

NOTICE OF COMMENT PERIOD

As an outgrowth of a study by the Nebraska Supreme Court and Nebraska Bar Association's Minority and Justice Implementation Committee, the Nebraska Supreme Court is considering minimum standards for court-appointed counsel in criminal and juvenile cases. The Nebraska Supreme Court invites interested persons to comment on the proposed new Uniform Standards for Court-Appointed Counsel, Neb. Ct. R. §§ 3-1101 to 3-1103 and Appendix 1. Anyone desiring to comment on the proposed new rules and appendix should do so in writing to the office of the Clerk of the Supreme Court and Court of Appeals, P.O. Box 98910, Lincoln, NE 68509-8910, or via e-mail to lanet.asmussen@nebraska.gov no later than June 1, 2011.

The full text of the proposed new rules and appendix is available below and at the Nebraska Supreme Court's Web site address, <http://www.supremecourt.ne.gov/rules/index.shtml>, or a hard copy may be obtained from the office of the Clerk of the Supreme Court and Court of Appeals upon request.

CHAPTER 3 ATTORNEYS AND THE PRACTICE OF LAW ARTICLE 11 UNIFORM STANDARDS FOR COURT-APPOINTED COUNSEL

Section.

3-1101. Uniform standards for court-appointed counsel in criminal cases.

3-1102. Uniform standards for court-appointed counsel in juvenile cases.

3-1103. Uniform standards for attorneys appointed as guardians ad litem in juvenile cases.

Appendix 1. Court-appointed attorney certification application.

§ 3-1101. Uniform standards for court-appointed counsel in criminal cases.

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(A) This Rule defines the minimum qualifications for attorneys appointed by the trial court in criminal proceedings as set forth below. This Rule shall be applicable to all cases filed on or after _____, 2011.

(B) Objective. The objective of this Rule is to ensure competent and adequate legal representation to all eligible persons entitled to court-appointed counsel by state or federal constitution or by statute. An attorney is not entitled to appointment for simply meeting the minimum qualifications.

(C) Death penalty cases. In all cases where the State has given notice of its intention to seek the death penalty, the trial court shall appoint a minimum of two attorneys as counsel with the following minimum qualifications:

(1) Shall be a member of the Nebraska Bar or be admitted pro hac vice.

(2) Have at least 5 years of litigation experience in the field of felony criminal law.

(3) Be in compliance with Neb. Ct. R. §§ 3-401.1 to 3-402.3, mandatory continuing legal education for lawyers, with training or educational programs on the representation of a defendant in a criminal case.

(4) Attended and successfully completed within the 2 years preceding the appointment at least 10 hours of training or educational programs on the federal and state aspects of cases in which the death penalty is sought, including, but not limited to, training or education in the following areas:

(a) Relevant state, federal, and international law;

(b) Pleading a motion practice;

(c) Pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;

(d) Jury selection;

(e) Trial preparation and presentation, including the use of experts;

(f) Ethical considerations particular to capital defense representation;

(g) Preservation of the record and of issues for appellate and other postconviction review;

(h) Postconviction litigation in state and federal courts;

(i) Presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.

(5) Have participated in either state or federal court as counsel or co-counsel to final judgment in at least

(a) Three felony jury trials, including one murder jury trial; and

(b) Five direct criminal appeals in felony cases.

(6) Have participated as counsel or co-counsel to final judgment in at least five postconviction motions involving Class IA, IB, IC, ID, or II felonies in either state or federal trial courts, including one postconviction murder motion.

(D) Class IA, IB, IC, ID, or II felonies. In all cases where the State has charged a defendant with a Class IA, IB, IC, ID, or II felony, the trial court shall appoint counsel with the following minimum qualifications:

(1) Shall be a member of the Nebraska Bar or be admitted pro hac vice.

(2) Have at least 5 years of litigation experience in the field of felony criminal law.

(3) Be in compliance with Neb. Ct. R. §§ 3-401.1 to 3-402.3, mandatory continuing legal education for lawyers, with 10 hours of training or educational programs on the representation

of a defendant in a criminal case within the 2 years preceding the appointment.

(4) Have participated in either state or federal court as counsel or co-counsel to final judgment in at least

(a) Three felony jury trials; and

(b) Five direct criminal appeals in felony cases.

(5) Have participated as counsel or co-counsel to final judgment in at least five postconviction motions involving felonies in either state or federal trial courts.

(E) Class III, IIIA, or IV felonies. In all cases where the State has charged a defendant with a Class III, IIIA, or IV felony, the trial court shall appoint counsel with the following minimum qualifications:

(1) Shall be a member of the Nebraska Bar or be admitted pro hac vice.

(2) Have at least 2 years of litigation experience in the field of criminal law.

(3) Be in compliance with Neb. Ct. R. §§ 3-401.1 to 3-402.3, mandatory continuing legal education for lawyers, with 10 hours of training or educational programs on the representation of a defendant in a criminal case within the 2 years preceding the appointment.

(4) Have participated in either state or federal court:

(a) As counsel, one bench trial in which the court received evidence;

(b) As counsel or co-counsel, two jury trials to verdict;

(c) Conducted at least one hearing involving live testimony in a criminal proceeding;

(d) Participated in jury selection in a criminal case in which the jury was sworn;

(e) Filed two direct criminal appeals.

(F) Counsel shall certify to the trial court in such form as the Supreme Court may require that counsel meet the qualifications of this Rule prior to accepting appointment in any case. Such forms shall be maintained by the trial court.

(G) Counsel shall annually file the required certification as provided in § 3-1101(F) by January 1 in order to maintain eligibility to accept appointment by the trial court. The trial court shall only appoint counsel who has a current certification on file with the trial court.

(H) Newly admitted attorneys who have not been engaged in the practice of law for more than 1 year are not eligible for appointment under this Rule.

(I) Waiver. If an attorney cannot meet one or more of the requirements set forth above, the trial court may waive such requirement upon demonstration by the attorney that he or she, by reason of extensive criminal or civil litigation, appellate or postconviction experience, or other exceptional qualifications, is capable of providing effective representation as lead or co-counsel in criminal cases as set forth under this Rule.

(J) Exemptions. Elected public defenders, as provided by Neb. Rev. Stat. § 23-3401, and their assistant public defenders are exempt from the provisions of this Rule.

§ 3-1102. Uniform standards for court-appointed counsel in juvenile cases.

(A) This Rule defines the minimum qualifications for attorneys appointed by the trial court in juvenile proceedings under the Nebraska Juvenile Code. This Rule shall be applicable to all cases filed on or after _____, 2011.

(B) Objective. The objective of this Rule is to ensure competent and adequate legal representation to all eligible persons entitled to court-appointed counsel by state or federal

constitution or by statute. An attorney is not entitled to appointment for simply meeting the minimum qualifications.

(C) Juvenile cases. In all cases under the jurisdiction of a juvenile court, the juvenile court shall appoint counsel with the following minimum qualifications:

(1) Shall be a member of the Nebraska Bar or be admitted pro hac vice.

(2) Have at least 1 year of litigation experience in cases involving juvenile cases under the Nebraska Juvenile Code.

(3) Be knowledgeable with juvenile statutes, case law, standards, and procedures and be familiar with services available to children and parents in the juvenile system.

(4) Be in compliance with Neb. Ct. R. §§ 3-401.1 to 3-402.3, mandatory continuing legal education for lawyers, with 10 hours of training or educational programs on the representation of a juvenile or parent, guardian, or custodian of any juvenile described in the Nebraska Juvenile Code.

(5) Have participated in juvenile court:

(a) As counsel, two preadjudication hearings, two adjudication hearings, and two dispositional and/or postdispositional hearings;

(b) As co-counsel, three preadjudication hearings, three adjudication hearings, and three dispositional and/or postdispositional hearings;

(c) Filed two appeals from a decision of the juvenile court;

(d) Have observed a total of at least 30 hours of juvenile case hearings under the Nebraska Juvenile Code.

(D) Counsel shall certify to the trial court in such form as the Supreme Court may require that counsel meet the qualifications of this Rule prior to appointment in the case. Such forms shall be maintained by the trial court.

(E) Counsel shall annually file a certification by January 1 in order to maintain eligibility to accept appointment by the trial court. The trial court shall only appoint counsel who has a current certification on file with the trial court.

(F) Newly admitted attorneys who have not been engaged in the practice of law for more than 1 year are not eligible for appointment under this section.

(G) Waiver. If an attorney cannot meet one or more of the requirements set forth above, the trial court may waive such requirement upon demonstration by the attorney that her or she, by reason of extensive experience in juvenile case litigation or other exceptional qualifications, is capable of providing effective representation as lead or co-counsel in juvenile cases as set forth under this Rule.

(H) Exemptions. Elected public defenders, as provided by Neb. Rev. Stat. § 23-3401, and their assistant public defenders are exempt from the provisions of this Rule.

§ 3-1103. Uniform standards for attorneys appointed as guardians ad litem in juvenile cases.

(A) This Rule defines the minimum qualifications for attorneys appointed by the trial court as guardians ad litem in juvenile proceedings under the Nebraska Juvenile Code. This Rule shall be applicable to all cases filed on or after _____, 2011.

(B) Objective. The objective of this Rule is to ensure competent and adequate legal representation to all eligible persons entitled to court-appointed counsel by state or federal constitution or by statute. An attorney is not entitled to appointment for simply meeting the minimum qualifications.

(C) In all cases under the jurisdiction of a juvenile court, the juvenile court shall appoint attorneys as guardians ad litem with the following minimum qualifications:

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(1) Shall be a member of the Nebraska Bar or be admitted pro hac vice.

(2) Have at least 1 year of litigation experience in cases involving juvenile cases under the Nebraska Juvenile Code.

(3) Be in compliance with Neb. Ct. R. §§ 3-401.1 to 3-402.3, mandatory continuing legal education for lawyers, with 10 hours of training or educational programs on the representation of a juvenile or parent, guardian, or custodian of any juvenile described in the Nebraska Juvenile Code.

(D) Neb. Ct. R. § 4-401; guardians ad litem; required training; appointments. All attorneys appointed as guardians ad litem pursuant to Neb. Rev. Stat. § 43-247(3)(a) shall abide by the requirements of § 4-401 for training.

(E) All attorneys appointed as guardians ad litem pursuant to this Rule shall be proficient in the following:

(1) Requirements of a guardian ad litem report.

(2) Ethical issues and the role of a guardian ad litem.

(3) Issues which impact or impair the functioning of families, including but not limited to:

(a) Dynamics of child abuse and neglect;

(b) Substance abuse and mental health issues;

(c) Poverty, employment, and housing;

(d) Domestic violence;

(e) Physical, psychological, and psychiatric health issues;

(f) Education;

(g) Visitation and demonstration of parental skills.

(4) Techniques of gathering relevant information and resources:

- (a) Interviewing skills, regarding both children and adults;
 - (b) How to obtain and interpret reports from other professionals and providers;
 - (c) Inquiry into appropriateness and stability of juveniles' placement.
- (5) Psychological aspects of children, including child development issues;
- (6) Permanency planning: family preservation, reunification, adoption, guardianship, another permanent planned living arrangement;
- (a) Appropriate parental-child relationship, bonding, attachment, and effects of separation and loss;
 - (b) Developmental considerations: age appropriate visitation, with particular emphasis on the needs and vulnerabilities of children age 0-5.
- (7) Cultural, ethnic diversity, and gender issues;
- (8) Relevant state and federal statutes and case law;
- (9) Indian Child Welfare Act;
- (10) Legal advocacy, mediation, and negotiation skills.
- (F) Counsel shall certify to the trial court in such form as the Supreme Court may require that counsel meets the qualifications of this Rule prior to appointment in the case. Such forms shall be maintained by the trial court.
- (G) Counsel shall annually file a certification by January 1 in order to maintain eligibility to accept appointment by the trial court. The trial court shall only appoint counsel who has a current certification on file with the trial court.
- (H) Newly admitted attorneys who have not been engaged in the practice of law for more than 1 year are not eligible for appointment under this section.

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(I) Waiver. If an attorney cannot meet one or more of the requirements set forth above, the trial court may waive such requirement upon demonstration by the attorney that he or she, by reason of extensive experience in juvenile case litigation or other exceptional qualifications, is capable of providing effective representation as lead or co-counsel in juvenile cases as set forth under this Rule.

(J) Exemptions. Elected public defenders as provided by Neb. Rev. Stat. § 23-3401, and his or her assistant public defenders, are exempt from the provisions of this Rule.

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Appendix 1

COURT-APPOINTED ATTORNEY CERTIFICATION APPLICATION
State of Nebraska

Neb. Ct. R. §§ 3-1101 to 3-1103 require attorneys who wish to be appointed as counsel in criminal and juvenile cases or as guardians ad litem in juvenile cases to certify that counsel meet the qualifications of §§ 3-1101 to 3-1103 prior to accepting appointment in any case.

Please complete the following application to be considered for appointment as court-appointed counsel under §§ 3-1101 to 3-1103 and file it with the appropriate clerk of the court.

Certification Application (please print legibly or type):

Name: _____ Nebraska Bar # _____
(As it appears on Nebraska Bar I.D. card)

Business Address: _____

City: _____ State: _____ Zip: _____

Business Phone: _____ Fax Number: _____

Email Address: _____

Certification:

_____ I am a member in good standing with the Nebraska Bar or seek to be admitted pro hac vice.

_____ I have read Neb. Ct. R. §§ 3-1101 to 3-1103, Uniform Standards for Court-Appointed Counsel, and I affirm that I meet the minimum qualifications as set forth in the rule for the type of case I am requesting appointment.

I am requesting appointment in the following cases (may select more than one):

_____ Death Penalty/Class I Felony

_____ Class IA, IB, IC, ID, or II Felony

_____ Class III, IIIA, or IV Felony

_____ Juvenile Cases

_____ Guardian ad litem in a juvenile case

Attorney Signature

Date: _____