

## JUVENILE JUSTICE UPDATE

# The Impact of National Standards on Juvenile Defense Practice

by Sarah Bergen with David A. Shapiro

The United States Supreme Court's 1967 opinion in *In re Gault*<sup>1</sup> established a child's constitutional right to counsel in delinquency proceedings. Since then, the juvenile justice community has disagreed about the nature and breadth of that right.

Some argue the adversarial intentions juvenile defenders bring to delinquency proceedings impedes the rehabilitative focus of the juvenile court. Others diminish the importance of appointing lawyers for youth compared to the seemingly more urgent stakes of the adult indigent defense system.

However, the *Gault* opinion and the U.S. Constitution clearly demand high-level representation for children to preserve fairness and protect their rights in juvenile court.<sup>2</sup> Given the unique status of childhood, and the impact that immaturity, disabilities, or trauma can have on a child's life, children, most of all, need access to competent counsel when they come before the state.

The *National Juvenile Defense Standards (Standards)*, released by the National Juvenile Defender Center (NJDC) in February 2013, underscore the critical role of high-quality counsel for youth in delinquency proceedings. By demonstrating what is required for juvenile defenders to provide competent, diligent, and zealous representation to young clients throughout a delinquency case, the *Standards* aim

to guide the juvenile defense bar and provide a national framework through which juvenile defenders can elevate and enhance their practice.

In part, the *Standards* grew from other professional standards that preceded it, including the Institute of Judicial Administration-American Bar Association's (IJA-ABA) *Juvenile Justice Standards*.<sup>3</sup> Addressing the juvenile justice system as a whole, the IJA-ABA *Juvenile Justice Standards* provide helpful and relevant policy guidance to the field. The *National Juvenile Defense Standards* expanded upon this foundation to establish the first set of practice-based national standards to focus through the lens of a juvenile defender and exclusively target the provision of juvenile defense.

To create these *Standards*, NJDC engaged in a deliberative and robust five-year process, guided by a multidisciplinary group of juvenile justice professionals from across the country, and rooted in a set of guiding principles that embrace law and developmental science. The *Standards* address the requirements of zealous advocacy and acknowledge the systemic barriers

juvenile defenders must overcome to meet such requirements.

By incorporating significant scientific research on adolescent behavior and development, the *Standards* break new ground, articulating a defender's duty to protect their child clients' constitutional rights in a developmentally appropriate manner at every stage of delinquency proceedings. Uniquely, the *Standards* also address a defender's vital role in addressing systemic barriers and achieving policy reform.

This article examines how defenders can use the comprehensive framework for juvenile defense provided in the *Standards* to elevate their practice and derive detailed guidance on the delivery of high quality juvenile defense services.

(Cont'd on p. 86)

### What's Inside:

- 82 CASE LAW UPDATE
- 90 IN PRACTICE  
10 Questions Asked by Children Whose Parents are in Prison
- 92 REUNIFICATION HEROES  
Hawaiian Father and Case worker Team Up to Achieve Reunification
- 94 VIEWPOINT  
Mother Seeks Courtroom Reform
- 96 RESEARCH IN BRIEF

(Cont'd from front page)

## Juvenile Defense as a Specialization

Just as recent U.S. Supreme Court decisions have relied on the claim that “kids are different,”<sup>4</sup> the Standards detail how juvenile defense differs from adult criminal defense, and is a specialty requiring unique preparation and intensive training. The Standards’ emphasis on specialization implies that a system with defenders who recognize the legitimacy and complexity of juvenile delinquency representation will lead to better outcomes and protections for court-involved youth.

### *Specialized knowledge and skill.*

Juvenile defenders owe child clients the same ethical and professional duties owed to adult clients, such as the duties of loyalty and confidentiality. However, children bring along some unique issues, such as school, parents, and ongoing cognitive development, which impact the nature of representation. Accordingly, the Standards delve into the additional, specialized knowledge and skills needed to competently practice juvenile defense throughout the trajectory of a delinquency case.

Extensive and specialized training is critical for juvenile defenders to provide high-quality representation. Lawyers need to firmly grasp the skills to competently practice adult criminal defense, in addition to understanding issues that arise at the specialized hearings in delinquency court. These include juvenile corrections, alternatives to detention, juvenile competence, disposition planning, adolescent decision making, and the role of the parents.

At the outset, the Standards stress the need for specialization in juvenile defense in Standard 1.3. This standard provides that in addition to being familiar with juvenile delinquency statutes and rules of procedure, juvenile defenders, at a minimum, must receive training on: key aspects of developmental science, such as capaci-

ties in legal proceedings, amenability to treatment, and culpability; effective adolescent interviewing techniques; the specialized skill of communicating with clients in a developmentally appropriate and effective manner; consequences of juvenile adjudications; and the operations of child-serving institutions.<sup>5</sup>

*Lawyer and counselor roles.* Another key component of the specialization of juvenile defense in the Standards is the need for juvenile defenders to act as equal parts defense lawyer and counselor. While adolescent decision making may be limited by developmental immaturity, “when given the opportunity to consult with counsel and engage in deliberative thinking, these limitations are likely to dissipate significantly.”<sup>6</sup> Experts have found that youth can make better decisions when informed and unhurried than when under stress and peer or authority influences.<sup>7</sup> This means that juveniles are less likely to waive their rights or further incriminate themselves if they consult with counsel first and counsel properly advises them of their rights.

*Legal guide.* Legal processes and court procedures can be too complex for some adults to comprehend.<sup>8</sup> Thus the Standards assert that juvenile defenders must be conscious of how adolescent developmental stages and other attributes of immaturity may impact a young client’s understanding, reasoning and decision making as applied to his or her ongoing case.<sup>9</sup> Juvenile defenders must know how to guide and advise a young client through the difficult legal and extralegal concepts that arise during representation so the client can meaningfully participate in his or her own defense.

## Eliciting and Representing Client’s Stated Interests

The Standards reify a defender’s duty to pursue the stated interests of child clients, pointing out that the most effective juvenile defenders understand that their “primary and fundamental

responsibility is to advocate for the client’s expressed interests.”<sup>10</sup> The lawyer is not to represent the so-called “best interests” of the client, but rather ensure that clients be meaningful participants in their own defense. As the Standards make clear, “[c]ounsel may not substitute his or her own view of the client’s best interests for those expressed by the client,” and “[c]ounsel may not substitute a parent’s interests or view of the client’s best interests for those expressed by the client.”<sup>11</sup>

Too often, stakeholders conflate the roles of the juvenile defender with that of probation officers or guardians ad litem, or assume the “best interest” approach of the abuse and neglect system applies within the delinquency realm as well. The Standards make clear, however, that juvenile defenders owe their child clients the same ethical duties owed to adult clients. Defense attorneys who think their job is to advocate for the so-called “best interests” of the client convert the juvenile court into what the U.S. Supreme Court has called a “kangaroo court.”<sup>12</sup> That is, they leap over the due process protections guaranteed to all parties in court proceedings.

“Expressed interest” representation requires juvenile defense attorneys to counsel their clients through the legal and extralegal processes of a delinquency case. Young clients often lack knowledge and understanding about their rights and the procedures of the delinquency system. The Standards make clear that teaching youth about each of these is a critical component of representation that will help younger clients make informed decisions that the lawyer should then honor and advocate for accordingly.<sup>13</sup>

Competent, high-quality juvenile defenders explain laws and consequences to their young clients, helping to inform their representation and clients’ decisions, and maximize the potential for best outcomes. The Standards state that, “[h]aving a client-directed approach does not mean that counsel sets aside his or her legal training and experience at the whim of

a client; rather, counsel, drawing upon that training and experience, must keep the client fully informed and provide the client with information and advice, in developmentally appropriate language, on a particular matter and possible outcomes. This will help the client make informed decisions that the lawyer should then honor.”<sup>14</sup>

A lawyer properly trained in juvenile defense will know how to effectively communicate with his or her client and elicit how the client would like to proceed. Lawyers who do not specialize in juvenile defense will come to rely on the other players in the juvenile court: parents, who may have interests adverse to those of the client;<sup>15</sup> probation officers, who represent the state; and judges.

## Explaining Client Confidences and Confidential Information

An attorney practicing high-quality juvenile defense understands the need to maintain a confidential relationship with the client. Standard 2.3 mandates that a juvenile defender explain to the client the nature of confidential communications and how confidentiality might be waived.<sup>16</sup> Specifically, “[c]ounsel must clarify that the client’s private conversations with counsel are protected from disclosure to anyone, including the client’s parent, the prosecutor, and the court.”<sup>17</sup>

Juvenile defenders, “. . . must also explain that the attorney-client privilege is deemed waived if anyone else, including a parent, is present during a conversation between the client and counsel.”<sup>18</sup> As the Standards assert, a trained juvenile defender knows that his or her role is not to become a conduit of information between client and parent, but to build a relationship of trust that will foster zealous advocacy on the client’s behalf.<sup>19</sup>

Competent juvenile defenders should also grasp the importance of protecting confidential client information. As the Standards instruct, “[c]ounsel must exercise discretion in revealing the contents of psychiatric, psychological, medical, social, and

educational reports that bear on the client’s history or condition. In general, counsel should not disclose data or conclusions contained in such reports unless the client provides informed consent, and even then, only if doing so will advance the client’s stated objectives. Before requesting reports from outside institutions (e.g., educational reports), counsel must obtain informed consent from the client.”<sup>20</sup>

Counsel should also be able to negotiate problems that may arise with parents and other third parties about nondisclosure of information.<sup>21</sup> Furthermore, competent counsel should limit the stigma created when information about a client is leaked to parties outside the proceedings. Counsel’s advanced knowledge of the local juvenile courthouse and calendar can help when protecting client confidences. The Standards explains how: “If proceedings are scheduled to be public, to protect the confidential information involved, counsel, in consultation with the client, should move to close the proceedings or request the case to be called last on the docket, when the courtroom is empty.”<sup>22</sup> Overall, the confidential relationship between a juvenile client and the attorney is parallel to that between an adult client and counsel.<sup>23</sup>

## Involving the Client and Preparing for Disposition

Disposition is often referred to as the most important phase of delinquency court proceedings, as it is the point at which youth confront the consequences of their adjudication and are subject to the court’s discretion.<sup>24</sup> Accordingly, the *Standards* carefully delineate the myriad responsibilities and obligations a juvenile defender owes the young client at this critical stage. To start, standards 6.1 and 6.2 explain that juvenile defenders must be well-informed about the disposition alternatives available in their jurisdiction, explain those options to the client, and work with the client to develop a theory of disposition consistent with the client’s desired outcome.<sup>25</sup>

The *Standards* make clear that competent juvenile representation also requires counsel to present and zealously advocate for a written, individualized disposition plan for the client. Disposition planning is particularly complex because of the conflicting interests of various parties involved, and the high level of deference typically given by the court to stakeholders or juvenile justice professionals other than the defender. A juvenile defender must be able to successfully navigate these varied interests while focusing on the client’s stated interests and practicing client-directed advocacy.

*Disposition planning.* The attorney must involve the client in developing an individualized and tailored disposition plan and also prepare him or her for the disposition hearing.<sup>26</sup> Specifically, “[c]ounsel must explore disposition options with the client, explaining the processes and the possible range of dispositions the court will consider. Counsel must advise the client about the obligations, duration, and consequences of failure to comply with a disposition order.”<sup>27</sup> Juvenile defense attorneys must be properly trained on available disposition alternatives in order to meaningfully involve clients in discussing the positives and negatives of each disposition option. Throughout, “[c]ounsel must actively engage the client in discussions of available dispositions and should not recommend a disposition to the court without the client’s consent.”<sup>28</sup>

*Social/Psychological Background.* The Standards mandate that juvenile defenders be familiar with a client’s social history reports and psychological and other evaluative testing that often plays a key role in dispositional outcomes.<sup>29</sup> A lawyer must be able to both understand and explain these tests to the client, and must engage with the client about their potential uses.<sup>30</sup>

*Parental involvement.* Parents can play a crucial role at the disposition stage.

The *Standards* address how parental involvement can often lead to strengthened client advocacy, but reinforce the idea that parental involvement must be handled delicately. A trained juvenile defender is best able to balance the importance of obtaining parental buy-in while maintaining a relationship of trust and comfort with the client.<sup>31</sup> “Counsel should consult with the client’s parent because: (1) he or she can help assess the relative strengths and weaknesses of a proposed disposition plan; (2) he or she often plays a significant role in the success of a disposition plan; and (3) the position a parent takes with respect to a disposition can have a significant effect on the court’s decision-making.”<sup>32</sup>

Although the juvenile justice system has become increasingly punitive, juvenile courts across America still cling to their rehabilitative mission. When the client participates in the disposition planning, the client helps shape his or her own rehabilitation.<sup>33</sup> “Procedural justice research suggests that youth are more likely to comply with a disposition plan if they have been heard and have been given a meaningful opportunity to participate in the development of [the disposition] plan.”<sup>34</sup> It takes a conscientious, competent, zealous, trained advocate to make the court’s rehabilitative vision a reality, by making sure the client is the central, active participant at the disposition planning stage.

## Undertaking Systemic Reform

The *Standards* recognize that no juvenile defender practices in a vacuum, and the reality of systemic barriers outside of counsel’s control may impact a case, the attorney-client relationship, or the course of representation. In section dedicated to a “Juvenile Defender’s Role in Addressing Systemic Deficiencies,” the *Standards* make clear that defenders may not stand idly by as gross injustices occur in their jurisdictions and impact their client’s cases. Rather, the *Standards* assert that frontline defenders are best positioned to identify and chal-

lenge system deficiencies such as late appointment, limitation on the right to counsel, over-bearing caseloads, and/or bias.<sup>35</sup> Even if defenders are overburdened by duties owed their clients, they should use the foundational ideals featured in the *Standards* to “strive to ensure that the system in which [they] represent young clients provides a fair and formal tribunal that abides by constitutional, statutory, and ethical mandates.”<sup>36</sup>

In short, the *Standards* promote the idea that even if an individual defender is too busy or unsure how to break down systemic barriers, at the very least, counsel has a duty to say something if he or she witnesses injustices. While it is neither practical nor possible for each individual defender to also become a policy advocate, every defender has a responsibility to act in some way when larger systemic problems affect how they represent clients.

Whether defenders address these issues themselves or work with advocacy groups or defender leadership to push for reform, every defender is well-positioned to provide statistical data and qualitative examples of how the current system may prevent zealous, constitutional advocacy. Part X of the *Standards* aims to provide bases on which juvenile defenders can advocate for the systemic reform needed to provide the competent, diligent, and zealous representation their clients require and deserve.<sup>37</sup>

## Conclusion

The *National Juvenile Defense Standards* meet a tremendous need in the indigent defense community and provide comprehensive guidance for attorneys on the many components that comprise high quality, effective representation of youth in delinquency proceedings. Carefully deliberated and constructed, they are not aspirational; rather, the performance-based *Standards* demonstrate what is required for juvenile defenders to provide competent, diligent, and zealous representation to their clients.

As this article discussed, the

*Standards* offer a national framework for providing juvenile defense—one that, among many other things, emphasizes juvenile defense as a specialization, sees the juvenile client as the primary decision maker, envisions a relationship of trust and confidence between client and attorney, and encourages juvenile defenders to assume a role in addressing systemic reform. For years to come, the *National Juvenile Defense Standards* will continue to serve as a guide for elevating the quality of representation of young people in conflict with the law.

---

*Sarah Bergen*, is a staff attorney and *David A. Shapiro*, Esq. is a Gault Fellow at the National Juvenile Defender Center, Washington, DC.

## Endnotes

1. *In re Gault*, 387 U.S. 1 (1967).
2. “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.” *In re Gault*, 387 U.S. 1, 36 (1967).
3. Institute for Judicial Admin. & American Bar Ass’n. “Standards Relating to Counsel for Private Parties.” In *Juvenile Justice Standards: A Balanced Approach*. Cambridge, Massachusetts: Ballinger Publishing, 1980.
4. “To start with the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults.” *Miller v. Alabama*, 132 S.Ct. 2455 (2012).
5. National Juvenile Defender Center. “§ 1.3: Specialized Training Requirements for Juvenile Defense.” *National Juvenile Defense Standards*, 2012, 21-22.
6. “§ 1.2 cmt.: Elicit and Represent Client’s Stated Interests.” *National Juvenile Defense Standards*, 2012, 21 cmt. (citing Steinberg, Laurence et al., “Are Adolescents Less Mature than Adults: Minors Access to Abortion, the Juvenile Death Penalty, and the Alleged APA ‘Flip-Flop.’” *American Psychologist* 64, October 2009, 583.)
7. *See, e.g.*, Steinberg, Laurence et al., “Are Adolescents Less Mature than Adults: Minors Access to Abortion, the Juvenile Death Penalty, and the Alleged APA ‘Flip-Flop.’” *American Psychologist* 64, October 2009, 583.
8. “Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable,

generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.” *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

9. “§ 2.6: Overcoming Barriers to Effective Communication with the Client.” *National Juvenile Defense Standards*, 2012, 44 cmt. (citing Kamban, Praveen & Christopher Thompson. “The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants.” *Behavioral Science and Law* 27, 2009, 173.

10. “§ 1.2: Elicit and Represent Client’s Stated Interests.” *National Juvenile Defense Standards*, 2012, 19.

11. “§ 1.2(a): Elicit and Represent Client’s Stated Interests” and “§ 1.2(b): Elicit and Represent Client’s Stated Interests.” *National Juvenile Defense Standards*, 2012, 19.

12. *In re Gault*, 387 U.S. 1, 28 (1967).

13. “§ 1.2 cmt.: Elicit and Represent Client’s Stated Interests.” *National Juvenile Defense Standards*, 2012, 20.

14. *Ibid.*

15. *See* Kristin Henning. “It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases.” *Nevada Law Journal* 6, 2006, 836.

16. “§ 2.3: Explain Client Confidences and Confidential Information.” *National Juvenile Defense Standards*, 2012, 38.

17. *Ibid.*

18. *Ibid.*

19. “§ 2.5(b): Parents and Other Interested Third Parties.” *National Juvenile Defense Standards*, 2012, 42-43.

20. “§ 2.3(d): Explain Client Confidences and Confidential Information.” *National Juvenile Defense Standards*, 2012, 39.

21. “§ 2.5: Parents and Other Interested Third Parties.” *National Juvenile Defense Standards*, 2012, 42-43 cmt.

22. “§ 2.3(e): Explain Client Confidences and Confidential Information.” *National Juvenile Defense Standards*, 2012, 39.

23. “§ 2.3: Explain Client Confidences and Confidential Information.” *National Juvenile Defense Standards*, 2012, 39 cmt. (citing Model Rules of Prof’l Conduct R. 1.6(a)).

24. “§ 6.1: Role of Counsel Regarding Disposition Advocacy.” *National Juvenile Defense Standards*, 2012, 106 cmt. (citing Institute for Judicial Admin. & American Bar Assn. “Standards Relating to Counsel for Private Parties, § 9.1 cmt.” In *Juvenile Justice Standards: A Balanced Approach*. Cambridge, Massachusetts: Ballinger Publishing, 1980.)

25. “§ 6.1: Role of Counsel Regarding Disposition Advocacy.” *National Juvenile Defense Standards*, 2012, 106.

26. “§ 6.3: Involve Client in Development of Disposition Plan and Prepare Client for the Hearing.” *National Juvenile Defense Standards*, 2012, 108.

27. *Ibid.*

28. “§ 6.3(a): Involve Client in Development of Disposition Plan and Prepare Client for the Hearing.” *National Juvenile Defense Standards*, 2012, 108.

29. “§ 6.3(b): Involve Client in Development of Disposition Plan and Prepare Client for the Hearing.” *National Juvenile Defense Standards*, 2012, 108.

30. “6.3(c): Involve Client in Development of Disposition Plan and Prepare Client for the Hearing.” *National Juvenile Defense Standards*, 2012, 108.

31. “§ 6.3: Involve Client in Development of Disposition Plan and Prepare Client for the Hearing.” *National Juvenile Defense Standards*, 2012, 108 cmt.

32. *Ibid.*

33. *Ibid.*

34. *Ibid.* at 108-09 (citing Tyler, Tom R. “What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures.” *Law & Society Review* 22, 2005, 103-35.) *See generally*, Tyler, Tom R. *Why People Obey the Law*. Princeton: Princeton University Press, 1990; Tyler, Tom R. & Yuen Huo. *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*. New York: Russell Sage Foundation Publications, 2002; *cf.* Fagan, Jeffery & Tom R. Tyler. “Legal Socialization of Children and Adolescents.” *Social Justice Research* 18, 2005, 217-42; Fondacaro, Mark, et al. “Procedural Justice in Resolving Family Disputes: A Psychosocial Analysis of Individual and Family Functioning in Late Adolescence.” *Journal of Youth & Adolescence* 27, 1998, 101-19; Fondacaro, Mark, et al. “Identity Orientation, Voice, and Judgments of Procedural Justice during Late Adolescence.” *Journal of Youth & Adolescence* 35, 2006, 987.

35. “Part X – Juvenile Defender’s Role in Addressing System Deficiencies: Introduction.” *National Juvenile Defense Standards*, 2012, 152; *Ibid.*, “§ 10.1 cmt.: Participate in Policy Development and Review,” 152-53.

36. “Part X – Juvenile Defender’s Role in Addressing System Deficiencies: Introduction.” *National Juvenile Defense Standards*, 2012, 152.

37. *Ibid.*, 151-62.

(*SWM v. State*, continued from p. 83)

decisions from other states that held that due process required a youth be competent to proceed.

Although the juvenile statute did not state what standard the juvenile court should use to judge competency, it did give specific authority for courts to order evaluations and examinations of youth. The court concluded that a rational inference from that section was that one purpose of evaluations would be to determine competency.

Given this gap, the court noted the criminal standards were consistent with the Juvenile Act, which strives to protect party’s constitutional rights. The court also held the right to counsel has little meaning for some children if there is no requirement to be competent.

However, even juveniles without developmental delays will not have the same rational understanding of proceedings that an adult would. Thus, the court held the proper approach to assessing a juvenile’s competency is to apply age-appropriate norms, not to hold them to an adult standard of understanding and participation.

Because the court applied the incorrect standard, the case was remanded.