

STANDARDS FOR DSS ATTORNEYS

Becoming a DSS Attorney is a lot like learning to throw hand grenades. Somebody gives you the basic routine of pulling the pin and throwing the grenade and then you learn how to become proficient by doing it yourself and being sure the explosions don't happen too close to you.

Some of us either came from the private sector or are in the private sector prior to representing DSS. Some of us came straight from law school to DSS. Either way it was our good fortune to wind up in a job where our mission is to protect children. I remember how little pride and satisfaction I got from criminal and domestic court and what a shot in the arm it was to come to DSS and wear a white hat all the time.

Our juvenile statutes don't tell us what is expected from DSS attorneys. The conduct of DSS Court varies widely between counties and as we see from the listserve, there are a lot of different ways counties address DSS issues.

There have been some publications about standards for DSS attorneys and I will give you an overview of them today.

The American Bar Association published the "Standards of Practice for Lawyers Representing Child Welfare Agencies" in 2004. These standards can be found at [www.abanet.org/child/agency-standards.pdf]. The stated purpose of these standards is to improve the quality of child welfare agency representation and uniformity of practice throughout the country.

These standards provide definitions that are pertinent.

"1. Agency: The state or county child welfare agency that is charged with protecting and caring for children suspected or found to be abused or neglected and providing services to the child's family. The agency investigates reports of child abuse and neglect, provides preventative services to families and takes custody of children and oversees their placement in foster care. If a child is placed in foster care, the agency works with the family to reunite the child or achieve another permanency outcome for the child. an Agency Attorney as : " An attorney who is an employee or contractor with the government who is charged with the responsibility of initiating proceedings on behalf of the government or the people to protect abused and neglected children."

2. Agency Attorney: An attorney who is an employee or contractor with the government who is charged with the responsibility of initiating proceedings on behalf of the government or the people to protect abused and neglected children.

3. Client: A person or entity who employs an attorney or counselor to appear in court, advise, assist and defend in legal proceedings. The client is the entity to which the agency attorney is responsible." ¹

BASIC OBLIGATIONS

The ABA Standards divide the different obligations of the Agency Attorney into the following categories:

General

1. Fully understand and comply with all relevant federal and state laws, regulations, policies, and rules;
2. Promote timely hearings and reduce case continuances;
3. Protect and promote the agency's credibility;
4. Cooperate and communicate on a regular basis with other professionals and parties in a case, including the client/agency.

Advise and Counsel

5. Counsel the client/agency about all legal matters related to individual cases as well as policy issues and periodically monitor cases;

Court Preparation

6. Develop a case theory and strategy to follow at hearings and negotiations;
7. Prepare or help prepare the initial petition and all subsequent pleadings;
8. Timely file all pleadings, motions, and briefs;
9. Obtain all documents and information needed, including copies of all pleadings and relevant notices filed by other parties;
10. Participate in all depositions, negotiations, discovery, pretrial conferences, mediation sessions (when appropriate), and hearings;
11. Participate in settlement negotiations and attempt speedy resolution of the case, when appropriate;
12. Develop a case timeline and tickler system;
13. Subpoena and prepare all witnesses, including the client;
14. Ensure proper notice is provided to all parties and necessary caretakers;

Hearings

15. Attend and prepare for all hearings;
16. Prepare and make all appropriate motions and evidentiary objections;

17. Present case in chief, present and cross-examine witnesses, prepare and present exhibits;
18. In jurisdictions in which a jury trial is possible, participate in jury selection and drafting jury instructions;
19. Request the opportunity to make brief opening and closing arguments when appropriate;
20. Prepare or help prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision;

Post Hearings/Appeals

21. Follow all court orders pertaining to the attorney for the client/agency;
22. Review court orders to ensure accuracy and clarity and review with agency when necessary;
23. Take reasonable steps to ensure the agency complies with court orders;
24. Consider and discuss with the agency the possibility of appeal;
25. If a decision is made to appeal, timely file the necessary post-hearing motions and the notice to appeal paperwork;
26. Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending;
27. Communicate the results of the appeal and its implications to the agency/client

I'll discuss these in order.

GENERAL

1. Fully understand and comply with all relevant federal and state laws, regulations, policies, and rules.

While this sounds pretty elementary, it means that we should be familiar with Federal laws and State policies as they pertain to child welfare. Agency Attorneys don't have to become social workers but you do have to understand the rules your client is operating under. Some DSS attorneys feel that if it doesn't appear in N.C.G.S. 7B, then it doesn't apply. DSS agencies operate under very strict and often complicated policies that written to ensure compliance with Federal and State laws. I think this also covers understanding the funding part of DSS as far as funding is impacted by the legal system. Title IV-E of the Social Security Act is a prime example of how potentially hundreds of thousands if not millions of dollars depend on getting the proper findings in our Nonsecure, Seven Day and Permanency Planning Orders. The Adoptions and Safe Families Act is another Federal law that directly impacts our legal obligations. The requirements pertaining to timeliness of hearings and obtaining permanence are two examples of how the Federal law impacts DSS Attorneys. Given the fiscal

climate of today, it is not inconceivable that the Federal Government would begin to attach monetary sanctions to violations of the requirements of ASFA in the near future.

The ABA lists the following relevant laws and statutes:

- *Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357*
- *Child Abuse Prevention Treatment Act (CAPTA), 42 U.S.C. §5101*
- *Indian Child Welfare Act (ICWA) 25 U.S.C. §§1901-1963, and the ICWA Regulations, 25 C.F.R. Part 23*
- *Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622 (b)(9) (1998), 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. §1996b (1998).*
- *Interstate Compact on Placement of Children (ICPC)*
- *Foster Care Independence Act of 1999, P.L. 106-169*
- *Individuals with Disabilities Education Act (IDEA), P.L. 91-230*
- *Family Education Rights Privacy Act (FERPA), 20 U.S.C. §1232g*
- *Health Insurance Portability and Accountability Act of 1996 (HIPPA), P. L., 104-192 §264, 42 U.S.C. §1320d-2 (in relevant part)*
- *All state laws, policies and procedures regarding child abuse and neglect*
- *State laws concerning privilege and confidentiality, public benefits, education, and disabilities*
- *State's Rules of Professional Responsibility or other relevant ethics standards*

2. Promote timely hearings and reduce case continuances;

This is an area that needs improvement all across the country, including North Carolina. DSS Court has traditionally been the bottom rung in the District Court ladder.

I had a judge inform me one time that I only had until 1:00 PM to finish my DSS calendar because he and all the other lawyers were going to a baseball game.

We want to make reasonable accommodations to our fellow lawyers and to get along with the local bar however continuances in DSS cases should be limited to the reasons provided in N.C.G.S. 7B-803, This statute provides that "7B-803. The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile. "

This is the most abused of any of our juvenile statutes. It's clear that the intent of both the American Bar Association standards and the North Carolina

General Statutes that we hold timely hearings and cut down on continuances. Every day that goes by is another day that a child is separated from their family or is kept in legal limbo until the Court decides what should happen in the child's case. We should be arguing strenuously against continuances where there is no need for further evidence and no extraordinary circumstances.

3. Protect and promote the agency's credibility;

This standard is best achieved by taking cases to Court that have proper preparation. In most areas, DSS isn't the most popular agency in the County. DSS Attorneys have to work hard to establish and maintain credibility in the legal community. The DSS attorney should strive to demonstrate the positive aspects of the agency.

4. Cooperate and communicate on a regular basis with other professionals and parties in a case, including the client/agency;

The DSS attorney should establish and maintain communications with all of the other professionals in the case, including the social workers. As the ABA points out, the DSS attorney must have all relevant information to effectively try the case. They recommend regular meetings with the DSS staff to discuss the cases and stay abreast of the changes occurring in the case.

ADVISE AND COUNSEL

5. The DSS attorney should counsel the client/agency about all legal matters related to individual cases as well as policy issues and periodically monitor cases.

The DSS attorney must spend time with the caseworkers to prepare the individual cases for hearing. The DSS attorney should meet with the caseworkers before trial to get the information from the caseworker and to tell the caseworker, in clear language, what is expected to happen in Court. The ABA stresses the DSS attorney's role as a counselor and the obligation to monitor the cases regularly to ensure that all legal mandates such as notice and visitation are being properly met. They state that the DSS attorney should attend all staffing where major changes in the Agency's plan are expected to change.

COURT PREPARATION

6. Develop a case theory and strategy to follow at hearings and negotiations.

The case theory and strategy should be developed by the DSS attorney and the caseworkers. The ABA says : "The legal steps the agency attorney takes at the beginning of a case lay the groundwork for strong case planning by the agency and positive outcomes for the child and family throughout the life of the case." Proper attention at the commencement of the case will prevent future problems with pleadings being properly verified and properly served. A proper assessment of the case and good communications with the caseworkers will help

everyone in identifying the problems and understand the Agency's approach to addressing these problems.

7. Prepare or help prepare the initial petition and all subsequent pleadings;

Practice varies between counties in North Carolina on how petitions are drafted. Some counties have the social workers draft the initial petition, while the DSS attorneys draft the petitions or approve the petitions prior to filing . The ABA states that the DSS attorney should play the lead role in drafting of petitions

8. Timely file all pleadings, motions, and briefs;

These pleadings, motions and briefs must be thorough, accurate and timely. They must be complete and contain all relevant information.

9. Obtain all documents and information needed, including copies of all pleadings and relevant notices filed by other parties;

This includes issuing proper subpoenas to secure the presence of necessary witnesses and that the proper records and documents are available to the Court at the hearing. The ABA states that the DSS attorney should work with the case worker to ensure that the case file contains “ full mental health and substance abuse treatment records, histories for the children and parents, abuse and neglect reports with supporting materials about the investigation, education records, health records, birth certificates for the children, death certificates, affidavits of efforts to locate parents, and results of paternity tests”. They further stress the benefits of having strong exhibits and documentary evidence.

10. Participate in all depositions, negotiations, discovery, pretrial conferences, mediation sessions (when appropriate), and hearings;

DSS attorneys should be good negotiators and should participate in all negotiations in each case. DSS cases are difficult to negotiate sometimes because of factors like child safety or culpability of parents in abuse or neglect. The DSS attorney must make it clear that they are ready to try the case and not compromise on every point to avoid the hearing.

11. Participate in settlement negotiations and attempt speedy resolution of the case, when appropriate;

Negotiating in DSS cases should never be done on a plea bargaining basis. (i.e. admitted to dependency in a neglect case or admitting neglect in an abuse case). It is impossible to address the issues in a neglect case if the adjudication is for dependency. In that case, the parent only has to appear in Court and say they want their child and the Court would have to return the child to the parent. The Court, in addressing the issues raised in the case, is limited to the issues that were adjudicated.

Another point the ABA states is that “The attorney must communicate all settlement offers to the agency and it is the agency's decision whether to settle”.

A number of DSS cases are settled behind closed doors where the DSS staff are not allowed to participate. DSS attorneys should keep in mind that they have to have the agency's permission to settle cases.

12. Develop a case timeline and tickler system;

At the beginning of a case, the DSS attorney and the caseworker should develop timelines that specify what actions should be taken and when. Proper case tracking is essential to proper preparation for Court and ensuring that the caseworkers know when the matter will be heard and what is expected to be addressed at the hearing. ASFA and IV-E both have timelines that are required to be met. Obtaining a finding in a court order that the Department has made reasonable efforts to prevent the child from coming into DSS custody must be done within sixty days of the day the child came into custody or the child will never be IV-E eligible.

13. Subpoena and prepare all witnesses, including the client;

The DSS Attorney should make sure that all necessary witnesses are subpoenaed and that the witnesses know why they are being called and what they are going to be asked.

The DSS Attorney should conduct pretrial conferences with the client. The social workers should know what they are expected to testify to and they should have an opportunity to discuss the case with the DSS Attorney prior to trial.

14. Ensure proper notice is provided to all parties and necessary caretakers;

The DSS Attorney should ensure that all parties who are required to be give notice pursuant to the General Statutes have been noticed and the proper proof of service appears in the case file.

Hearings

15. Attend and prepare for all hearings;

Given the large case loads handled by a large majority of DSS Attorneys, they are generally pushed for time and don't have the time to properly prepare for every hearing. The success of the DSS Agency depends upon how well they get good court results from their good social work.

16. Prepare and make all appropriate motions and evidentiary objections;

There is not a great deal of motion practice in North Carolina Juvenile Courts. DSS Attorneys should be prepared to file motions to allow the residual hearsay exceptions in cases where there is a need to get this evidence before

the Court. In sexual abuse cases or other sensitive cases, the DSS Attorney should be prepared to make a motion to close the hearing to the public.

17. Present case in chief, present and cross-examine witnesses, prepare and present exhibits;

This is where we get the most on the job training. We learn how to try these cases by doing it. In this day of heightened appellate scrutiny, the DSS Attorney has to be very careful that all the exhibits are properly identified and entered into evidence as well ensuring that there is actual evidence on every issue before the Court. Court Reports can be incorporated by reference, however they should not be relied upon to establish needed findings of fact without some mention of those facts in open Court. Our Court of Appeals has made it plain that they want to be able to determine that the trial Court made independent judgments regarding the findings of facts and didn't use the whole Court Report as the basis of it's findings of fact.

18. In jurisdictions in which a jury trial is possible, participate in jury selection and drafting jury instructions;

Thank goodness we don't have this in Juvenile Court in North Carolina

19. Request the opportunity to make brief opening and closing arguments when appropriate;

Whether to make an opening statement or not is in the discretion of the DSS Attorney. At the pace we process cases, it's not practical (or appreciated by the Court) to make opening and closing remarks in every case.

20. Prepare or help prepare proposed findings of fact, conclusions of law and orders when they will be used in the court's decision;

Most DSS Attorneys prepare the Orders for the Court and have some latitude in making the Findings of Fact and Conclusions of Law in the Orders. There is often confusion about what the difference is between a Finding of Fact and a Conclusion of Law. If you approach the Order in a backward progression, you start with what was ordered by the Court, then see if the Conclusions of Law support the ultimate findings and then see if the Findings of Fact support the Conclusions of Law.

Post Hearings/Appeals

21. Follow all court orders pertaining to the attorney for the client/agency;

This is self explanatory. We all pay close attention to what the Trial Court expects of the DSS Attorney.

22. Review court orders to ensure accuracy and clarity and review with agency when necessary

All Court Orders should be reviewed closely by the DSS Attorney and the DSS program staff to ensure accuracy. In reviewing hundreds of Orders in preparing for the IV-E audit, I see Orders that were obviously not closely reviewed. It is often the case where an original Order is done and every order after the first one just adds another sentence to the Order and you have to look closely to figure out what has changed. It is best practice to craft each Order for the particular case and keep the Order current so that it is clear what the Court heard and what the Court Ordered. All of the history of the case is not necessary in review hearing Orders.

23. Take reasonable steps to ensure the agency complies with court orders:

It is very important to review each Order with the DSS program staff to ensure that they understand what the Court has Ordered and what is expected at the next hearing. DSS Attorneys should attend occasional staffings to monitor whether the Court Order is being properly followed.

24. Consider and discuss with the agency the possibility of appeal:

Since the creation of IDS, appeals have become the norm instead of the exception as it was when trial Counsel had to handle their own appeals. They usually found some way to discourage their clients for asking for an appeal. The reality of the situation is that DSS Attorneys don't have time to be filing appeals on their cases because of the large caseloads they carry.

25. If a decision is made to appeal, timely file the necessary post-hearing motions and the notice to appeal paperwork:

See #24 above.

26. Request an expedited appeal, when feasible, and file all necessary paperwork while the appeal is pending:

While North Carolina has an expedited process for juvenile appeals, I don't see that they move a lot faster than normal appeals.

27. Communicate the results of the appeal and its implications to the agency/client.

It's important that the DSS program staff understand the results of an appeal and what areas need improvement .

CASE LOADS

The ABA standards drafting committee recommends a case load of no more than 60 cases. Many of you laugh at that number because your caseload is two or three times that many. It's important to stress to DSS management that if the DSS Agency wants it's DSS Attorney to comply with the recommended standards for DSS Attorneys, they need to realize that with the caseloads that are being handled in a majority of Counties, it is impossible for a DSS Attorney to comply with these standards. This is one area that needs to be stressed to the DSS Directors Association to give them a benchmark to consider in their supervision of their DSS Attorney.

EVALUATIONS

The ABA recommends that DSS Agencies develop and implement an attorney evaluation process. This process should include observing the DSS Attorney in Court; reviewing the DSS Attorney's files and talking with Court officials, colleagues, and program staff to evaluate the Attorney's performance and effectiveness. The ABA further recommends that the person in the DSS Agency who manages the DSS Attorney advocate for salaries that are competitive with other governmental attorneys in the jurisdiction to be able to keep good attorneys and avoid turnover.

CONCLUSION

These standards point out a lot of areas we can use to improve the level of practice in DSS Court in North Carolina. I don't think anything is more important than consideration of the caseloads being handled by DSS Attorneys. Case loads over 100 far exceed the ABA recommendation and as a practical matter are simply too much for one attorney to effectively handle.

These standards are taken from

"Standards of Practice For Lawyers Representing Child Welfare Agencies"
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http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/agency_standards.authcheckdam.pdf