

**COMMISSION ON LEGAL COUNSEL FOR INDIGENTS
MINIMUM ATTORNEY PERFORMANCE STANDARDS
JUVENILE DEPRIVATION AND
TERMINATION OF PARENTAL RIGHTS MATTERS**

Performance Standard 1.1 – The Objective and Function of the Performance Standards

Performance Standard 1.2 - Interpretation of the Performance Standards

Performance Standard 2.1 - Legal Training and Experience of Counsel

Performance Standard 2.2 - Other Training and Experience of Counsel

Performance Standard 3.1 - Accepting Appointments - Adequate Time and Resources

Performance Standard 3.2 - Accepting Appointments - Conflicts

Performance Standard 4.1 - General Responsibilities - Contact with Client

Performance Standard 4.2 - General Responsibilities - Acting Diligently and Promptly

Performance Standard 4.3 - General Responsibilities - Acting Ethically

**Performance Standard 4.4 - General Responsibilities - Acting in Accordance with
Commission Standards and Policies**

Performance Standard 5.1 - Attorney-Client Relationship - Role of Counsel

Performance Standard 5.2 - Attorney-Client Relationship - Candor Toward Client

Performance Standard 5.3 - Attorney-Client Relationship - Clients with Limited Capacity

Performance Standard 5.4 - Attorney-Client Relationship - Incarcerated Clients

**Performance Standard 6.1 - Initial Case Activities - Meeting with Client/Scheduling Initial
Intake Interview**

Performance Standard 6.2 - Initial Case Activities - Initial Intake Interview

**Performance Standard 6.3 - Initial Case Activities - Release from Detention or Shelter
Care**

Performance Standard 6.4 - Initial Case Activities - Matter Assigned to Referee

Performance Standard 7.1 - Investigation and Preparation - Independent Investigation

Performance Standard 7.2 - Investigation and Preparation - Case Plans

**Performance Standard 7.3 - Investigation and Preparation - Formal and Informal
Discovery Procedures**

**Performance Standard 7.4 - Investigation and Preparation - Duties Regarding Physical
Evidence**

Performance Standard 7.5 - Investigation and Preparation - Theory of the Case

Performance Standard 8.1 - Preliminary Proceedings - Detention/Shelter Care Hearing

Performance Standard 9.1 - Prehearing Motions - The Decision to File Motions

Performance Standard 9.2 - Prehearing Motions - Preparing, Filing, and Arguing

**Performance Standard 9.3 - Prehearing Motions - Continuing Duty to File Prehearing
Motions**

Performance Standard 10.1 - Negotiations - General Duties

Performance Standard 10.2 - Negotiations - Strategies

Performance Standard 11.1 - Adjudication - In General

Performance Standard 11.2 - Adjudication - Preparation

Performance Standard 11.3 - Adjudication - Opening Statement

Performance Standard 11.4 - Adjudication - Confronting the Petitioner's Case

Performance Standard 11.5 - Adjudication - Presenting the Client's Case

Performance Standard 11.6 - Adjudication - Closing Argument

Performance Standard 12.1 - Dispositional Phase - In General

Performance Standard 12.2 - Dispositional Phase - Confronting the Evidence

Performance Standard 12.3 - Dispositional Phase - Presenting the Client's Case

Performance Standard 12.4 - Dispositional Phase - Post-disposition

Performance Standard 13.1 - Permanency Planning - In general

Performance Standard 13.2 - Permanency Planning - Hearings

Performance Standard 14.1 - Termination of Parental Rights - In general

Performance Standard 14.2 - Termination of Parental Rights - Preparation

Performance Standard 14.3 - Termination of Parental Rights - Confronting the Petitioner's Case

Performance Standard 14.4 - Termination of Parental Rights - Presenting the Client's Case

Performance Standard 14.5 - Termination of Parental Rights - Presenting the Client's Case During the Dispositional Phase

Performance Standard 15.1 - Review of Matter by District Court Judge

Performance Standard 15.2 (a) - The Right to an Appeal in Juvenile Deprivation Matters, and From Appealable Orders in TPRs Which Do Not Result in Termination of Parental Rights

Performance Standard 15.2 (b) - The Right to an Appeal From an Order in a TPR Resulting in Termination of Parental Rights

Performance Standard 16.1 - Case Assignment Termination

**COMMISSION ON LEGAL COUNSEL FOR INDIGENTS
MINIMUM ATTORNEY PERFORMANCE STANDARDS
JUVENILE DEPRIVATION AND
TERMINATION OF PARENTAL RIGHTS MATTERS**

Performance Standard 1.1 – The Objective and Function of the Performance Standards

These standards are intended to service several purposes. They are intended to encourage public defenders and other appointed counsel to perform to a high standard of representation and to promote professionalism in the representation of indigent clients in juvenile deprivation and termination of parental rights matters. The Standards are intended to alert counsel to courses of action that may be necessary, advisable, or appropriate, and thereby to assist attorneys in deciding upon the particular actions that must be taken in each case to ensure that the client receives the best representation possible. The Standards are also intended to provide a measure by which the Commission can evaluate the performance of individual attorneys, and to assist the Commission in training and supervising attorneys.

These standards are intended to be used as a guide to professional conduct and performance in juvenile deprivation and termination of parental rights matters. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel; however, they may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 1.1.

Performance Standard 1.2 - Interpretation of the Performance Standards

The language of these Standards is general, implying flexibility of action which is appropriate to the situation. Use of judgment in deciding upon a particular course of action is reflected by the phrases “should consider” and “where appropriate.” In those instances where a particular action is absolutely essential to providing quality representation, the Standards use the words “should” or “shall.” Even where the Standards use the words “should” or “shall,” in certain situations the lawyer’s best informed professional judgment and discretion may indicate otherwise.

There is an unending variety of circumstances presented by juvenile cases and that this variation in combination with changes in law and procedure requires that attorneys approach each new case with a fresh outlook. Therefore, though the Standards are intended to be comprehensive, they are not exhaustive. Depending upon the type of case and the particular jurisdiction, there may well be additional actions that an attorney should take or should consider taking in order to provide zealous and effective representation.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 1.2.

Performance Standard 2.1 - Legal Training and Experience of Counsel

An attorney appointed by the Commission to represent clients in juvenile deprivation and termination of parental rights matters, whether as a contract counsel or as a public defender, shall be licensed to practice law in the State of North Dakota.

An attorney who undertakes representation of clients as an appointed counsel in juvenile deprivation and termination of parental rights matters should have sufficient legal training and experience to provide effective representation. In order to provide quality representation, an attorney should be familiar with the substantive criminal and juvenile law, and with the Juvenile Court Act and case law interpreting it. Counsel should also be familiar with relevant federal law. Appointed counsel has a continuing obligation to stay abreast of changes and developments in the law, to meet the necessary requirements to maintain their license, and to meet any requirements set by Commission for training.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 2.1.

See also: 42 U.S.C. §§ 620-679 (Adoption and Safe Families Act); 45 C.F.R. Parts 1355-1357 (ASFA Regulations); 25 U.S.C. §§ 1901-1963 (Indian Child Welfare Act); 25 C.F.R. Part 23 (ICWA Regulations); 44 Fed. Reg. 67, 584 (November 26, 1979) (Guidelines for State Courts: Indian Child Custody Proceedings).

Performance Standard 2.2 - Other Training and Experience of Counsel

In addition to legal training and experience, an attorney who undertakes representation of clients as an appointed counsel in juvenile deprivation and termination of parental rights matters should have sufficient experience, training and skill in areas such as communication techniques with children and adolescents to provide quality representation. Counsel should develop a basic knowledge of child development and adolescent brain development; cultural and ethnic differences as they relate to child rearing; alcohol and drug abuse; domestic violence; sexual, physical, and emotional abuse; and how children may be affected by abuse, neglect, and dependency. Counsel should be familiar with available programs and services that can aid children, parents, and families.

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 2.2 (Dec. 14, 2007); NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 1.3 (Dec. 14, 2007).

Performance Standard 3.1 - Accepting Appointments - Adequate Time and Resources

Before agreeing to act as counsel or accepting an appointment, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer effective representation to a defendant in a particular matter. If it later appears that counsel is unable to offer effective representation in the case, counsel should move to withdraw.

If counsel's caseload is so large that counsel is unable to satisfactorily meet these performance standards, counsel shall inform the Supervising or Lead Attorney of counsel's public defender office (if counsel is a public defender) or the Director of the Commission on Legal Counsel for Indigents (if counsel is an attorney otherwise assigned to cases by the Commission), and the court or courts before whom counsel's cases are pending. If a Supervising or Lead Attorney of a public defender office determines that the caseloads for his or her entire office are so large that counsel is unable to satisfactorily meet these performance standards, the Supervising or Lead Attorney shall inform the court or courts before whom cases are pending and the Director.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 3.1.

Also considered: ABA Formal Ethics Opinion 06-441 (May 13, 2006).

Performance Standard 3.2 - Accepting Appointments - Conflicts

Counsel should be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client.

Counsel should identify those potential clients for whom representation would constitute an ethical conflict as soon as possible. When a case assignment is made, the attorney should conduct an initial intake interview/consultation with the client where the attorney first inquires as to whether the client knows of any other persons who are, or who may become clients of the attorney. The attorney should then (assuming that no conflicts have as yet been identified) ask about the specifics of the incidents, which may lead to the identification of other conflicts. If a conflict is identified, the interview should end at that point.

If there is a conflict, the attorney should submit a conflict form to the lead attorney for that judicial district, or to the Commission, if there is not a lead attorney, and a different attorney will be assigned. If the attorney has made an appearance before the court, the attorney should also move the court to withdraw, and/or submit a substitution of counsel, whichever is the court's preference.

If a conflict develops later during the course of representation, counsel has a duty to notify the client and move to withdraw from the matter.

Commentary: The majority of the language of this standard was previously adopted by the Commission at its October 27, 2006 meeting as "Policy Regarding Conflicts."

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 3.2.

See also: "Policy on Assignment of Conflict Cases by Public Defender Offices," adopted by the Commission at its October 27, 2006 meeting; "Policy on Withdrawal," adopted by the Commission at its March 16, 2007 meeting.

Form: "Conflict Reassignment"

Performance Standard 4.1 - General Responsibilities - Contact with Client

Counsel should take all reasonable steps to maintain adequate and appropriate contact with a client throughout the proceedings. When the client is subject to a court order or case plan, counsel should attempt to communicate regularly with the client to assess whether the client is performing as he or she should pursuant to the order or plan. If counsel loses contact with a client, counsel should make a reasonable effort to reestablish contact, which may entail seeking information from family members, social services, law enforcement, probation officer and other sources.

Counsel has the obligation to keep the client informed of the progress of the case in a timely manner, where it is possible to do so. Counsel should take all reasonable steps to ensure that the client is notified in advance of all court dates. Counsel, when representing the parent in the matter, should provide the client with copies of all petitions, court orders, case plans, and other important documents in the case.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 4.1; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 1.4 (Dec. 14, 2007).

Performance Standard 4.2 - General Responsibilities - Acting Diligently and Promptly

Counsel should act with reasonable diligence and promptness in representing a client.

Counsel should avoid unnecessary delay in the disposition of cases. Counsel should not misrepresent facts or otherwise mislead the court in order to obtain a continuance. Because children are often displaced during these proceedings and because of the deadlines imposed under state and federal law, counsel should attempt to avoid continuances by any party for frivolous reasons. Counsel should object to continuance motions by other parties where necessary and appropriate.

Counsel should be punctual in attendance at court and in the submission of all motions, briefs and other papers. Counsel should emphasize to the client and all witnesses the importance of punctuality in attendance in court.

Counsel should not carry a workload, that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of the matter, or may lead to the breach of professional obligations. Counsel should not accept an appointment in one case for the purpose of delaying trial in another case.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 4.1; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 1.4 (Dec. 14, 2007).

See also: NDCC § 27-20-22 (Summons) (timing of hearing).

Performance Standard 4.3 - General Responsibilities - Acting Ethically

All attorneys are expected to act ethically at all times. As with all members of the bar, a public defender or other counsel appointed by the Commission is an officer of the court. An attorney should not intentionally misrepresent matters of fact or law to the court. Counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to counsel to be directly adverse to the position of the client and not disclosed by opposing counsel.

Counsel should adhere to the North Dakota Rules of Professional Conduct and other guidelines of professional conduct stated in statutes, rules, court decisions, codes or canons. Counsel has no duty to execute any directive of a client which does not comport with law or such standards.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 4.2.

See also: Comment to N.D.R. Prof. Conduct 6.2 (“[a]n appointed lawyer has the same obligations to the client as retained counsel . . .”).

Performance Standard 4.4 - General Responsibilities - Acting in Accordance with Commission Standards and Policies

Public defenders and other counsel appointed by the Commission should abide by the standards and policies adopted by the Commission on Legal Counsel for Indigents.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 4.3.

Performance Standard 5.1 - Attorney-Client Relationship - Role of Counsel

The primary role of a public defender or other counsel appointed by the Commission is to provide zealous and quality representation for their clients. Counsel should seek the lawful objectives of the client and should not substitute the attorney's judgment for that of the client in those case decisions that are the responsibility of the client.

Counsel should advise the client regarding the probable success and consequences of adopting any posture in the proceedings and give the client the information necessary to make an informed decision. Counsel should consult with the client regarding the assertion or waiver of any right or position of the client.

Counsel should consult with the client as to the strategy and means by which the client's objectives are to be pursued and exercise his or her professional judgment concerning technical and legal tactical issues involved in the representation.

Counsel has an obligation to abide by ethical norms, to act in accordance with the rules of the Court, and pursuant to the Standards and Policies of the Commission.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 5.1.

Performance Standard 5.2 - Attorney-Client Relationship - Candor Toward Client

Counsel should advise the client with complete candor concerning all aspects of the of the case, including a candid estimate of the probable outcome.

Counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence over the client's decision as to the client's decisions.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 5.2.

Performance Standard 5.3 - Attorney-Client Relationship - Clients with Limited Capacity

Counsel owes the same duties of loyalty and confidentiality to a client who is of limited capacity as it owed to a client who is not; counsel owes the same duties of loyalty and confidentiality to a juvenile client as is owed to an adult. When a client's capacity to make adequately considered decisions in connection with the representation is limited, counsel should act in accordance with Rule 1.14 of the North Dakota Rules of Professional Conduct.

Counsel should be familiar with the procedures for requesting appointment of a guardian ad litem for a juvenile. Counsel should consider requesting appointment of a guardian ad litem in the appropriate case.

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 1.5 (Dec. 14, 2007); NC Commission on Indigent Defense Services Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 2.1 (Dec. 14, 2007).

See also: NDCC § 27-20-48 (Guardian ad litem); N.D.R. Prof. Conduct 1.14 (client under a disability).

Performance Standard 5.4 - Attorney-Client Relationship - Incarcerated Clients

Counsel should understand that an incarcerated client can actively participate in his or her case. Counsel should investigate whether the client is being held in a facility that offers parenting, anger management, or other classes that may be required under the client's case plan or court order. If necessary, counsel should make arrangements with the prison or jail for a contact visit between a service provider and the incarcerated client. Counsel should consider attempting to involve the client's prison or jail social worker or case manager in the process, in order to identify relevant services that might be available within the prison or jail.

Unless otherwise directed by the client, counsel should take steps to ensure that a transport order is issued to have the client brought to court for all hearings. If such is not possible, counsel should consider alternative means of communication between the court and the client, including a telephone conference call during the hearing, or a deposition of the client before the court date.

Unless inappropriate under the circumstances of the case, counsel should encourage an incarcerated client to write letters, send small gifts or cards to the child, pay small amounts of child support if possible, and otherwise attempt to maintain contact with the child despite the incarceration.

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 1.6 (Dec. 14, 2007).

Performance Standard 6.1 - Initial Case Activities - Meeting with Client/Scheduling Initial Intake Interview

If counsel has been appointed to represent a child who is in detention, counsel or a representative of counsel should meet with the child within 24 hours after assignment to the case. Counsel or a representative of counsel should contact any other client within 72 hours after assignment to the case, in order to schedule an initial interview with the client.

Commentary: It is understood that in some situations, counsel or a representative of counsel will not be able to meet with a child in detention within 24 hours after assignment. Under such circumstances, counsel or counsel's representative should attempt to contact the child by telephone to inform the child of the representation, to answer any immediate questions, and to inform the client of when counsel or counsel's representative will meet with the client. If contact cannot be made by telephone, the client should be sent the information by mail.

The initial contact with a client who is not in detention may be by telephone or mail.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 6.1.

Performance Standard 6.2 - Initial Case Activities - Initial Intake Interview

A. Preparation:

Prior to conducting the initial interview the attorney should, where possible, obtain and review copies of any relevant documents which are available, including a copy of the petition, and determine the grounds for alleging deprivation or for seeking termination of parental rights.

B. In addition, where the child is detained or in shelter care, the attorney should:

1. be familiar with the legal criteria for placement of a juvenile in detention or shelter care, and for seeking release therefrom; and
2. be familiar with the different types of prehearing release conditions the court may set and whether private or public agencies are available to act as a custodian for the child's release.

C. Conducting the Interview:

1. The purpose of the initial interview is to acquire information from the client concerning the case, and to provide the client with information concerning the case. If the parent is the client, counsel should also explain the client's options, and to determine the client's expressed preferences.
2. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome. Counsel for a juvenile client should communicate with the child in a matter that will be effective, considering the child's maturity, intellectual ability, educational level, special education needs, and physical, mental and emotional health. If possible, counsel should obtain from the client all release forms necessary to obtain client's medical, psychological, education, military, prison and other records as may be pertinent.
3. Information that should be acquired may include, but is not limited to:

- a) general information about the client, including his or her family and social support, and house, transportation, financial, employment and immigration status (if applicable);
- b) general information about any physical or mental health problems, or alcohol or substance abuse, which may have contributed to the allegations and/or impair the client's ability to work toward reunification;
- c) information about the client's criminal or juvenile court history, if any, and any prior involvement with the Department of Human Services.
- d) the existence of any companion criminal charges against the parent arising out of the same facts or circumstances alleged in the juvenile petition, including the names of any appointed or retained criminal defense counsel;
- e) the client's version of the facts and circumstances surrounding the allegations and the client's view of any possible defenses;
- f) information about any potential relative placements, including contact information and relevant background information, such as any substance abuse or criminal history;
- g) information about the current visitation schedule between the parent and child if the child is not in the parental home, and the client's wishes regarding visitation;
- h) information about services provided prior to removal of the child from the parental home, if any, as well as services that might have avoided the need for removal if they had been provided;
- i) any evidence that should be preserved;
- j) any photographs relevant to the defense of the allegations that may exist or should be taken as soon as possible; and

- k) the names and locating information of any witnesses, and the client's consent to contact those persons.
4. Information to be provided to the client, may include, but is not limited to:
- a) an explanation of the scope of representation which will be provided;
 - b) an overview of the juvenile court process and actors, the possible time-line of the case, and an explanation that the client's level of effort and cooperation will be taken into account by the court;
 - c) an explanation of the attorney-client privilege and possibly instructions not to talk to anyone about the facts of the case without first consulting with the attorney. Counsel should explain to the client the attorney's position concerning the client discussing the case with social workers, the GAL, any foster parents, and other persons outside of counsel's presence, and should ask to be informed of all such contacts. Counsel's position regarding contact with other parties should take into account the seriousness of the allegations, whether the client appears capable of determining if contact will be beneficial or detrimental to his or her interests, the need for social workers to have access to the client without unnecessarily delaying reunification efforts, and counsel's ethical obligations to the client. Regardless of counsel's position on third party contact with the client, the attorney should instruct the client not to sign any documents presented by any party, including a proposed case plan, without first consulting with counsel.
 - d) the nature and elements of the allegations in the petition;
 - e) how counsel can be reached and when counsel plans to next have contact with the client;

- f) an explanation that the client should make and keep appointments with the attorney, appear in court when required, and maintain a phone number, address, or both where the attorney can reach the client;
- g) the requirements of the case plan and the possible consequences of failing to abide by the plan;
- h) any recommended evaluations or treatment and the possible consequences of failing to obtain them;
- i) the parent's right to visitation;
- j) the role of any foster parents and the importance of developing a positive relationship with them, if possible; and
- k) the names of any other persons who may be contacting the client on behalf of counsel.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 6.2; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Section 2 (Dec. 14, 2007).

See also: NDCC § 27-20-51 (Inspection of court files and records); id. § 27-20-52 (Law enforcement and correctional facility records).

Performance Standard 6.3 - Initial Case Activities - Release from Detention or Shelter Care

Unless contrary to the expressed interests of the client, counsel for a juvenile client shall attempt to secure the prompt release of the client from detention or shelter care, under the conditions most favorable and acceptable to the client.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 6.3; NC Commission on Indigent Defense Services Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 4.1 (a) (Dec. 14, 2007).

Performance Standard 6.4 - Initial Case Activities - Matter Assigned to Referee

If the matter is assigned to a juvenile referee, counsel should determine if, due to the complexity of the matter, or for other reasons, the matter should be heard by a district court judge. If counsel makes such a determination, counsel should file a timely written request to remove.

See also: N.D. Sup. Ct. Admin. R. 13, § 8 (Removal from Referee).

Performance Standard 7.1 - Investigation and Preparation - Independent Investigation

A. Counsel has a duty to conduct an independent case review and investigation of the allegations in the petition, which may include, but is not limited to:

1. Review of all pleadings and applicable statutes and case law;
2. Review of all social service and court files; and
3. In-depth interview(s) of the client. If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment of counsel. The interview with the client should be used to obtain information as described above under the performance standards applicable to the initial interview of the client.

B. If applicable, counsel should obtain and review all previous court files concerning the child. If necessary, counsel should seek a court order authorizing access.

C. Counsel should make all reasonable efforts to obtain relevant information in the possession of third parties, such as the Department of Human Services, law enforcement, and any GAL. Counsel should make prompt requests for such information, which may include, but is not limited to physical evidence, social service records, medical or mental health records or reports, substance abuse treatment results, information about the client's attendance at anger management and parenting classes, and information about the client's education, employment, and housing status. Where appropriate, counsel should ask the client to sign necessary releases allowing counsel access to confidential information.

D. Counsel should identify all potential witnesses and determine priorities regarding persons to interview. Potential witnesses may include, but are not limited to:

1. mental health workers who have worked with the parent or child;
2. school personnel;
3. law enforcement;
4. physicians;

5. relatives;
6. neighbors and landlords;
7. employers;
8. caseworkers;
9. foster parents and other caretakers;
10. alcohol and drug counselors;
11. ministers and priests;
12. parenting instructors; and
13. the child or children who are the subject of the petition.

If potential witnesses are represented by counsel, the attorney should obtain permission from that counsel and the interview should take place in the presence of counsel, unless the witness waives that right. If counsel for the parent determines that it is necessary to interview the child or children, counsel should be careful to utilize interviewing techniques that are age appropriate and take into account the alleged abuse or deprivation the child may have suffered.

E. Counsel should determine whether any of the following should be brought to the immediate attention of the GAL, and/or the court:

1. possible placements for the child, including potential relative placements;
2. services that might enable reunification or physical placement of the child in the parental home while the another entity retains legal custody, if applicable;
3. the client's wishes regarding visitation; and
4. the parent or child's immediate physical and mental needs, if any.

F. Counsel should evaluate the efforts made to reunify the parent and child and, if appropriate, ask that needed services be provided, such as:

1. mental or physical exam of a party;
2. a modification or increase in visitation;
3. relative placement of a child;

4. funds, transportation, or other services aimed at assisting the parent in overcoming the conditions that led to the filing of the petition and in pursuing reunification.

Counsel should maintain documentation of all requests for services and the agency's response.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 7.1; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 2.4 (Dec. 14, 2007).

See also: NDCC § 27-20-51 (Inspection of court files and records); id. § 27-20-52 (Law enforcement and correctional facility records); N.D.R. Prof. Conduct 4.2 (Communication with person represented by counsel).

Performance Standard 7.2 - Investigation and Preparation - Case Plans

Counsel should be aware that a case plan may have been entered into between the parent and the Department of Human Services prior to the filing of a petition, in an attempt to avoid filing.

Counsel for the parent should review any proposed or signed case plan with the client to among other things, verify that it requires services and service providers that are appropriate and tailored to the needs of the client and that it conceivably could be completed within the time allowed by the plan. Counsel should consider negotiating with the department about the specific requirements of the proposed case plan if, after consultation with the client, counsel believes that modifications to the required services, the service providers, or the time frame for completion would be favorable to the client. If possible, counsel should ask the department to provide a list of approved service providers and allow the parent client to choose an appropriate provider from the list. Counsel should also consider negotiating with the department about the extent of and limitations on information that will be given to the department in reports by service providers in order to facilitate a therapeutic relationship between the parent client and the service providers.

Counsel for the parent, after consultation with the client and taking into account the client's objectives and needs, should advise the client whether to agree to and sign a proposed case plan, and/or whether to sign a proposed case plan after crossing through those items with which the client disagrees, or after writing modifications on the plan. If counsel and the parent client agree that the client will not sign a proposed case plan, counsel should instruct the client to write on the case plan "refused to sign on advice of counsel." Counsel should also advise the client that a refusal to sign a proposed plan may cause the department to view the client as uncooperative and may be admitted into evidence and relied upon by the court.

Whenever a case plan is signed, counsel for the parent should advise the client of his or her responsibilities under the plan, and of any potential consequences of not following the plan.

If it later becomes relevant that the client could not have completed an objective of a signed case plan within the time allowed, counsel for the parent should consider gathering evidence for presentation at the next hearing about the impossibility of performance.

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 2.6 (Dec. 14, 2007).

Performance Standard 7.3 - Investigation and Preparation - Formal and Informal Discovery Procedures

Counsel has a duty to pursue as soon as practicable discovery regarding to the case and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.

Counsel should consider seeking discovery of the following items:

1. the complete files of the Department of Human Services, including any social worker's notes and reports about every contact with the parent, child, and any other person material to the case;
2. the complete files of the GAL for the child;
3. police records and reports;
4. records in the possession of medical or mental health professionals, with a release from the client;
5. records in the possession of alcohol or substance abuse treatment facilities, with a release from the client;
6. school records for the child and/or the parent, with a release from the client; and
7. impeachment evidence, such as prior convictions or similar evidence of other misconduct by or bias of a witness.

If discovery is not timely provided to counsel, counsel should consider filing a motion to compel production and/or seeking a continuance of the applicable hearing.

Counsel should be aware that the court may deny, restrict, or defer discovery in a juvenile case. If counsel's discovery requests are denied, counsel should ask for an in camera inspection by the court and submit affidavits or statements in support of that request. Counsel should preserve any discovery issues for appeal by making any necessary objections on the record and making any appropriate offers of proof.

If counsel receives discovery requests from any other party, counsel should comply with the requests to the extent required by the North Dakota Rules of Civil Procedure and should object to any requests that do not tend to elicit admissible or relevant information. If necessary and appropriate, counsel should consider seeking a protective order from the court.

Counsel should be generally familiar with federal law providing that medical records regarding an evaluation, diagnosis, or treatment for alcohol or substance abuse are confidential and may not be released or disclosed without the patient's consent or a court order that meets federal requirements. If counsel is aware of any such relevant records regarding the client, counsel should ask the client to execute a release form.

Counsel should be generally familiar with federal law prohibiting the release of educational records without the student's consent if he or she is now 18 years of age or older, a parent's consent if the student is still under 18 years of age, or a court order that meets federal requirements. If counsel is aware of any such relevant records regarding the child or the respondent parent, counsel should ask the client to execute a release form.

Commentary: Juvenile matters are civil matters, and discovery procedures are presently controlled by the North Dakota Rules of Civil Procedure.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 7.2; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 2.10 (Dec. 14, 2007).

See also: NDCC § 27-20-51 (Inspection of court files and records); id. § 27-20-52 (Law enforcement and correctional facility records); N.D.R. Civ. P. Part V (Depositions and discovery).

Performance Standard 7.4 - Investigation and Preparation - Duties Regarding Physical Evidence

In a juvenile deprivation or termination of parental rights matter, counsel may receive physical evidence from the client, his or her friends and relatives, the police, or the prosecution.

Counsel who receives a physical item under circumstances implicating a client in unruly, delinquent, or criminal conduct should disclose the location of or should deliver the item to law enforcement authorities only if required by law or court order, or as provided in this standard.

Unless required to disclose, counsel should return the item to the source from whom counsel received it, except as provided in this standard. In returning the item to the source, counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

Counsel may receive the item for a reasonable period of time during which defense counsel intends to return the item to the owner; reasonably fears that return of the item to the source will result in destruction of the item; reasonably fears that return of the item to the source will result in physical harm to anyone; intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or cannot return it to the source. If counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If counsel retains the item, he or she should retain it in counsel's law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

If the item received is contraband (an item possession of which is in and of itself a crime, such as narcotics), counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in counsel's judgment he or

she cannot retain the item, whether or not it is contraband, counsel should disclose the location of or should deliver the item to law enforcement authorities in a manner that does not pose an unreasonable risk of physical harm to anyone.

If counsel discloses the location of or delivers the item to law enforcement authorities, or delivers the item to a person other than the client, counsel should do so in a way designed to protect the client's interests.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 7.3.

Performance Standard 7.5 - Investigation and Preparation - Theory of the Case

During case review, investigation and preparation for hearing, counsel should develop and continually reassess a theory of the case. A theory of the case is one central theory that organizes the facts, emotions, and legal bases in support of the client's position. The theory of the case furnishes the basic position from which counsel determines all actions in a case.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 7.4; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 2.2 (Dec. 14, 2007).

Performance Standard 8.1 - Preliminary Proceedings - Detention/Shelter Care Hearing

Where the child is detained or in shelter care, counsel should take steps to see that the detention/shelter care hearing is conducted in a timely fashion.

In preparing for the hearing, the attorney should become familiar with the allegations of the petition, the statutory basis for detaining or placing a child in shelter care, and factual information available concerning whether the appropriateness of detention or shelter care.

Counsel should prepare the client for the hearing.

Counsel should know the detention facilities, community placements and other services available in the jurisdiction.

Counsel should consider using the testimony at the hearing as a discovery tool, and elicit as much information as possible with regards to the facts and circumstances of the case.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 8.2; Georgia Performance Standards for Juvenile Defense Representation in Indigent Delinquency and Unruly Case (May 5, 2006), Performance Standard 7.

See also: NDCC §27-20-14 (Detention of child - Juvenile Drug Court Exception); id. § 27-20-15 (Release or delivery to court); id. § 27-20-16 (Place of detention); id. § 27-20-17 (Release from detention or shelter care - Hearing - Conditions of release).

Performance Standard 9.1 - Prehearing Motions - The Decision to File Motions

Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the client is entitled to relief which the court has discretion to grant.

The decision to file pretrial motions should be made after considering the applicable law in light of the known circumstances of the case. Among the issues that counsel should consider addressing in a prehearing motion are:

1. the detention of the child;
2. defects in the petition, and timing of any hearings, and the possibility of bringing a motion to dismiss the petition;
3. discovery obligations;
4. motions to divulge the identity and contact information of witnesses and others
5. motions for medical, psychological or psychiatric evaluations; and

Counsel should withdraw a motion or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the client's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion may have many objectives in addition to the ultimate relief requested by the motion. Counsel thus, should consider whether:

1. the time deadline for filing prehearing motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;
2. changes in the governing law that might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;
3. later changes in the strategic and tactical posture of the case may occur which affect the significance of potential pretrial motions.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 9.1; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent

Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 2.8 (Dec. 14, 2007).

See also: NDCC § 27-20-24 (2) (Conduct of hearings) (“If the hearing has not been held within the time limits, or any extension thereof, required by subsection 1 of section 27-20-22, the petition must be dismissed); N.D.R. Civ. P. Part III (Pleadings and Motions); N.D.R. Civ. P. 37 (Failure to make or cooperate in discovery); N.D.R. Ct. 3.2 (Motions).

Performance Standard 9.2 - Prehearing Motions - Preparing, Filing, and Arguing

Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon. In filing a prehearing motion, counsel should be aware of the effect it might have upon the timely disposition of the matter.

When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

1. investigation, discovery and research relevant to the claim advanced;
2. the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
3. full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and potential consequences of having the client testify; and
4. familiarity with all applicable procedures for obtaining evidentiary hearings prior to the dispositional hearing in the matter.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 9.2.

See also: NDCC § 27-20-18 (Subpoena); N.D.R. Ct. 3.2 (Motions).

Performance Standard 9.3 - Prehearing Motions - Continuing Duty to File Prehearing Motions

Counsel should be prepared to raise during the subsequent proceedings any issue which is appropriately raised prehearing, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Furthermore, counsel should be prepared to renew a prehearing motion if new supporting information is disclosed in later proceedings.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 9.3.

Performance Standard 10.1 - Negotiations - General Duties

After appropriate investigation and case review, counsel should explore with the client the possibility and desirability of reaching a negotiated settlement of the matter rather than proceeding to a contested hearing. Counsel should be aware of, and make sure the client is aware of the possible dispositions the court may order if the child is found to be deprived, or in a termination of parental rights matter, the effect of such a judgment terminating parental rights. Counsel should discuss with the client the goals the client seeks to achieve, and should thoroughly inform the client of his or her alternatives, the chances of prevailing at a hearing, and the advantages, disadvantages, and potential consequences of any negotiated disposition.

Counsel should keep the client fully informed of any continued negotiations and promptly convey to the client any offers made by for a negotiated disposition. Counsel shall not accept any agreement without the client's express authorization.

If the parent client also faces criminal charges arising out of the allegations in the juvenile petition and the parent attorney does not represent the client in criminal court, the parent attorney should consult with the parent's criminal defense attorney. However, the decision to consent to a judgment ultimately rests with the client

The existence of ongoing tentative negotiations should not prevent counsel from taking steps necessary to preserve the client's rights nor should the existence of ongoing plea negotiations prevent or delay counsel's investigation into the facts of the case and preparation of the case for further proceedings, including adjudication.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 10.1; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 3.1 (Dec. 14, 2007); id. Guideline 3.2.

See also: NDCC § 27-20-30 (Disposition of deprived child); id. §27-20-44 (Termination of parental rights); id. § 27-20-45 (Proceedings for termination of parental rights); id. § 27-20-46 (Effect of order terminating parental rights or appointing a legal guardian); id. § 27-20-47 (Disposition upon termination of parental rights).

Performance Standard 10.2 - Negotiations - Strategies

In developing a negotiation strategy, counsel should be completely familiar with concessions that the client might offer as part of a negotiated settlement, including, but not limited to:

1. not to proceed to hearing on the merits of one or more of the allegations in the petition;
2. to decline from asserting or litigating any particular prehearing motions;
3. an agreement to fulfill specified dispositional conditions; and
4. stipulating to the admissibility of evidence that requires the use of live witnesses, where the information is known to be admissible and relevant.

Counsel should be completely familiar with benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:

1. to dismiss or reduce one or more allegations in a petition;
2. to dismiss one or more related criminal charges;
3. that, with the agreement of the court, a specified disposition will be entered; and
4. that the petitioner will take, or refrain from taking, at the time of disposition, a specified position with respect to the disposition to be imposed by the court.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 10.2; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 3.1 (Dec. 14, 2007).

Performance Standard 11.1 - Adjudication - In General

Throughout preparation and the adjudicatory hearing, counsel should consider the theory of the case and ensure that counsel's decisions and actions are consistent with that theory.

Counsel should be familiar with the Rules of Evidence and the law relating to all stages of the adjudicatory process, as well as all legal and evidentiary issues that reasonably can be anticipated to arise at the adjudicatory hearing based on the pleadings, investigation, and discovery, and should be prepared to make appropriate objections. If, at the adjudicatory hearing, the petitioner makes material allegations about facts or circumstances that are not contained in the petition, counsel should consider seeking a continuance or objecting to preserve the issue for appellate review.

Throughout the hearing process counsel should endeavor to establish a proper record for appellate review. Counsel should be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and should insure that a sufficient record is made to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so. Counsel shall take necessary steps to insure full official recordation of all aspects of the court proceeding. If a relevant and important non-verbal event happens during the hearing, counsel should ask to have the record reflect what happened.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 11.1; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 4.2 (Dec. 14, 2007).

Performance Standard 11.2 - Adjudication - Preparation

In advance of the adjudicatory hearing, counsel should take all steps necessary to complete appropriate and thorough investigation, discovery, and research. Counsel should interview and subpoena:

1. all potentially helpful witnesses that have been identified by the client and by counsel's review of the pleadings and evidence, including medical personnel or other professionals, as well as any reports and attachments;
2. any needed adverse witnesses, including the child if necessary and appropriate; and
3. custodians of any potentially helpful physical or documentary evidence, and the evidence;

Counsel should also obtain any photographs or preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may help the court better understand the case.

Where appropriate counsel should have the following materials available at the time of the adjudicatory hearing:

Where appropriate, counsel should have the following materials available at the time of the adjudicatory hearing:

1. copies of all relevant documents filed in the case, including the petition;
2. a copy of the Juvenile Court Act and other critical statutes and cases related to anticipated issues;
3. any Department of Human Services reports and attachments;
4. any expert reports;
5. copies of any subpoenas;
6. a list of all exhibits to be offered and the witnesses through whom they will be introduced;

7. any reports from assessments or counseling that the client has completed;
8. documentation concerning the client's employment and housing status;
9. documentation regarding any special achievements of the child while in the custody of the parent;
10. negative drug screen results, if any;
11. draft of opening statement;
12. cross-examination plans for all possible adverse witnesses;
13. direct-examination plans for all prospective defense witnesses;
14. a plan, outline, or draft of closing argument;
15. proposed findings of fact and conclusions of law to be offered to the judge at the end of the hearing.

Counsel should consider seeking an advance ruling on issues likely to arise at the adjudicatory hearing, by requesting a pre-hearing conference, filing a motion *in limine*, or other means.

Counsel should avoid unnecessarily having young children testify and should be sensitive to the nature of young children as witnesses. Where appropriate, counsel should ask for an in camera interview of child witnesses in the presence of all attorneys, or for the court to allow remote testimony or other accommodations.

Counsel should consider whether there are tactical reasons to stipulate to damaging facts that are readily provable and uncontroverted, such as the possibility that the facts will have less impact on the court if they are summarized rather than the subject of lengthy testimony, and the possibility that the court will view the client as accepting responsibility for the stipulated facts or circumstances.

Counsel should be familiar with and advise the client of the direct and collateral consequences of an adjudication of deprivation, or termination or parental rights, including the effect on any future allegations regarding this child or other children.

If the client is facing criminal charges or might face future criminal charges due to the allegations in the juvenile petition, the parent attorney should consider asking the court to place any adjudication order under seal and to direct all parties to maintain the confidentiality of the order.

Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is detained, counsel should try to ensure, prior to the hearing, that the client does not appear before the judge in inappropriate clothing or in shackles or handcuffs. If a client is brought before the judge in detention clothing, shackles, or handcuffs, counsel should object and seek relief from the court.

Counsel should plan with the client the most convenient system for conferring throughout the hearing. Where necessary, counsel should seek a court order to have the client available for conferences.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 11.1; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Section 4.

See also: NDCC § 27-20-18 (Subpoena).

Performance Standard 11.3 - Adjudication - Opening Statement

Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.

Counsel's objective in making an opening statement may include the following:

1. to provide an overview of the client's case;
2. to identify the weaknesses of the petitioner's case;
3. to emphasize the petitioner's burden of proof;
4. to summarize the testimony of witnesses, and the role of each in relationship to the entire case; and
5. to describe the exhibits which will be introduced and the role of each in relationship to the entire case.

Whenever the petitioner oversteps the bounds of proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations suggest otherwise.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 11.6.

Performance Standard 11.4 - Adjudication - Confronting the Petitioner's Case

Counsel should attempt to anticipate weaknesses in the petitioner's proof and consider researching and preparing corresponding motions for dismissal.

Counsel should consider the advantages and disadvantages of entering into stipulations concerning the petitioner's case.

In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

In preparing for cross-examination, counsel should, when appropriate:

1. consider the need to integrate cross-examination, the theory of the case and closing argument;
2. consider whether cross-examination of each individual witness is likely to generate helpful information;
3. anticipate those witnesses the petitioner might call in its case-in-chief or in rebuttal;
4. consider a cross-examination plan for each of the anticipated witnesses;
5. be alert to inconsistencies in a witness' testimony;
6. be alert to possible variations in witnesses' testimony;
7. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
8. have prepared a transcript of all audio or video tape recorded statements made by the witness;

9. review relevant statutes and local police policy and procedure manuals, disciplinary records and department regulations for possible use in cross-examining police witnesses;
10. be alert to issues relating to witness credibility, including bias and motive for testifying; and
11. have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including certified copies of records such as prior convictions of the witness or prior sworn testimony of the witness.

Counsel should consider conducting a voir dire examination of petitioner's potential witnesses who may not be competent to give particular testimony, including expert witnesses whom the petitioner may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

Where appropriate, at the close of the petitioner's case, counsel should move for a dismissal on each allegation in the petition. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present the client's case.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 11.1.

Performance Standard 11.5 - Adjudication - Presenting the Client's Case

Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the petitioner's failure to meet the burden of proof.

Counsel should discuss with the client all of the considerations relevant to the client's decision to testify, as well as the possibility that another party may call the parent client to testify, including but not limited to the likelihood of cross-examination and impeachment, and the possibility that the client might incriminate himself or herself by testifying in the juvenile proceeding if the client is also facing criminal prosecution. Counsel should also discuss with the client the possibility that, by invoking his or her Fifth Amendment privilege against self-incrimination when responding to questions about potentially criminal activity, the juvenile court may infer an answer unfavorable to the client. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully.

In preparing for presentation of the client's case, counsel should, where appropriate:

1. develop a plan for direct examination of each potential defense witness;
2. determine the implications that the order of witnesses may have on the case;
3. determine what facts necessary for the defense case can be elicited through the cross-examination of the petitioner's witnesses;
4. consider the possible use of character witnesses;
5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
6. review all documentary evidence that must be presented; and
7. review all tangible evidence that must be presented.

In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the petitioner.

Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

Counsel should conduct redirect examination as appropriate.

When appropriate, at the close of the defense case, counsel should renew the motion for a judgment of dismissal on each allegation of the petition.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 11.7; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 4.4.

Performance Standard 11.6 - Adjudication - Closing Argument

Counsel should be familiar with the substantive limits on both the petitioner's and the client's summation.

Counsel should be familiar with the court rules, applicable statutes and law, and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the petitioner.

In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

1. highlighting weaknesses in the petitioner's case;
2. describing favorable inferences to be drawn from the evidence;
3. incorporating into the argument:
 - a) helpful testimony from direct and cross-examinations; and
 - b) responses to anticipated petitioner's arguments; and
4. the effects of the defense argument on the petitioner's rebuttal argument.

Whenever the petitioner exceeds the scope of permissible argument, counsel should consider objecting, requesting mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

1. whether counsel believes that the case will result in a favorable decision for the client;
2. the need to preserve the objection for appellate review; or
3. the possibility that an objection might enhance the significance of the information in the court's mind.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 11.9.

Performance Standard 12.1 - Dispositional Phase - In General

Throughout preparation and the dispositional hearing, counsel should consider the theory of the case and ensure that counsel's decisions and actions are consistent with that theory.

Counsel should be aware that the Rules of Evidence do not apply to dispositional hearings in juvenile court, and that the court may generally accept into evidence information from any source which is helpful in determining the issues presented. However, counsel should be prepared to object on the record to information and testimony that is unreliable, inflammatory, immaterial, inaccurate or incapable of being verified.

If the petitioner or GAL provides to counsel in advance of the dispositional hearing any reports or documentary evidence that they intend to offer at the hearing, counsel should review them carefully with the client to determine whether any information in the reports or evidence may be inaccurate or susceptible to impeachment. Counsel should also consider subpoenaing the authors of the reports to be cross-examined if counsel knows the petitioner does not intend to call them as witnesses.

Throughout the hearing process counsel should endeavor to establish a proper record for appellate review. Counsel should be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and should insure that a sufficient record is made to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so. Counsel shall take necessary steps to insure full official recordation of all aspects of the court proceeding. If a relevant an important non-verbal event happens during the hearing, counsel should ask to have the record reflect what happened.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 12.1; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent

Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 4.5 (Dec. 14, 2007).

See also: NDCC § 27-20-18 (Subpoena); id. § 27-20-29 (Hearing - Findings - Dismissal); N.D.R. Evid. 1001 (Applicability of rules).

Performance Standard 12.2 - Dispositional Phase - Confronting the Evidence

Counsel should anticipate and be prepared to respond to any inaccurate or unfavorable information that is presented at the dispositional hearing.

Where appropriate, counsel should cross-examine any witnesses whose testimony is damaging to the client's interests, and challenge the accuracy, credibility, and weight of any reports or other evidence before the court.

If any reports or documentary evidence offered at the dispositional hearing have not been timely provided to counsel prior to court, counsel should consider moving to continue the dispositional hearing to allow time for review of the reports or evidence, or filing a motion *in limine* to prohibit the introduction of the reports or evidence.

Counsel should be aware that dispositional orders may need to contain appropriate findings of fact pursuant to the Juvenile Court Act as to whether reasonable efforts to eliminate the need for the child's out-of-home placement and to reunify the parent and child. If necessary, counsel should ask the court to make appropriate findings on the record

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 4.6 (Dec. 14, 2007).

See also: NDCC § 27-20-32.1 (Court order required for removal of child); id. § 27-20-32.2 (Reasonable efforts to prevent removal or to reunify - When required).

Performance Standard 12.3 - Dispositional Phase - Presenting the Client's Case

Counsel representing a parent should be prepared to present all mitigating and favorable information regarding the client to the court at the dispositional hearing—including evidence of the parent's achievements and progress after the filing of the petition—through documentary evidence, photographs, and the testimony of the respondent parent and other witnesses. Potential mitigating and favorable information includes, but is not limited to, medical, psychiatric, psychological, social, employment, and educational information.

If appropriate, counsel should present to the court an alternative dispositional plan or report on behalf of the client, including placement of the child in the parental home or viable alternative placements for the child that are favorable to the client. Counsel should present evidence in support of the alternative plan or report, including but not limited to:

1. supporting testimony of the client, relatives, and others;
2. supporting testimony of experts, if necessary and appropriate; and
3. supporting affidavits, reports, and hearsay evidence, as long as such documents and evidence have been provided to opposing counsel in advance of the hearing to avoid a motion *in limine* to prohibit the introduction of the evidence.

Counsel should be aware of the dispositional alternatives set forth in the Juvenile Court Act, and should advocate for those that are consistent with the client's wishes and well grounded in fact and law.

At the dispositional hearing, counsel should request that the court direct appropriate placements for the child and specific visitation schedules with the respondent parent. If appropriate, counsel should ask the court to direct that there be a home study of the client's home, a potential relative placement, or another suitable placement for the child.

Counsel should also request orders for the Department of Human Services to provide or make referrals for services that may benefit the parent client and aid in reunification, including but not limited to:

1. family preservation services;
2. medical and mental health services;
3. alcohol or drug treatment;
4. parenting education;
5. housing assistance;
6. domestic violence counseling;
7. anger management counseling; and
8. other social services.

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 4.7 (Dec. 14, 2007).

See also: NDCC § 27-20-30 (Disposition of deprived child); id. § 27-20-32.1 (Court order required for removal of child); id. § 27-20-32.2 (Reasonable efforts to prevent removal or to reunify - When required).

Performance Standard 12.4 - Dispositional Phase - Post-disposition

Counsel should discuss with the client the result of the dispositional hearing, all responsibilities of the client pursuant to the court's ruling, any available post-disposition motions to set aside an adverse decision, and the parent's right to appeal.

Counsel should review any proposed order or orders and suggest amendments, if necessary to be consistent with the court's findings, conclusions, and decree. If counsel was not permitted to review the proposed order in advance of signing and there are errors in the order, counsel should consider filing a motion to set aside the court order, to have it stricken from the record, and to have an amended order entered.

If the order does not contain all findings of fact that are required by the Juvenile Court Act, counsel should consider filing a motion for rehearing or for an amended order.

If necessary and appropriate, counsel should file any applicable motions for rehearing, for an amended order, or for relief from the order in accordance with the Rules of Civil Procedure, as well as any notices of appeal.

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 4.8 (Dec. 14, 2007).

See also: NDCC § 27-20-32.1 (Court order required for removal of child); id. § 27-20-32.2 (Reasonable efforts to prevent removal or to reunify - When required).

Performance Standard 13.1 - Permanency Planning - In general

Counsel should be aware that the Rules of Evidence do not apply at review and permanency planning hearings in juvenile court, and that the court may generally accept into evidence information from any source which is helpful in determining the issues presented. However, counsel should be prepared to object on the record to information and testimony that is unreliable, inflammatory, immaterial, inaccurate or incapable of being verified. Counsel should also take steps to ensure that the court's ruling on any objection is on the record and that any stricken information or evidence does not appear in the record.

In preparation for review and permanency planning hearings, counsel should conduct appropriate investigation and consider interviewing potential witnesses. In accordance with all applicable local rules and ethical standards governing interviews of represented parties, counsel should consider interviewing the foster parent(s), caseworker, and any professionals who are providing services to the parent. Counsel should also meet with the parent client, review the applicable Department of Human Services or GAL reports and attachments, and anticipate and prepare to counter any negative information or inferences about the client.

Counsel should verify that any reports or documentary evidence that the department, the GAL, or other advocates seek to have admitted at a review or permanency planning hearing have been provided to counsel prior to court. If any reports or documentary evidence have not been timely provided to counsel, counsel should consider moving to continue the hearing to allow time for review of the reports or evidence, or filing a motion *in limine* to prohibit the introduction of the reports or evidence. When reports are provided to counsel in advance, counsel should consider subpoenaing the authors of the reports to be cross-examined if counsel knows the petitioner does not intend to call them as witnesses.

Counsel should assess the reunification efforts made and consider whether any special limitations of the respondent parent warrant specific increased reunification efforts. If

applicable, counsel should argue in favor of increased reunification efforts and against ceasing reunification efforts.

Counsel should verify all services and visitation promised or directed in prior orders and case plans has been provided, and should consider calling the parent to testify about any previously ordered services that were not provided.

At review and permanency planning hearings, counsel should present favorable documentary and photographic evidence and testimony about the parent client's progress in meeting his or her case plan. Evidence counsel should consider presenting includes, but is not limited to:

1. improvements in the parent's educational, employment, or housing status;
2. the parent's payment of child support obligations;
3. the parent's payment of mortgages, rent, and utilities;
4. proper licensure and insurance of a motor vehicle;
5. the parent's attendance at group or individual therapy;
6. the parent's attendance at alcohol or substance abuse treatment programs or meetings;
7. the parent's regular communication and visitation with the child; and
8. the parent's compliance with other court orders, including probationary judgments.

Counsel should ask the court to make specific findings on the record as to the reunification efforts expended by the agency granted authority over the child and whether those efforts were sufficient and reasonable.

If counsel believes reunification efforts have not been reasonable, counsel should object on the record to preserve the issue for possible appellate review.

If necessary and appropriate, counsel should file any applicable motions for rehearing, for an amended order, or for relief from the order, as well as any notices of appeal.

Commentary: The “permanency planning” hearing referenced in this standard is a court hearing, not an agency meeting or view, such as a permanency planning meeting by a social service agency.

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 5.2 (Dec. 14, 2007).

See also: NDCC § 27-20-18 (Subpoena); id. § 27-20-32.2 (Reasonable efforts to prevent removal or to reunify - When required); id. § 27-20-36 (Limitations of time on orders of disposition); id. § 27-20-37 (Modification or vacation of orders); N.D.R. Evid. 1101 (Applicability of rules); N.D. Sup. Ct. Admin. R. 13 (Judicial Referees).

Performance Standard 13.2 - Permanency Planning - Hearings

Counsel should be prepared at the permanency planning hearing to present an alternative long-term plan for the child and to present evidence in support of the alternative plan.

If reunification with the parent is adopted as the permanent plan or a concurrent plan for the child, counsel should take all reasonable steps to ensure that the judge's findings of fact and order clearly state the parties' obligations, the time the parent has to comply, and the possibility of return to the parental home if the parent complies.

If the court enters a permanency planning order that changes the permanent plan to adoption, counsel should advocate that reunification, or custody or guardianship with a relative or other suitable adult, be adopted as a concurrent plan where appropriate. Counsel should also explain to the client that, even when adoption is the primary permanent plan for the child, the parent may still pursue reasonable efforts on his or her own and the court may subsequently revise the permanent plan to direct reunification.

Counsel should advise the client when service of a petition or motion to terminate is expected to be made soon, such as at the conclusion of the permanency planning hearing where the court approves a permanent plan that requires termination of parental rights. Counsel should be aware that and inform the client that the petition would constitute a new case assignment. If the client were to desire indigent defense services on the termination matter, the client would need to complete a new application for service, and if the client qualifies, counsel would be appointed.

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 5.4 (Dec. 14, 2007).

See also: NDCC § 27-20-32.2 (Reasonable efforts to prevent removal or to reunify - When required); id. § 27-20-36 (Limitations of time on orders of disposition).

Performance Standard 14.1 - Termination of Parental Rights - In general

Throughout preparation and the termination hearing, counsel should consider the theory of the case and ensure that counsel's decisions and actions are consistent with that theory.

Counsel should be familiar with the Rules of Evidence and the law relating to the process to terminate parental rights, as well as all legal and evidentiary issues that reasonably can be anticipated to arise at the hearing based on the pleadings, investigation, and discovery, and should be prepared to make appropriate objections. If, at the termination hearing, the petitioner makes material allegations about facts or circumstances that are not contained in the petition, counsel should consider seeking a continuance or objecting to preserve the issue for appellate review.

Throughout the hearing process counsel should endeavor to establish a proper record for appellate review. Counsel should be familiar with the substantive and procedural law regarding the preservation of legal error for appellate review, and should insure that a sufficient record is made to preserve appropriate and potentially meritorious legal issues for such appellate review unless there are strategic reasons for not doing so. Counsel shall take necessary steps to insure full official recordation of all aspects of the court proceeding. If a relevant and important non-verbal event happens during the hearing, counsel should ask to have the record reflect what happened.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 11.1; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 6.1 (Dec. 14, 2007); id. Guideline 6.2.

Performance Standard 14.2 - Termination of Parental Rights - Preparation

Counsel should confer with the client as soon as possible after a petition to terminate parental rights is filed about all issues related to the defense of the petition, including but not limited to:

1. witnesses that should be interviewed and possibly subpoenaed;
2. documentary and photographic evidence that should be gathered and/or subpoenaed; and
3. any prior court files, both for the subject child and any other child of the parent client, which may be relied upon or introduced into evidence by the petitioner or the GAL.

If appropriate, counsel should also discuss with the client whether there are tactical reasons to stipulate to any allegations in the petition, other than ultimate facts that could themselves constitute a ground for termination, such as facts that are uncontroverted and/or readily capable of determination or proof. The decision to stipulate ultimately rests with the client.

If the parent client also faces criminal charges arising out of the allegations in the termination petition and the parent attorney does not represent the client in criminal court, the parent attorney should consult with the parent's criminal defense attorney prior to filing any answer or response to the petition or motion.

The decision to file pre-hearing motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of each case, as well as the need to preserve issues for appellate review. Pre-hearing motions that counsel should consider filing include, but are not limited to:

1. discovery motions;
2. motions for an in camera inspection;
3. motions to dismiss the petition;
4. motions to divulge the identity and contact information for witnesses and others;

5. motions for medical, psychological, or psychiatric evaluations; and
6. evidentiary motions and motions *in limine*.

Motions should be filed in a timely manner, comport with the formal requirements of statute and court rules, and succinctly inform the court of the authority relied upon.

Unless there are sound tactical reasons for not doing so, counsel should consider utilizing all available informal and formal discovery methods and should seek discovery to the broadest extent permitted by law, including but not limited to:

1. the identity of all lay witnesses who will be called to testify at the termination hearing and a summary of the testimony to be elicited;
2. the identity of all expert witnesses who will be called to testify at the termination hearing and copies of the witnesses' curriculum vitae and any reports prepared by the witnesses; and
3. a list of all reunification services that were provided to the parent prior to the filing of the petition or motion to terminate.

If discovery is not timely provided to counsel, the parent attorney should consider filing a motion to compel production and/or seeking a continuance of the termination hearing.

In advance of the termination hearing, counsel should take all steps necessary to complete appropriate and thorough investigation, discovery, and research, including but not limited to:

1. interviewing and subpoenaing all potentially helpful defense witnesses that have been identified by the client and by counsel's review of the pleadings and evidence, including medical personnel or other professionals that are referenced in the Department of Human Services files, or GAL reports and attachments;
2. interviewing and subpoenaing any needed adverse witnesses, including the child if necessary and appropriate;

3. examining and subpoenaing all potentially helpful physical or documentary evidence;
4. obtaining copies of all Department of Human Services and GAL reports and attachments so that counsel can be prepared with rebuttal witnesses and evidence;
5. obtaining and reading transcripts of any prior proceedings in the case or related cases, if applicable;
6. obtaining any photographs or preparing charts, maps, diagrams, or other visual aids of all scenes, persons, objects, or information that may help the judge better understand the case; and
7. meeting with the client to review the reports and attachments, discuss the defense, and prepare the client's testimony.

Where appropriate, counsel should have the following information and materials available at the time of the termination hearing:

1. copies of all relevant documents filed in the case, including the petition or motion;
2. a copy of the Juvenile Court Act and other critical statutes and cases related to anticipated issues;
3. any Department of Human Services or GAL reports and attachments;
4. any expert reports;
5. copies of subpoenas;
6. a list of all exhibits to be offered and the witnesses through whom they will be introduced;
7. any reports from assessments or counseling that the client has completed;
8. documentation concerning the client's employment and housing status;
9. documentation regarding any special achievements of the child while in the custody of the parent;

10. negative drug screen results, if any;
11. draft of opening statement;
12. cross-examination plans for all possible adverse witnesses;
13. direct-examination plans for all prospective defense witnesses;
14. a plan, outline, or draft of closing argument; and
15. proposed findings of fact and conclusions of law to be offered to the judge at the end of the hearing.

Counsel should avoid unnecessarily having young children testify, and should be sensitive to the nature of young children as witnesses. Where appropriate, counsel should ask the court for any appropriate accommodations and take steps to ensure that the substance of any testimony by child witnesses is placed on the record.

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 6.2 (Dec. 14, 2007).

See also: NDCC § 27-20-18 (Subpoenas).

Performance Standard 14.3 - Termination of Parental Rights - Confronting the Petitioner's Case

Counsel should attempt to anticipate weaknesses in the petitioner's proof and consider researching and preparing corresponding motions for dismissal.

Counsel should consider the advantages and disadvantages of entering into stipulations concerning the petitioner's case.

In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

In preparing for cross-examination, counsel should, when appropriate:

1. consider the need to integrate cross-examination, the theory of the case and closing argument;
2. consider whether cross-examination of each individual witness is likely to generate helpful information;
3. anticipate those witnesses the petitioner might call in its case-in-chief or in rebuttal;
4. consider a cross-examination plan for each of the anticipated witnesses;
5. be alert to inconsistencies in a witness' testimony;
6. be alert to possible variations in witnesses' testimony;
7. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
8. have prepared a transcript of all audio or video tape recorded statements made by the witness;

9. review relevant statutes and local police policy and procedure manuals, disciplinary records and department regulations for possible use in cross-examining police witnesses;
10. be alert to issues relating to witness credibility, including bias and motive for testifying; and
11. have prepared, for introduction into evidence, all documents which counsel intends to use during the cross-examination, including certified copies of records such as prior convictions of the witness or prior sworn testimony of the witness.

Counsel should consider conducting a voir dire examination of petitioner's potential witnesses who may not be competent to give particular testimony, including expert witnesses whom the petitioner may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

Where appropriate, at the close of the petitioner's case, counsel should move for a dismissal on each allegation in the petition. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present the client's case.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 11.1.

Performance Standard 14.4 - Termination of Parental Rights - Presenting the Client's Case

Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the petitioner's failure to meet the burden of proof.

Counsel should discuss with the client all of the considerations relevant to the client's decision to testify, as well as the possibility that another party may call the parent client to testify, including but not limited to the likelihood of cross-examination and impeachment, and the possibility that the client might incriminate himself or herself by testifying in the termination proceeding if the client is also facing criminal prosecution. Counsel should also discuss with the client the possibility that, by invoking his or her Fifth Amendment privilege against self-incrimination when responding to questions about potentially criminal activity, the juvenile court may infer an answer unfavorable to the client. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully.

In preparing for presentation of the client's case, counsel should, where appropriate:

1. develop a plan for direct examination of each potential defense witness;
2. determine the implications that the order of witnesses may have on the case;
3. determine what facts necessary for the defense case can be elicited through the cross-examination of the petitioner's witnesses;
4. consider the possible use of character witnesses;
5. consider the need for expert witnesses and what evidence must be submitted to lay the foundation for the expert's testimony;
6. review all documentary evidence that must be presented; and
7. review all tangible evidence that must be presented.

In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the petitioner.

Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

Counsel should conduct redirect examination as appropriate.

When appropriate, at the close of the defense case, counsel should renew the motion for a judgment of dismissal on each allegation of the petition.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 11.7; NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 6.4.

Performance Standard 14.5 - Termination of Parental Rights - Presenting the Client's Case During the Dispositional Phase

If the court determines that grounds to terminate parental rights exist and the case enters the dispositional phase, counsel should be prepared to present to the court at the dispositional hearing all mitigating and favorable information on behalf of the parent client—including evidence of the parent's achievements and progress after the filing of the petition and evidence of the child's expressed interests regarding adoption—through documentary evidence, photographs, and the testimony of the respondent parent and other witnesses. Potential mitigating and favorable information includes, but is not limited to, medical, psychiatric, psychological, social, employment, and educational information. During the dispositional phase, counsel's goal is to demonstrate that, while grounds to terminate may exist, termination would not be in the best interest of the child.

If appropriate, counsel should present to the court an alternative dispositional plan to termination and adoption, including viable alternative placements for the child that are favorable to the client. Counsel should present evidence in support of the alternative plan, including but not limited to:

1. supporting testimony of the parent client, relatives, and others;
2. supporting testimony of experts, if necessary and appropriate; and
3. supporting affidavits, reports, and other hearsay evidence, as long as such documents and evidence have been provided to opposing counsel in advance of the hearing to avoid a motion *in limine* to prohibit the introduction of the evidence.

Counsel should be aware that a dispositional order must contain appropriate findings of fact pursuant to the Juvenile Court Act. If necessary, counsel should ask the court to make appropriate findings on the record.

Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level, Guideline 6.6.

Performance Standard 15.1 - Review of Matter by District Court Judge

If the deprivation or termination of parental rights matter was handled by a judicial referee, counsel should be familiar with the procedures available to request a review of the referee's findings and order. When a judicial referee has entered an order or judgment adverse to the client's position, counsel should consider and discuss with the client whether it is appropriate to file a written request for a review by the district court judge. This written request should be filed by counsel if so directed by the client.

See also: N.D. Sup. Ct. Admin. R. 13 (Judicial Referees)

Performance Standard 15.2(a) - The Right to an Appeal in Juvenile Deprivation Matters, and From Appealable Orders in TPRs Which Do Not Result in Termination of Parental Rights

Following entry of an appealable order, judgment or decree, in a deprivation matter, or from an appealable order in a TPR which does not result in the termination of parental rights, counsel shall inform the client of the client's right to appeal and the action that must be taken to perfect an appeal.

If it appears that the client desires to appeal and desires appointed counsel for the appeal, trial counsel should file the notice of appeal. Trial counsel should also order any necessary transcripts.

The appeal will be assigned pursuant to the Commission's policy on Assignment of Appellate Cases, and if a different attorney is assigned to the matter, a substitution of counsel can be filed at a later date.

In those cases where a different attorney will handle the appeal, trial counsel should cooperate in providing information to the appellate counsel concerning the proceedings in the lower court.

Commentary: A portion of this standard was previously adopted by the Commission at its October 27, 2006 meeting as "Policy on Filing the Notice of Appeal."

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 13.2.

See also: NDCC § 27-20-56 (Appeals); "Policy Regarding Transcripts," adopted by the Commission at its October 27, 2006 meeting.

Form: Request to Assign Case to Appellate Attorney.

**Performance Standard 15.2 (b) - The Right to an Appeal From an Order in a TPR
Resulting in Termination of Parental Rights**

Following entry of an order terminating parental rights, counsel shall inform the client of the client's right to appeal and the action that must be taken to perfect an appeal.

An appeal from an order terminating parental rights is held in an expedited manner, and appellate briefs must be filed with the notice of appeal. Due to the shortened timelines, the requirement that the client reapply for indigent defense services is waived.

If the client desires to appeal and desires appointed counsel for the appeal, trial counsel will be responsible for handling the appeal. Trial counsel should file the notice of appeal. Trial counsel should also order any necessary transcripts.

If for some reason, trial counsel is unable to handle the appeal, counsel should, immediately upon receiving information that the client wishes to appeal, submit a conflict reassignment request to the appropriate office, and order any necessary transcripts.

See N.D.R. App. P. 2.2 (Termination of Parental Rights - Expedited Appeals).

See also: NDCC § 27-20-56 (Appeals); "Policy Regarding Transcripts," adopted by the Commission at its October 27, 2006 meeting.

Form: Notice of Eligibility for Appointed Counsel - Conflict Re-assignment.

Performance Standard 16.1 - Case Assignment Termination

Counsel should notify or attempt to notify the client when the case assignment is concluded. If necessary in the particular jurisdiction, counsel should file a motion to withdraw when the case assignment terminates, or should request that the order or judgment include a provision that counsel is permitted to withdraw.

Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 14.1.

See also N.D.R. Ct. 11.2 (Withdrawal of attorneys); “Standard Regarding ‘Case Assignment Termination,’” adopted by the Commission at its July 17, 2007 meeting; “Policy on Withdrawal,” adopted by the Commission at its March 16, 2007 meeting.