appearing in juvenile court is expected to provide quality representation and advocacy for their clients or the State for the purposes of the county attorney, throughout the entirety of the case.

(b) Any attorney appearing in juvenile court is expected to acquire sufficient working knowledge of the Nebraska Juvenile Code and all relevant federal laws, state laws, regulations, policies, and rules.

(c) Attorneys should not accept workloads or caseloads that, by reason of their excessive size or demands, including, but not limited to, factors such as the number of clients represented at any given time, interfere with or lead to the breach of the professional obligations or standards required to be met by an attorney.

(d) Attorneys should not accept caseloads that are likely to, in the best professional judgment of the attorney, lead to the provision of representation or service that is ineffective to protect and further the interests of their client or the State for the purposes of the county attorney, or likely to lead to the breach of the professional obligations of the attorney.

(e) An attorney representing a juvenile, in addition to the consultation set forth previously in this section, may wish to meet with the parent, guardian, or custodian of the juvenile. The potential for conflict of interest between an accused juvenile and his or parent, guardian, or custodian should be clearly recognized and acknowledged. All parties should be informed that the attorney is counsel for the juvenile and that in the event of disagreement between a parent, guardian, or custodian and the juvenile, the attorney is required to serve exclusively the interests of the juvenile. Further, meetings that include the parent, guardian, or custodian may not provide the protection of privilege to the juvenile's statements to his or her attorney.

(f) Prior to any adjudication hearing, attorneys should investigate all circumstances of the allegations, seek discovery, and if circumstances warrant, request appointment of an investigator or expert witness to aid in the preparation of the case, and for any other order necessary to protect their client's rights or those of the State for the purposes of the county attorney.

(g) Attorneys should avoid the use of last-minute plea agreements that result from inadequate preparation.

(h) Prior to disposition, attorneys should fully explain the possible disposition options to their client or the State for the purposes of the county attorney, and gain their views on these options.

(i) Counsel must inform the client of the right to appeal a final order. The decision to appeal is up to the client in cases where counsel is appointed. When the client declines to appeal, counsel must explain to the client the consequences of the decision to waive an appeal. When the client decides to appeal, counsel must take steps necessary to perfect an appeal. When the client obtains alternate counsel or is assigned by the State for the purposes of the county attorney to conduct the appeal, trial counsel is obligated to fully cooperate with appellate counsel.

(E) Termination of Authority.

(1) The authority of the attorney shall commence upon appointment or entry of appearance by retained counsel and shall continue until such time as the court terminates its jurisdiction.

(2) An attorney may withdraw from representation in any case, where the attorney files a motion to withdraw, and the court, in its discretion, enters a corresponding order granting such withdrawal. Termination of representation may only be sought or granted if it is in compliance with Neb. Ct. R. § 3-501.16.

(3) An appointed attorney may be removed from a case for cause, where the court finds that the attorney's performance is inadequate, that the attorney has failed to discharge duties or to protect the interests of the client for whom the attorney was appointed, or that any other factor or circumstance prevents or circumstance prevents or substantially impairs the attorney's ability to fairly and fully discharge his or her duties.

(4) Standby counsel may be appointed by the court for any attorney privately retained as determined necessary by the court.

(F) Compensation for Court-Appointed Attorneys.

(1) An attorney appointed by a court shall be paid at the hourly rate established by the court.

(2) Generally, no distinction should be made between rates for services performed in and outside of court, and the same rate should be paid for any time the attorney spends traveling in fulfilling his or her professional obligations.

(3) Court-appointed attorneys shall be compensated for all hours reasonably necessary to provide legal representation.

(G) Training.

(1) Any attorney appearing before the juvenile court shall have completed training which qualifies as juvenile-specific training as required by Neb. Ct. R. §§ 6-1468 and 6-1705¹ and as provided by or as approved by the Administrative Office of the Courts Judicial Branch Education Division.

(2) A list of attorneys who have completed the training described shall be maintained by the Administrative Office of the Courts and maintained on its website.

(3) Attorneys appointed by the court shall be made from the list maintained by the Administrative Office of the Courts or as provided in subsection (B)(3) of this section.

¹ The Subcommittee recommends that the guardian ad litem rules be amended to include all attorneys practicing in juvenile court.