

**COMMISSION ON LEGAL COUNSEL FOR INDIGENTS**  
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**JUVENILE UNRULY AND DELINQUENCY MATTERS**

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**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 unruly and delinquency 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 unruly and delinquency 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 unruly and delinquency 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 unruly and delinquency 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 juvenile and criminal law, and with the Juvenile Court Act and case law interpreting it. 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.*

## **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 unruly and delinquency 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.

*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 - Acting Diligently and Promptly**

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

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 avoid unnecessary delay in the disposition of cases. 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 misrepresent facts or otherwise mislead the court in order to obtain a continuance.

Counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.

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.*

## **Performance Standard 4.2 - 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 defense 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 4.3 - 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 owes the same duties of loyalty and confidentiality to a juvenile client as is owed to an adult.

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.

*Commentary: The decisions which are ultimately for the client include: whether to admit or deny the allegations of a petition, whether to accept a plea agreement, whether to testify in his or her own behalf, whether to appeal. Counsel has the primary responsibility for deciding what motions to file and what evidence to offer, including which witnesses to call and what questions to ask of the witnesses.*

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 5.1; Oregon State Bar, Indigent Defense Task Force Report: Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases, Standard 1.3 (as set forth in the Compendium of Standards for Indigent Defense Systems, Vol. 2 (Dec. 2000); 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: N.D.R. Prof. Conduct 1.14 (client under a disability).*

## **Performance Standard 5.2 - Attorney-Client Relationship - Relationship with Others**

If counsel has been appointed to represent a child in a juvenile matter, counsel should maintain a relationship with the juvenile client's parent or guardian, but should not allow the relationship to interfere with counsel's duties to the child, or the expressed interests of the child.

*Commentary: If the parent or guardian is represented in the matter, the relationship should be maintained through the parent or guardian's attorney.*

*Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 2.3 (Dec. 14, 2007).*

*See also: N.D.R. Prof. Conduct 4.2 (Communications with persons represented by counsel).*

### **Performance Standard 5.3 - 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 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:

1. be familiar with any charges or allegations against the client, the essential elements of the offense(s) and the potential punishment(s);
2. obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by any juvenile court officers, and law enforcement reports that might be available.

### **B. In addition, where the juvenile client 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 client'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. 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 juvenile in a matter that will be effective, considering the juvenile'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.
2. Information that should be acquired may include, but is not limited to:

- a) the juvenile's current living arrangements, family relationship, and ties to the community, including the length of time the juvenile's family has lived at the current and former addresses, as well as the juvenile's supervision when at home;
- b) the immigration status of the juvenile and the juvenile's family members, if applicable;
- c) the juvenile's educational history, including current grade level and attendance and any disciplinary history, and the juvenile's work history, if any;
- d) the juvenile's physical and mental health, including any impairing conditions such as substance abuse or learning disabilities, and any prescribed medications and other immediate needs;
- e) the juvenile's delinquency history, if any, including arrests, detentions, adjudications, and failures to appear in court;
- f) whether there are any other pending charges or allegations against the juvenile, and the identity of any other appointed or retained counsel;
- g) whether the juvenile is on probation, and if so, the name of the juvenile's probation officer, and the juvenile's past or present performance under supervision;
- h) the options available to the juvenile for release if the juvenile is in detention;
- i) the facts surrounding the juvenile matter;
- j) any evidence of improper police or other governmental conduct, including interrogation procedures that may effect the client's rights;
- k) the names and locating information of any witnesses;

- l) where appropriate, evidence of the juvenile's competence to stand trial and/or mental state at the time of the offense; and
  - m) the names of individuals or other sources that counsel can contact to verify the information provided by the client (counsel should obtain the permission of the client before contacting these individuals);
3. Information to be provided to the client, includes, but is not limited to:
- a) an explanation of the scope of representation which will be provided;
  - b) an explanation of the allegations contained in the petition, and the potential penalties or dispositions;
  - c) a general overview of the procedural progression of the case, where possible;
  - d) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
  - e) what arrangements will be made or attempted for the satisfaction of the client's most pressing needs;
  - f) how counsel can be reached and when counsel plans to next have contact with the client; and
  - g) 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 Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Section 3 (Dec. 14, 2007).*

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

Unless contrary to the expressed interests of a juvenile client, counsel 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 - Detained Client**

If a juvenile client is detained, counsel should try to ensure, prior to any initial court hearing, that the client does not appear before the judge in inappropriate clothing or in shackles or handcuffs. If a detained juvenile client is brought before the judge in detention clothing, shackles, or handcuffs, counsel should object and seek relief from the court.

*Adapted from: NC Commission on Indigent Defense Services Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 4.1 (c) (Dec. 14, 2007).*

### **Performance Standard 6.5 - 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 therefore.

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

## **Performance Standard 7.1 - Investigation and Preparation - Independent Investigation**

Counsel has a duty to conduct a prompt investigation of each case. Counsel should, regardless of the juvenile client's statements or admissions to defense counsel of facts constituting guilt or the client's stated wish to admit the allegations of the petition, insure that the allegations in the petition are factually and legally correct and the client is aware of potential defenses to the charges.

Sources of investigative information may include the following:

1. Copies of the petition in the case should be obtained and examined to determine the specific allegations that have been brought against the juvenile client. The relevant statutes and precedents should be examined to identify:
  - a) the elements of the offense(s) of which the juvenile client is alleged to have committed;
  - b) the defenses and affirmative defenses that may be available;
  - c) any lesser included offenses that may be available; and
  - d) any defects in the petition, constitutional or otherwise, such as statute of limitations or double jeopardy.
2. Information from 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. Information relevant to disposition should also be obtained from the client, when appropriate.
3. Interviewing witnesses. Counsel should consider the necessity to interview the potential witnesses, including any complaining witnesses and others adverse to the juvenile client, as well as witnesses favorable to the client. Interviews of witnesses adverse to the client should be conducted in a manner that permits

counsel to effectively impeach the witness with statements made during the interview, such as in the presence of a third person who will be available to testify as a witness at trial.

4. The police and prosecution reports and documents. Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports and field notes. Where appropriate, counsel should pursue such efforts through formal and informal discovery unless sound tactical reasons exist for not doing so. Counsel should obtain criminal history information regarding the client and for the prosecution witnesses.
5. Physical evidence. Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should examine any such physical evidence.
6. The scene of the incident. Where appropriate, counsel should attempt to view the scene of the alleged offense as soon as possible after counsel is appointed. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions). Counsel should consider the taking of photographs and the creation of diagrams or charts of the actual scene of the offense.
7. Securing the assistance of experts. Counsel should secure the assistance of experts where it is necessary or appropriate to:
  - a) the preparation of the defense;
  - b) adequate understanding of the prosecution's case;
  - c) rebut the prosecution's case; or

- d) investigate the client's competence to proceed, mental state at the time of the offense, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 7.1.*

*See also: "Policy on Reimbursement of Extraordinary Expenses," adopted by the Commission at its December 11, 2006 meeting.*

## **Performance Standard 7.2 - 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. In considering formal discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.

Counsel should consider seeking discovery of the following items:

1. potential exculpatory information;
2. potential mitigating information;
3. all oral and/or written statements by the client, and the details of the circumstances under which the statements were made;
4. the prior juvenile or criminal record of the client and any evidence of other misconduct that the prosecution may intend to use against the client;
5. all books, papers, documents, data, photographs, tangible objects, buildings or places, or copies, or copies or portions thereof, relevant to the case;
6. all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
7. a written summary of any expert testimony the prosecution intends to use in its case-in-chief at trial.
8. the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
9. statements of co-defendants;
9. statements of other persons when relevant to the case.

If counsel has made formal discovery demands, counsel should seek prompt compliance and/or sanctions for failure to comply.

*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.*

## **Performance Standard 7.3 - Investigation and Preparation - Duties Regarding Physical Evidence**

In a juvenile unruly or delinquency matter, counsel may receive physical evidence from the juvenile 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 7.4 - 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 for a finding of not responsible or adjudication of a lesser offense, while also telling the juvenile's story of innocence, reduced culpability, or unfairness. 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 Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 6.4 (Dec. 14, 2007).*

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

Where the juvenile client is entitled to a detention or shelter care hearing counsel should take steps to see that the hearing is conducted in a timely fashion.

In preparing for the hearing, the attorney should become familiar with:

1. the elements of each of the offenses alleged;
2. the law of the jurisdiction for establishing probable cause;
3. factual information which is available concerning probable cause;
4. the subpoena process for obtaining compulsory attendance of witnesses at preliminary hearing;

Counsel should prepare the juvenile client for the hearing.

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

Counsel should use 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 Cases (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 8.2 - Preliminary Proceedings - Transfer Hearings**

A new, inexperienced counsel should not handle a transfer hearing without the supervision or assistance of more experienced counsel. A transfer hearing, while not a hearing on the merits of the case, could result in the loss of the protections afforded in juvenile court. Therefore counsel should prepare in the same way and with as much care as for an adjudicatory or dispositional hearing, in accordance with all other juvenile standards.

Counsel should be aware of the statutory findings the court must make before transferring jurisdiction. Counsel should be aware of the current statutory and case law governing these findings.

Unless the juvenile client directs otherwise, counsel should present evidence to the court that counsel believes will support a decision not to transfer. Evidence may include, but is not limited to, the juvenile client's record, performance on probation, educational history, mental and emotional state, intellectual functioning, developmental issues, and family history. Counsel should be prepared to present testimony to prevent transfer including testimony by people who can provide helpful insight into the client's character, such as teachers, counselors, psychologists, community members, probation officers, religious affiliates, employers, or other persons with a positive and/or professional view of the juvenile client.

Counsel should ensure that all transfer hearing proceedings are recorded.

Counsel should preserve all issues for appeal.

*Adapted from: GA Performance Standards for Juvenile Defense Representation in Indigent Delinquency and Unruly Cases (May 5, 2006), Performance Standard 17; NC Commission on Indigent Defense Services Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 4.5 (Dec. 14, 2007).*

*See also: NDCC § 27-20-34 (Transfer to other courts); ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 15.1 (Children Prosecuted as Adults).*

## **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 prehearing 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 client;
2. the constitutionality of the implicated statute(s);
3. the potential defects in the charging process;
4. the sufficiency of the petition;
5. the discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;
6. the suppression of evidence gathered as the result of violations of the United States Constitution, the North Dakota Constitution, or North Dakota statutes or rules; including:
  - a) the fruits of illegal searches or seizures;
  - b) involuntary statements or confessions;
  - c) statements or confessions obtained in violation of the client's right to counsel, or privilege against self-incrimination;
  - d) unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.
7. access to resources which may be denied to the juvenile client because of his or her indigence;
8. the juvenile client's right to a continuance in order to adequately prepare or present his or her case;

9. matters of evidence which may be appropriately litigated by means of a prehearing motion in limine;
10. matters of hearing or courtroom procedure.

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 defense case may occur which affect the significance of potential prehearing motions.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 9.1.*

## **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 § 27-20-27 (Other basic rights); N.D.R. Ct. 3.2 (March 1, 2007) (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 - Plea Negotiations - Duties**

Counsel should explore with the juvenile client the possibility and desirability of reaching a negotiated disposition of the petition rather than proceeding to a hearing and in doing so should fully explain the rights that would be waived by a decision to admit to some or all of the allegations and not to proceed to a contested hearing.

Counsel should keep the juvenile client fully informed of any continued plea discussions and negotiations and promptly convey to the client any offers made by the prosecution for a negotiated settlement.

Counsel shall not accept any plea agreement without the client's express authorization.

The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense 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 trial.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 10.1.*

## **Performance Standard 10.2 - Plea Negotiations - Negotiation**

A. In order to develop an overall negotiation plan, counsel should be aware of, and make sure the client is aware of:

1. the possible dispositions the court may order if the child is found to be delinquent or unruly, including placement on probation, commitment to the custody of the division of juvenile services or another state department; and payment of a fine or restitution;
2. the possibility of transfer to district court;
3. other consequences of conviction including but not limited to deportation of the child or family members, ineligibility of the child or family members for various government programs, the prohibition from carrying a firearm, the suspension of a motor vehicle operator's license, sex offender registration requirements; and
4. the possible and likely place and manner of confinement.

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

1. not to proceed to hearing on merits of the allegations in the petition;
2. to decline from asserting or litigating any particular prehearing motions;
3. an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs; and
4. providing the prosecution with assistance in prosecuting or investigating the present case or other alleged unruly, delinquent or criminal activity.

C. In developing a negotiation strategy, 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 of the petitioned offenses;

2. that the juvenile client will not be subject to further investigation or prosecution for uncharged alleged unruly or delinquent conduct;
3. that the juvenile client will receive, with the agreement of the court, a specified disposition;
4. that the prosecution 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;
5. that the prosecution will not present, at the time of disposition, certain information; and
6. that the juvenile client will receive, or the prosecution will recommend, specific benefits concerning the juvenile client's place and/or manner of confinement.

D. In developing a negotiation strategy, counsel should be completely familiar with the position of any alleged victim with respect to disposition. In this regard, counsel should:

1. consider whether interviewing the alleged victim or victims is appropriate and if so, who is the best person to do so and under what circumstances;
2. consider to what extent the alleged victim or victims might be involved in the plea negotiations;
3. be familiar with any rights afforded the alleged victim or victims under North Dakota law; and
4. be familiar with the practice of the prosecutor and/or victim-witness advocate working with the prosecutor and to what extent, if any, they defer to the wishes of the alleged victim.

E. In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority, and probation department which may affect the content and likely results of negotiated plea bargains.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 10.2.*

*See also: NDCC § 12.1-32-15 (Offenders against children and sexual offenders - Sexually violent predators - Registration Requirement - Penalty); § Ch. 12.1-34 (Fair Treatment of Victims and Witnesses); id. Ch. 12.1-35 (Child Victim and Witness Fair Treatment Standards); id. § 27-20-31 (Disposition of delinquent child); id. § 27-20-31.1 (Delinquent children - Suspension of driving privileges); id. § 27-20-31.2 (Restitution); id. § 27-20-32 (Disposition of unruly child); id. § 62.1-02-01 (Persons who are not to possess firearms - Penalty).*

### **Performance Standard 10.3 - Plea Negotiations - The Decision to Admit the Allegations of the Petition**

Counsel should inform the juvenile client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages of the potential consequences of the agreement.

The decision to admit to the allegations of the petition rests solely with the juvenile client, and counsel should not attempt to unduly influence that decision.

A negotiated plea should be committed to writing whenever possible.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 10.3.*

## **Performance Standard 10.4 - Plea Negotiations - Admission of the Allegations Before the Court**

Prior to the admission of any allegations of the petition before the court, counsel should:

1. make certain that the juvenile client understands the rights he or she will waive by admitting allegations of the petition, and that the client's decision to waive those rights is knowing, voluntary and intelligent;
2. make certain that the juvenile client receives a full explanation of the conditions and limits of the plea agreement and the maximum sanctions and collateral consequences the client will be exposed to by admitting any allegations;
3. explain to the juvenile client the nature of the hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and if he or she will be providing a statement concerning the offense(s); and
4. make certain that if the plea agreement does not include a negotiated disposition, the client is informed that once the admissions have been accepted by the court, they may not be withdrawn after the court has pronounced its disposition of the matter.

After entry of the admissions, if the court postpones hearing evidence as to whether the juvenile is in need of treatment or rehabilitation, and if the child is in detention, counsel should be prepared to address the issue of release pending such hearing.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 10.4.*

*See also: NDCC § 27-20-29 (Hearing - Findings - Dismissal)*

## **Performance Standard 11.1 - Adjudicatory Hearing - Preparation**

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;
2. relevant documents prepared by investigators;
3. outline or draft of opening statement;
4. cross-examination plans for all possible prosecution witnesses;
5. direct examination plans for all prospective defense witnesses;
6. copies of defense subpoenas;
7. prior statements of all prosecution witnesses (such as transcripts and police reports) and counsel should have prepared transcripts of any audio or video taped witness statements;
8. prior statements of all defense witnesses;
9. reports from defense experts;
10. a list of all defense exhibits, and the witnesses through whom they will be introduced;
11. originals and copies of all documentary exhibits;
12. copies of all relevant statutes and cases; and
14. outline or draft of closing argument.

Counsel should be fully informed as to the rules of evidence, court rules, and the law relating to all stages of the hearing process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the hearing.

Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at hearing and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

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.

Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the juvenile 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 detained juvenile 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.

Throughout preparation and hearing, counsel should consider the potential effects that particular actions may have upon disposition if the court finds that the juvenile committed the acts alleged.

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 Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 9.2 (Dec. 14, 2007); id. Guideline 9.3.*

## **Performance Standard 11.2 - Adjudicatory Hearing - 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 should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.

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

1. to provide an overview of the defense case;
2. to identify the weaknesses of the prosecution's case;
3. to emphasize the prosecution'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 prosecutor 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 11.3 - Adjudicatory Hearing - Confronting the Prosecution's Case**

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

Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution'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 defense and closing argument;
2. consider whether cross-examination of each individual witness is likely to generate helpful information;
3. anticipate those witnesses the prosecutor 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 potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor 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.

Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.

Where appropriate, at the close of the prosecution'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 a defense case.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 11.7.*

## **Performance Standard 11.4 - Adjudicatory Hearing - Presenting the Defense Case**

Counsel should develop, in consultation with the juvenile 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 prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

Counsel should discuss with the client all of the considerations relevant to the client's decision to testify. Counsel should also be familiar with his or her ethical responsibilities that may be applicable if the client insists on testifying untruthfully. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.

In preparing for presentation of a defense 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 defense case;
3. determine what facts necessary for the defense case can be elicited through the cross-examination of the prosecution'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 prosecutor.

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.*

## **Performance Standard 11.5 - Adjudicatory Hearing - Closing Argument**

Counsel should be familiar with the substantive limits on both prosecution and defense 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 prosecution.

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 prosecution'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 prosecution arguments; and
4. the effects of the defense argument on the prosecutor's rebuttal argument.

Whenever the prosecutor 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 - Obligations of Counsel**

Among counsel's obligations in the dispositional phase of an unruly or delinquency matter are:

1. where a juvenile client chooses to admit to allegations in a petition, to ensure that a plea agreement is negotiated with consideration of the dispositional, financial and collateral implications;
2. to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
3. to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;
4. to develop a plan which seeks to achieve the least restrictive and burdensome dispositional alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the client's background, the available dispositional alternatives, and other information pertinent to the court's decision;
5. to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of any dispositional report before distribution of the report; and
6. to consider the need for and availability of specialists regarding disposition, and to seek the assistance of such specialists whenever possible and warranted.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 12.1.*

*See also: NDCC § 27-20-28 (Investigation and report); id. § 27-20-29 (Hearing - Findings - Dismissal); id. § 27-20-31 (Disposition of delinquent child); id. § 27-20-31.1 (Delinquent children - Suspension of driving privileges); id. § 27-20-31.2 (Restitution); id. § 27-20-32 (Disposition of unruly child).*

## **Performance Standard 12.2 - Dispositional Phase - Options, Consequences and Procedures**

A. Counsel should be familiar with the dispositional options applicable to the case, including;

1. any sentencing guideline structure;
2. any diversionary programs;
3. the possibility of expungement and sealing of records;
4. probation and permissible conditions of probation;
5. fines, associated fees and court costs;
6. victim restitution; and
7. reimbursement of attorney fees.

B. Counsel should be familiar with direct and collateral consequences of any disposition in the matter:

1. place of detention;
- 2.. eligibility for educational programs;
3. availability of drug rehabilitation programs, psychiatric treatment, health care, and other treatment programs;
4. deportation and other immigration consequences;
5. impact of a fine or restitution and any resulting civil liability;
6. suspension of a motor vehicle operator's permit;
7. prohibition of carrying a firearm; and
8. other consequences of conviction including but not limited to the ineligibility for various government programs including student loans, registration as a sex offender, and loss of public housing.

C. Counsel should be familiar with dispositional procedures, including:

1. the effect that plea negotiations may have upon the discretion of the court;

2. the availability of an evidentiary hearing and the applicable rules of evidence and burdens of proof at such a hearing;
3. the use of “victim impact” evidence at any dispositional hearing;
4. the right of the defendant to speak prior to disposition being entered; and
5. any discovery rules and reciprocal discovery rules that apply to dispositional hearings.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 12.2.*

*See also: NDCC § 27-20-31 (Disposition of delinquent child); id. § 27-20-31.1 (Delinquent children - Suspension of driving privileges); id. § 27-20-31.2 (Restitution); id. § 27-20-32 (Disposition of unruly child); § 27-20-36 (Limitations on time on orders of disposition).*

### **Performance Standard 12.3 - Dispositional Phase - Preparation for Disposition**

In preparing for disposition, counsel should:

1. inform the client of the applicable dispositional requirements, options, and alternatives, and the likely and possible consequences of them;
2. maintain regular contact with the client prior to the dispositional hearing, and inform the client of the steps being taken in preparation for the hearing;
3. obtain from the client relevant information concerning such subjects as his or her background and personal history, prior record, employment history and skills, education, medical history and condition, financial status, family obligations, and obtain from the client sources through which the information provided can be corroborated;
4. consider the need to utilize dispositional experts, including mental health, developmental, or educational professionals, if applicable;
5. inform the juvenile client of his or her right to speak at the dispositional hearing and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission may have upon an appeal, subsequent hearing on remand, or hearing on other offenses;
6. prepare the client to be interviewed by any official preparing a pre-dispositional report; and ensure the client has adequate time to examine the report, if one is utilized by the court;
7. inform the client of the disposition counsel will ask the court to consider; if the client and counsel disagree as to the disposition to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular disposition; and
8. collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary,

counsel should specifically request the opportunity to present tangible and testimonial evidence.

*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 Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level, Guideline 10.3 (Dec. 14, 2007).*

## **Performance Standard 12.4 - Dispositional Phase - Pre-Disposition Reports**

Counsel should be familiar with the procedures concerning the preparation, submission, and verification of any pre-dispositional reports. In addition, counsel should:

1. consider the strategic implications of requesting that a report be prepared;
2. provide to any official preparing a report relevant information favorable to the client, including, where appropriate, the client's version of the offense;
3. review the completed report;
4. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;
5. take appropriate steps to preserve and protect the client's interest where the defense challenges information in a pre-dispositional report as being erroneous or misleading and the court refuses to hold a hearing on a disputed allegation adverse to the client; the prosecution fails to prove an allegation; or the court finds an allegation not proved.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 12.4.*

*See also: NDCC § 27-20-28 (Investigation and report); id. § 27-20-29 (6) (court may continue hearing to receive reports bearing on disposition, or the need for treatment or rehabilitation).*

## **Performance Standard 12.5 - Dispositional Phase - The Prosecution's Position**

Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution will advocate that a particular type or length of disposition be ordered.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 12.5.*

## **Performance Standard 12.6 - Dispositional Phase - The Dispositional Hearing**

Counsel should be prepared at the dispositional hearing to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.

Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the disposition of the matter.

In the event there will be disputed facts before the court at the dispositional hearing, counsel should consider requesting an evidentiary hearing. Where a dispositional hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the client, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the client.

Where information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the client.

Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of detention, probation, psychiatric treatment or drug rehabilitation.

Where appropriate, counsel should prepare the client to personally address the court.

*Adapted from: ND Commission on Legal Counsel for Indigents Minimum Attorney Performance Standards - Criminal Matters, Performance Standard 12.6.*

### **Performance Standard 13.1 - Review of Matter by District Court Judge**

If the unruly or delinquency 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 juvenile client has been found by the referee to be in need of treatment or rehabilitation as an unruly or delinquent child, 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 13.2 - The Right to an Appeal**

Following entry of an appealable order, judgment or decree, 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 14.1 - 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.*