



Montana Legislative Services Division
Legal Services Office

TO: Task Force on State Public Defender Operations
FROM: Julie Johnson, Legal Services Office
DATE: December 1, 2015
RE: Questions From the Task Force

OVERVIEW

Below are several questions that were posed to staff by the Task Force. I have not rephrased or reordered the questions as they were asked.

In addition to this memo are the following Exhibits:

- A Attorney's Education and Experience Questionnaire
- B Practice Standard XXII: Representation of Children in Dependent/Neglect Cases
- C How to Become an OPD Contract Attorney
- D Initial Client Interview Form
- E Misdemeanor Criminal Case Checklist

QUESTIONS

1. ***What prohibitions are there for allowing attorneys to serve as staff or contract public defenders (PDs) if they have an official finding of misconduct or other finding of ineffective assistance of counsel?***

In general, a lawyer may not serve as a staff or contract attorney if the lawyer's license to practice in Montana has been suspended or the lawyer has been disbarred by the Montana Supreme Court.

More specifically, any attorney who applies to work as a contract attorney must complete the "Attorney's Education and Experience Questionnaire", attached as Exhibit A. The attorney is asked:

Have you ever been formally disciplined, or is a disciplinary action pending, by any of the courts before which you have been admitted to practice, or, have you ever been found by a court to have delivered ineffective assistance?

A contract attorney is required by the Memorandum of Understanding to notify the Contract Manager or the Conflict Coordinator within 10 days of the following events:

- a. Actual notice from the State Bar of Montana, or the disciplinary agency regulating attorneys in any state, that a complaint has been filed against Counsel;
- b. Being arrested or charged with a crime; or
- c. Any sanctions imposed on Counsel by any Court.

A finding of ineffective assistance of counsel is not necessarily equivalent to a finding of “official misconduct.” The U.S. Supreme Court has recognized that a 6th Amendment ineffective assistance of counsel claim is not necessarily the same as an allegation of an ethical violation. Nix v. Whiteside, 475 U.S. 157, 165 (1986) (“[u]nder the Strickland standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.”)

2. *What special training is required by the agency or by statute to serve as a child's attorney?*

There are no statutes requiring an attorney to have special training to serve as a child's attorney. OPD does not require any specific training, however, it does offer training on serving as a child's attorney on occasion. OPD sponsored a specific “Red Book” training on child welfare law in July, 2014. The training was conducted by the National Association of Counsel for Children under a grant from the Supreme Court administrator, and was attended by FTE and contract attorneys.

Also, when applying to work as a contract attorney for OPD, an attorney is asked whether he or she is qualified and/or interested in accepting Dependency and Neglect (DN) cases and to identify how many children or parents has the attorney represented in DN cases. Exhibit A, p. 3-4.

In addition, the Montana Public Defender Commission has issued Practice Standard XXII, addressing the "Representation of Children in Dependent/Neglect Cases", which is attached as Exhibit B. On page 3 of Exhibit B there is an outline of the training and knowledge an attorney is expected to have in order to be eligible to represent a child in a DN case.

3. *What are the legal guidelines for when a child should be appointed an attorney (frequently based on age)? How does this work with the ABA (American Bar Association) standards and the NACC (National Association of Counsel for Children) standards for child representation?*

A. Montana Law and OPD Guidelines

Section 41-3-425(2)(b), MCA, provides that the court shall immediately appoint the office of state public defender to assign counsel for "any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 (DN case) when a guardian ad litem (GAL) is not appointed for the child or youth."

Section 41-3-425(3), MCA, provides that "[w]hen appropriate, the court may appoint the office of state public defender to assign counsel for any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is appointed for the child or youth."

How these two sections are applied by the courts depends on the judge. Some courts will not appoint an attorney to a child when a GAL has been appointed to the child if the child is not communicative.

Attached as Exhibit B is Practice Standard XXII, which addresses the "Representation of Children in Dependent/Neglect Cases".

B. ABA Standards of Practice for Lawyers Representing Children

The ABA Standards identify two types of representation for children by court-appointed counsel:

1. **Child's Attorney:** A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.
2. **Best Interests Attorney:** A lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives.

According to the ABA:

These Standards and these definitions apply to lawyers fitting these descriptions regardless of the different titles used in various states, and regardless of whether the lawyer is appointed by the court or retained by the child.

A lawyer should be either a Child's Attorney or a Best Interests Attorney....The essential distinction between the two lawyer roles is that the Best Interests Attorney investigates and advocates the best interests of the child as a lawyer in the litigation, while the Child's Attorney is a lawyer who represents the child as a client. Neither kind of lawyer is a witness. Form should follow function in deciding which kind of lawyer to appoint. The role and duties of the lawyer should be tailored to the reasons for the appointment and the needs of the child.

C. National Association of Counsel for Children Standards

The National Association of Counsel for Children (NACC) Standards, identify three types of representation for children by court-appointed counsel:

1. **The Child's Attorney:** The term "child's attorney" means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.

NACC Commentary

These Standards explicitly recognize that the child is a separate individual with potentially discrete and independent views. To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position. Consequently, the child's attorney owes traditional duties to the child as client consistent with ER 1.14(a) of the Model Rules of Professional Conduct. In all but the exceptional case, such as with a preverbal child, the child's attorney will maintain this traditional relationship with the child/client. As with any client, the child's attorney may counsel against the pursuit of a particular position sought by the child. The child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients. Therefore, the child's attorney should ensure that the decision the child ultimately makes reflects his or her actual position.

2. Lawyer Appointed as Guardian Ad Litem: A lawyer appointed as "guardian ad litem" for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences.

NACC Commentary

In some jurisdictions the lawyer may be appointed as guardian ad litem. These Standards, however, express a clear preference for the appointment as the "child's attorney." These Standards address the lawyer's obligations to the child as client. A lawyer appointed as guardian ad litem is almost inevitably expected to perform legal functions on behalf of the child. Where the local law permits, the lawyer is expected to act in the dual role of guardian ad litem and lawyer of record. The chief distinguishing factor between the roles is the manner and method to be followed in determining the legal position to be advocated. While a guardian ad litem should take the child's point of view into account, the child's preferences are not binding, irrespective of the child's age and the ability or willingness of the child to express preferences. Moreover, in many states, a guardian ad litem may be required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a "lawyer." These Standards do not apply to nonlawyers when such persons are appointed as guardians ad litem or as "court appointed special advocates" (CASA). The nonlawyer guardian ad litem cannot and should not be expected to perform any legal functions on behalf of a child.

3. Developmentally Appropriate Lawyer: "Developmentally appropriate" means that the child's attorney should ensure the child's ability to provide client-based directions by structuring all communications to account for the individual child's age, level of education, cultural context, and degree of language acquisition.

NACC Commentary

The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning and consequences of action. A child client may not understand the legal terminology and for a variety of reasons may choose a particular course of action without fully appreciating the implications. With a child the potential for not understanding may be even greater. Therefore, the child's attorney has additional obligations based on the child's age, level of education, and degree of language acquisition. There is also the possibility that because of a particular child's developmental limitations, the lawyer may not completely understand the child's responses. Therefore, the child's attorney must learn how to ask developmentally appropriate questions and how to interpret the child's responses.

4. *What is the scope of appointment for OPD? We discussed this some during our first meeting but our committee wants to look at it more.*

In short, the scope of appointment is to serve as counsel from the time of the defendant's initial court appearance until the final appeal of the same criminal matter is concluded.

A defendant in a criminal proceeding is entitled to counsel at every critical stage of the proceedings "where rights may be preserved or lost, regardless of whether prejudice is shown." State v. Schenk, 151 Mont. 493, 497, 444 P.2d 861, 863 (1968) (citations omitted). "The right to counsel attaches no later than the preliminary hearing stage." White v. State of Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963).

Under very limited circumstances, a public defender may get involved in an ancillary proceeding. See, Practice Standard VI, Section 32 ("[i]f counsel is able to reach a global settlement of a case which requires only entry of appearance of counsel in an ancillary proceeding **for the sole purpose** of finalizing a global settlement of matters which include a case for which counsel has been assigned, counsel may do so.)

5. *Describe the case of A.W.S. and its effect on OPD and how it does or does not work with OPD statutes.*

In re A.W.S., 2014 MT 322, 377 Mont. 234, 339 P.3d 414, was issued in December 2014 by the Montana Supreme Court. In A.W.S., the Montana Supreme Court concluded that an indigent parent whose parental rights were subject to termination pursuant to a stepparent adoption petition had a constitutional right to counsel. The District Court had terminated the mother's rights, however, the Supreme Court reversed the order and remanded the matter for the appointment of counsel and a new hearing.

However, in a case decided 8 months later, In re J.M., 2015 MT 231, 380 Mont. 292, 354 P.3d 626, the Montana Supreme Court affirmed the termination of parental rights even though the father did not have court-appointed counsel. The Supreme Court clarified that an indigent parent facing termination of parental rights must give some indication to the court that he or she would like court-appointed counsel based on a lack of financial resources.

Currently, when OPD is appointed to serve as counsel for an indigent parent in a involuntary parental termination proceeding, it files a "Motion to Rescind" asking the court to rescind the order appointing counsel based on OPD's lack of resources.

6. *What are the legal requirements for when an appeal must legally be provided for by the State, including when a public defender must be appointed, how far their representation must go, must they appeal everything the person wants, etc?*

Section 47-1-104(4)(c), MCA, provides that a "court may order an office to assign counsel under this chapter..." "for an eligible appellant in an appeal of a proceeding listed in this subsection (4)."

The decision to appeal rests with the defendant. Jones v. Barnes, 463 U.S. 745 (1983). The U. S. Supreme Court has stated that "the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal." Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000). Failure to preserve a defendant's right to appeal when he has requested that notice be filed is error. State v. Rogers, 2001 MT 165, ¶ 24, 306 Mont. 130, 32 P.3d 724

After an order is issued, the trial attorney, whether OPD staff or a contract attorney, will notify the client of the order and the right to appeal. The attorney will advise the client of whether there are any legitimate grounds for an appeal. If the client decides to appeal, whether grounds exist or not, the attorney will file a "Notice of Appeal" in order to preserve the client's right to appeal. The "Notice of Appeal" is a one-page document, typically.

After the notice is filed, the case is then transferred to the Office of the Appellate Defender, where the Appellate Defender will assign the case. The attorney who is assigned the case, will review the record and the pleadings to determine whether any legitimate grounds for an appeal exist. If there are grounds, the attorney will continue with the appeal. However, if the attorney concludes that there are no grounds for appeal, the attorney will advise the client. If the client still insists on pursuing an appeal, the attorney will file what is known as an Anders brief and a motion to withdraw as counsel.

An Anders brief is a brief filed by the OPD attorney who wants to withdraw from the case on appeal, based on the attorney's conclusion that the appeal is frivolous. This brief is named after the case Anders v. California, 386 U.S. 738 (1967), and according to the U.S. Supreme Court, the brief must raise all possible arguable issues for appeal and must identify anything in record that might support the appeal. The Montana Supreme Court then decides whether the appeal is frivolous, and whether the attorney may withdraw from the case.

7. *What are the staffing requirements for when OPD must provide an attorney for an appeal and in what cases? What is this based on?*

See answer to Question No. 6.

8. *What criteria are used to select contract attorneys?*

See Exhibit A, entitled "Attorneys Education and Experience Questionnaire", and Exhibit C, entitled "How to Become an OPD Contract Attorney". An assigning supervisor, typically the Regional Deputy, will consider the attorney's prior experience and qualifications. Also, each attorney must list 3 professional references when applying to work as a contract attorney for OPD (Exhibit A, p.5). The Contract Manager checks each reference prior to entering into a Memorandum of Understanding" with the attorney.

In addition, once a contract attorney is selected, the Contract Manager will periodically evaluate the attorney. This evaluation consists of the following:

- cold calls to clients
- calls to judges and prosecutors who have worked with the attorney in a case
- reviewing substantive motions and briefs filed by the attorney
- reviewing bills submitted by the attorney

If the Contract Manager determines that a deficiency may exist, the Contract Manager will report that information to the Regional Deputy or the Chief Public Defender for further analysis and to determine a course to address the situation.

9. *What criteria are used to exclude contract attorneys?*

See answers to Question Nos. 1 and 8.

10. *What training is required of the contract attorney prior to taking a case, especially specialized cases?*

An attorney who is representing a defendant in a criminal case in which the prosecutor has filed a timely notice that it will seek the death penalty must be death penalty qualified.

No other specific training is required in advance of taking a particular type of case; however, the assigning supervisor will consider the contract attorney's qualifications and experience outlined in his or her "Attorney's Education and Experience Questionnaire" (Exhibit A) at the time of assignment.

Also, the OPD has client interview forms and checklists available to all of the attorneys who are court-appointed. Attached for reference is Exhibit D, entitled "Initial Client Interview Form", and Exhibit E, entitled "Misdemeanor Criminal Case Checklist". OPD also makes available other tools, such as:

- Courts of Limited Jurisdiction Practice Manual
- Criminal Practice Manual
- Dependent Neglect Practice Manual

cl0170 5335jxla.