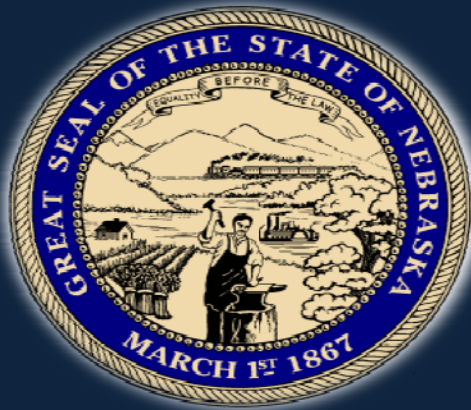


NEBRASKA



JUVENILE LEGAL DEFENSE:
A REPORT ON ACCESS
TO COUNSEL AND
QUALITY OF
REPRESENTATION FOR
CHILDREN IN
NEBRASKA

National Juvenile Defender Center
Fall 2009

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**JUVENILE LEGAL DEFENSE:
A REPORT ON ACCESS TO COUNSEL AND QUALITY OF
REPRESENTATION FOR CHILDREN IN NEBRASKA**

WRITTEN BY

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ON BEHALF OF

The National Juvenile Defender Center

FALL 2009

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It is our sincere hope that this assessment will stimulate discussion of the strengths and deficiencies of the Nebraska juvenile indigent defense system and that it will serve as a tool for change in the hands of Nebraska's many dedicated professionals.

EXECUTIVE SUMMARY

In 1967, in *In re Gault*, 387 U.S. 1 (1967), the United States Supreme Court extended the right to counsel to young people accused of crimes, explaining that youth need “the guiding hand of counsel” to respond to the charges leveled against them and to navigate the complicated justice system. This assessment of access to counsel and quality of representation for youth in Nebraska is part of a nationwide effort to address deficiencies and identify strengths in juvenile indigent defense practices. The goal of this assessment is to arm policymakers, judges, defender managers and others with the knowledge to improve the management and implementation of juvenile indigent defense services.

The information in this report was collected by a team of experts from across the country, with the guidance of two knowledgeable and dedicated advisory boards of national and Nebraska stakeholders, and with the support of the University of Nebraska’s Public Policy Center (PPC). Assessment team investigators traveled to 9 geographically diverse counties, chosen after extensive consultation with the University of Nebraska Public Policy Center and the national and state advisory boards, to observe courtroom proceedings and to interview judges, prosecutors, probation staff, public defenders and private attorneys, detention personnel, court administrators, support staff, youth, parents, and other key system stakeholders. The selected sample of counties represents at least 60% of the youth who go through Nebraska’s juvenile delinquency courts.

SIGNIFICANT FINDINGS

While assessment team investigators observed examples of model practices and effective defense advocacy, as in many other states, Nebraska’s juvenile justice system has deep-rooted systemic and practice deficiencies that impede the delivery of fair and balanced outcomes to system-involved youth. Many of Nebraska’s own judges, defense attorneys, county attorneys, probation officers, policy makers, detention center staff, and others expressed concerns about the quality of defense representation that Nebraska’s youth receive.

Excessive Waiver of Counsel

The right to counsel in delinquency proceedings is a constitutional right. Fundamental fairness requires that defense counsel: is appointed early in the youth’s case; has a meaningful opportunity to consult with the youth, and investigate and test the strength of the government’s case; explain potential short- and long-term consequences of a conviction; review the sufficiency of the case prior to the court’s accepting a plea agreement; and, is afforded facilities, including interview rooms or other private areas in the courthouse, to hold confidential client meetings. Regardless of the alleged offense, youth who would

not otherwise be able to vote, drink, marry, or enter into binding legal contracts should not be able to enter into plea agreements or navigate their cases without the assistance of counsel. In addition, the fact that the length of detention does not necessarily correlate with the severity of the charge, since many youth charged with minor offenses end up detained for long periods of time because of probation violations or because they are awaiting placement, means that the severity of the charge is unrelated to the need for defense counsel.

Although juvenile system participants did identify specific situations in which youth were generally not allowed to waive counsel – for example, in cases with perceived mental health issues, or serious felony allegations – waiver of counsel was the rule, not the exception. In Nebraska, the vast majority of youth charged with law violations waives counsel, pleads guilty at the initial hearing, and is sentenced immediately, usually to several months of probation with conditions. Most of these youth are facing their first court appearances, though some of the most egregious instances of waiver of counsel were observed in the cases of children who were charged in adult criminal court. Allowing youth to waive the right to counsel means that children not yet old enough to drive, vote, drink, or, in many cases, sign a binding contract, navigate the justice system alone. In light of the facts that the United States Supreme Court has held that due process and fundamental fairness require that youth accused of crimes have the right to counsel; that an ever-expanding body of research reveals that juveniles lack the knowledge and decision-making capabilities of adults; and that the consequences of waiving counsel can be devastating, every child, regardless of the severity of the allegations, should be discouraged from waiving counsel.

Stakeholders from every side of the system – judges, prosecutors, probation officers, as well as defense attorneys – all reported that waiver of counsel is an important fact of practice in their jurisdictions. System participants reported a range in estimates of youth waiving the right to counsel – with some counties reporting that 60-75% of children waive, while others reported that only 25% waive – a fact that suggests that local custom or preference, and not any statutory provision, dictates the percentage of children waiving counsel.

Youth are encouraged to waive counsel by a combination of individual and systemic factors. In the counties with high waiver rates, assessment team investigators observed practices by judges that subtly encouraged youth to waive counsel – for example, giving youth the impression that children who waived counsel would be treated more leniently, or arranging the docket so that the cases of youth who will waive counsel are heard first, and the youth who follow are encouraged to waive by the example of the earlier cases. Parents also encourage youth to waive counsel, sometimes applying substantial pressure. Finally, there were systemic practices that encouraged youth to waive counsel.

Assessment team investigators observed that the portion of the hearing in which children waived counsel tended to be perfunctory and rushed, so that children and their parents did not fully understand the significance of waiving counsel. These truncated waiver colloquies mean that poorly-informed youth who waive counsel do not understand the long- and short-term consequences to waiving counsel or to proceeding alone and representing themselves.

Ethical and Role Confusion

Although the practice varies from county to county, Nebraska attorneys representing youth in law violation hearings often act as both legal counsel and guardians *ad litem* for the child (GAL). Role confusion among defenders was identified as a significant problem by over two thirds of the investigative team, and some investigators highlighted questionable ethical conduct. These roles are very distinct, with different, often opposing, ethical mandates. Ethical canons require defense counsel to act in the child's expressed interest, serving as the child's voice in court proceedings and zealously advocating for what the child wants. In contrast, the GAL, independent from the child's expressed interest, acts in the child's best interest. In other words, the GAL can substitute her own judgment for the child's, and advocate for what she believes should happen in the case, regardless of the child's wishes.

Many defense attorneys expressed a clear understanding that their mandate was to serve their clients' expressed interests; others demonstrated that they erroneously thought that their role was to act in their clients' best interests. Moreover, defense attorneys do not struggle with this issue alone: other stakeholders also muddle the defense attorney and guardian *ad litem* roles. However, ethical canons are clear and require juvenile defense attorneys to act in the child's expressed interest. This requirement does not mean that a juvenile attorney does not counsel the client about choices that might perhaps be better for the youth, in instances in which the youth's expressed interest and the youth's best interest diverge. It simply means that, as the Model Rules of Professional Conduct mandate, juvenile defenders owe their clients the same ethical duties of loyalty, communication, and confidentiality that adult criminal defense attorneys owe their clients.

Lack of Zealous Advocacy

Assessment team investigators observed instances of juvenile defenders providing diligent, creative, client-centered advocacy for their young clients; however, this level of practice was not the norm. For example, many system stakeholders, as well as system-involved youth, reported that juvenile defense attorneys did not fulfill their ethical responsibility to maintain regular communication with youth. There is little to no litigation of competency to stand trial, discovery issues, or Fourth or Fifth Amendment violations. Preparation for adjudication and disposition hearings was rushed, and characterized by minimal investigation. There are very few written pre-trial motions. There are very few

trials. There are very few appeals. In general, defense representation was well-meaning, and even caring, but not necessarily client-centered or zealous.

Excessive Guilty Pleas

Observers found, and participants estimated, that only a small fraction of Nebraska’s delinquency cases actually proceed to an adjudication. The high rates of waiver of the right to counsel are accompanied by a high rate of plea agreements: the vast majority of juvenile cases is resolved by pleas, usually at the detention hearing, usually unrepresented, and usually without the benefit of any legal advice, examination of discovery, or independent investigation. Several factors contribute to this outcome. First, many stakeholders suggested to youth that they plead early in cases in order to avoid triggering the time-consuming and invasive court evaluation process that precedes placement in a youth facility. Others suggested that youth pled so that they could move the case along and get home to their families and friends. Also, under Nebraska laws that grant prosecutors the discretion to file certain cases in adult criminal court, prosecutors used the threat of transfer to extract guilty pleas from youth. In such a plea-heavy system, the quality of plea colloquies is critical to the preservation of due process rights. Assessment team investigators observed dozens of plea colloquies, some good – some even excellent – and some inadequate. Inadequate colloquies were insufficient in several ways: many judges did not use age-appropriate language, did not provide complete plea colloquies that advised youth of all the constitutional rights they were relinquishing, or did not explain the short and long term consequences of pleading.

Inadequate Resources

Nebraska’s juvenile defense system lacks adequate resources, and this deficiency permeates the entire system. For example, across the state, there were few courthouses with facilities that allowed confidential communications between defense attorneys and their juvenile clients. Most juvenile defense attorneys do not have investigators, social workers, mental health experts, and other experts at their disposal to help prepare their cases for trial or for disposition. There is a paucity of juvenile-specific training opportunities. Some large offices provided training on juvenile defense, but most small and mid-sized offices lacked the capacity to do so. These resources, unavailable to most of Nebraska’s juvenile defense attorneys, are indispensable for the provision of holistic and effective defense advocacy.

CONCLUSIONS AND RECOMMENDATIONS

The fact that Nebraska’s legislature has undertaken to fund this in-depth assessment of Nebraska’s juvenile defense delivery system reveals a political environment eager for thoughtful change. Improvements to Nebraska’s juvenile

indigent defense system are attainable through collaborative action to address systemic deficiencies at the state, regional and local levels. Creativity and leadership will go a long way toward solving problems and highlighting best practices. As a starting point, this assessment offers a series of comprehensive recommendations including:

Core Recommendations:

1. Revise Nebraska's Juvenile Code

For several reasons, Nebraska's juvenile code should be relocated and renumbered together in one section that is easily accessible to juvenile defenders. First, it should be reformed for the sake of clarity. As it stands, Nebraska's juvenile court provisions are scattered throughout Nebraska's statute. The Supreme Court itself has called Nebraska's juvenile code "a maze of statutory redundancy." *In re Interest of A.M.H.*, 233 Neb. 610, 619 (NE 1989). A consolidated and revised code could also take into account the ever-expanding body of adolescent development psychology and other social scientific research that illuminate the impact that legal practices have on children and youth - including practices concerning, for example, waiver of counsel, interrogation, review of *Miranda* warnings, and competency.

2. Increase Youth's Access to Counsel

The right to counsel in delinquency proceedings is a constitutional right. Fundamental fairness requires that defense counsel: is appointed early in the youth's case; has a meaningful opportunity to consult with the youth, investigate and test the strength of the government's case, explain potential short- and long-term consequences of a conviction, and review the sufficiency of the case prior to the court's accepting a plea agreement; and is afforded facilities, including interview rooms or other private areas in the courthouse, to hold confidential client meetings. Regardless of the alleged offense, youth who would not otherwise be able to vote, drink, marry, or enter into binding legal contracts should not be able to enter into plea agreements or navigate their cases without the assistance of counsel. In addition, the fact that the length of detention does not necessarily correlate with the severity of the charge, since many youth charged with minor offenses end up detained for long periods of time because of probation violations or because they are awaiting placement, means that the severity of the charge is unrelated to the need for defense counsel.

Accordingly, Nebraska should either prohibit juvenile waiver of counsel altogether, or follow the leads of Florida and Washington, whose Supreme

Courts have recently enacted juvenile court rules requiring that youth have a meaningful opportunity to consult with counsel about the waiver decision before being allowed to waive counsel. Limits on the waiver of counsel will lead to improvements in many other areas. For example, the early and timely availability of counsel at detention hearings will discourage the troubling practice of allowing youth to enter pleas at the initial hearing in law violations, of employing mass arraignments, and will complement insufficient judicial colloquies with a defense explanation of plea provisions.

3. *Address Ethical and Role Confusion*

The Nebraska Supreme Court Commission on Children in the Courts should clarify the ethical and role confusion that characterizes juvenile court practice in many counties. Consistent with the American Bar Association's (ABA) Model Rules of Professional Conduct, the Institute for Judicial Administration/ABA *Juvenile Justice Standards*, and the National Coalition of Juvenile and Family Court Judges *Delinquency Court Guidelines*, the Commission on Children in the Courts should take the position that youth in law violation proceedings must be represented by defense attorneys who advocate for the clients' stated interest and protect their clients' due process rights, and acknowledge that juvenile courts are adversarial fora in which zealous advocacy is expected and not penalized.

4. *Reduce the Overreliance on Transfer to Adult Criminal Court*

The cases of the vast majority of 15- and 16-year olds charged with felonies are direct filed in adult criminal court. The 2007 research study conducted by the Centers for Disease Control and Prevention showed that transfer policies are largely unsuccessful, as they do not lead to either specific deterrence (i.e., they do not prevent the transferred youth from reoffending) or general deterrence (i.e., they do not prevent youth who may have observed the example of the transferred youth from reoffending). The authors added that "The findings in this report indicate that transfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system. To the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good."¹

There is another troubling result of Nebraska's overreliance on the use of direct file provisions. The system that is left when all the felonies are transferred out is the second class juvenile system tilted towards a non-

due process based courtroom culture and best interest practice that encourages pleas and discourages zealous, client-based legal advocacy. It is easier for a “kiddie court” mentality to thrive when most of the cases processed in juvenile court are misdemeanors. The sense that there are no real consequences for the youth is buttressed by the impression that most youth get probation – although their liberty is easily jeopardized if they are accused of violating a court order. Limiting the use of direct file provisions might have the ancillary benefit of changing a juvenile court culture that diminishes youth’s rights.

5. Establish Ongoing Oversight and Monitoring

Nebraska’s indigent defense systems have been subjected to numerous studies throughout the past two decades. “The Indigent Defense System in Nebraska,” also referred to as the Spangenberg Report, was released in 1993 and identified 23 areas in need of improvement.² In 1995, L.B. 646 was signed into law, creating the Commission on Public Advocacy to provide assistance to counties in major cases by offering the services of staff attorneys.³ In 2004, the Nebraska Minority and Justice Task Force/Implementation Committee published “The Indigent Defense System in Nebraska: An Update.” This extensive study compared the state of indigent defense to the recommendations outlined in the Spangenberg Report more than ten years prior, and found some improvements but also highlighted several deficiencies still present in the delivery of indigent defense services. Although the state of juvenile indigent defense was not the focus of any of these reports, it was the focus of a 2006 report by the Attorneys Representing Children and Youth, a subcommittee of the Nebraska Supreme Court Commission on Children in the Courts, titled, “Legal Representation in Delinquency and Status Offense Cases in Nebraska.” That report, finalized three years ago, contains many of the recommendations included in this report.

A mechanism or commission should be created to provide ongoing oversight and monitoring of the juvenile defense system in Nebraska to ensure the equitable and fair distribution of resources; to collect data; to promulgate and implement best practice standards; to ensure the availability of juvenile defender-specific training; and to identify, develop, and implement specific policies and practices that will improve juvenile defense as required.

Implementation Strategies:

1. The Nebraska Legislature should:

- Enact a code provision that allows for the development and use of graduated sanctions for probation violations that casts detention, either as a sanction or while awaiting placement, as a last resort.
- Allocate more funding for judicial resources, and create more judgeships, so that the pressures of judicial economy are not so onerous as to require immediate plea agreements, lack of advisements, and mass arraignments. Concomitant with these resources, additional resources also need to be allocated to juvenile defenders and prosecutors accordingly.
- Promulgate guidelines on the length of stay in detention for youth awaiting service placements or those held on probation violations.
- Increase access to and improve the quality of mental health and substance abuse services available for system-involved youth by providing appropriate additional funding.
- Increase access to and improve the quality of pre-trial and post-disposition community based services by providing appropriate additional funding.
- Amend discovery provisions to allow filing of *ex parte* motions for funds for experts in law violation cases.
- Enact a code provision creating the automatic sealing of juvenile records for youth who have not been rearrested for two years after the end of the completion of their disposition, and for adult court convictions where the youth was younger than 21 years of age at the time of conviction; and,
- Replace direct file provisions with provisions that allow transfer to adult criminal court only after a hearing before a judge;
 - If the legislature will not repeal direct file provisions:*
 - Create a minimum age for direct file in adult criminal court;
 - Create a narrowly-delineated list of specific crimes for which direct file is eligible;
 - Prohibit judges from considering a previous finding that a youth is not amenable to rehabilitation from being allowed as evidence in a subsequent amenability proceeding.

2. *The Nebraska Supreme Court should:*

- Adopt a court rule that allows a youth to waive counsel only after the youth has had a meaningful opportunity to fully consult with counsel about the consequences of waiving.
- The Nebraska Supreme Court Commission on Children in the Courts should clarify the different roles of the juvenile defense attorney and the guardian *ad litem*, possibly in the form of a standard or court rule adopted by the Court.
- In order to use resources most effectively, deploy attorneys where most needed, and to improve the overall functioning of the juvenile

defense system, the Supreme Court should create a mechanism to collect an additional range of data included but not limited to: the number of youth who waive counsel; the number of cases that result in plea agreements; the number of youth charged in juvenile court but transferred to adult criminal court; the number of youth charged in adult criminal court; the number of youth charged with first-time offenses in adult criminal court; the number of youth charged with misdemeanors in adult criminal court; and the number of youth transferred from adult criminal court to juvenile court.

- The Nebraska Supreme Court Commission on Children in the Courts should promulgate and adopt practice standards that:
 - Clearly describe the role of juvenile defense counsel in law violation cases;
 - Clearly describe the role of GALs in dependency cases;
 - Proscribe attorneys from acting as both defense counsel and GALs in a single case; and
 - Proscribe attorneys from acting as both defense counsel and GAL for a single client, even in different cases.
- Require people practicing in juvenile court to devote two of their newly-mandated CLE hours to juvenile-specific training in order to be allowed to appear on juvenile cases each year;
- Convene defenders, judges and others to draft a model waiver colloquy that is age-appropriate and grounded in principles of adolescent development for use by judges in juvenile proceedings; and,
- The Nebraska Supreme Court’s Judicial Branch Education Committee, which governs education for judges, court employees and probation officers, should offer juvenile-specific training.

3. Juvenile Court Judges should:

- Provide, in age-appropriate language, comprehensive plea colloquies that advise the child about each of the rights the child is relinquishing, and verify that the child understands the consequences of relinquishing those rights prior to accepting any waiver of counsel or guilty plea, in accordance with *State v. Shulte*, 687 N.W. 2nd 823, 827 (Neb. 1997), prevailing law, and rules.
- Insist on decorum and respect in the courtroom, discouraging the “kiddie court” mentality.
- Fully honor the due process rights of the youth before the court and encourage a culture of zealous defense advocacy; and,
- Insist that school officials make every reasonable effort to address a given student’s truancy issues before filing a case, and, if the school has not complied, dismiss the case.

4. Chief Public Defenders and Public Defender Offices should:

- Dedicate appropriate resources, including funding for training and professional development, access to investigators, social workers, and support staff, for juvenile defense attorneys.
- Work with the legislature to ensure resource and pay parity for juvenile defense attorneys.
- Ensure a work environment that values due process and cuts out the “kiddie court” mentality so pervasive in juvenile courts.
- Implement appropriate supervision structure for juvenile defense attorneys and require periodic performance reviews.
- Adopt a case tracking system that logs and helps defenders remember to file motions at different points throughout their juvenile cases.
- Ensure adequate support for post-disposition representation.
- Ensure representation at probation violation hearings; and,
- Provide professional support and camaraderie to contract attorneys.

5. Public Defender and Contract Attorneys should work together to:

- Create a state-based juvenile defense resource center.
- Create a model juvenile court training that focuses on juvenile-specific topics, including adolescent development and education.
- Create mentoring opportunities, whereby newer attorneys are mentored by more experienced attorneys familiar with juvenile court practice.
- Add juvenile-specific trainings to the statewide trainings held for judges, prosecutors, and probation officers – in particular, for those handling juvenile cases.
- Coordinate efforts across counties to share resources, information, and training opportunities; and,
- Receive training on the overlap and unique differences between status offender and delinquency cases.

6. Prosecutors should:

- Develop uniform criteria for prosecutors for the cases in which transfer to adult criminal court is appropriate.
- Disallow the use of transfer or direct file as plea negotiation tools; and,
- Develop criteria concerning what school cases should be brought and which should be diverted, so that the vast majority of school cases, including minor assaults, are not referred to juvenile court.

PURPOSE OF STUDY AND METHODOLOGY

In 2008 the Nebraska Legislature passed LB 961 in recognition of the fact that persistent problems plaguing Nebraska's juvenile indigent defense system required serious attention and study. The University of Nebraska Public Policy Center was asked to administer the grant and to conduct a national search to find a consultant that would be qualified to provide a methodologically sound and objective assessment of Nebraska's juvenile indigent defense system. After a competitive bidding process, the National Juvenile Defender Center (hereinafter NJDC) was selected to conduct the statewide assessment of juvenile legal defense in Nebraska.

The Legislature recognized that a study of the juvenile legal defense system was necessary in order to address several problematic areas. LB 961 outlined many areas of the system that needed to be examined including, but not limited to gathering of general data and information about the structure and funding mechanisms for juvenile legal defense; a review of caseloads; the examination of issues related to the timing of appointment of counsel; supervision of attorneys; charging and trying juveniles as adults; frequency with which juveniles waive their right to counsel and under what conditions they do so; allocation of resources; adequacy of juvenile court facilities; compensation of attorneys; supervising and training of attorneys; access to investigators, experts, social workers, and support staff; access to educational officers, teachers, educational staff and truancy officers; examining issues relating to truancy and the relationship between the school districts and the juvenile court system; and recidivism. The Legislature expressly stated that the assessment "shall also highlight promising approaches and innovative practices within the state and offer recommendations to improve weak areas."⁴

The first step in NJDC's assessment process was to become acclimated with the law and practices relating to the juvenile indigent defense system in Nebraska. NJDC staff prepared a comprehensive memorandum which included information about Nebraska's geography, demographics, economy, judicial branch, juvenile arrest statistics, politics, disproportionate minority contact, juvenile indigent defense delivery system, determination of indigence to qualify for state-funded representation, juvenile court jurisdiction, the right to counsel in juvenile delinquency proceedings, transfer to adult court, detention statutes, and life without parole for juveniles transferred to adult criminal court. NJDC staff also examined Nebraska's demographics and census data, as well as information about the state government, federal representatives and senators, state profiles, juvenile justice, the Nebraska court system, crime data, the indigent defense system and the juvenile code. This information was compiled into a *briefing binder*, a copy of which was provided to the University of Nebraska Public Policy Center upon completion.

After a lengthy evaluative process, and in consultation with the University of Nebraska Public Policy Center and the national and state advisory boards, NJDC ultimately selected 9 geographically diverse counties for in-depth study and analysis. The selected sample of counties represents at least 60% of the youth who go through Nebraska's juvenile delinquency courts. An investigative assessment team of 22 members (including NJDC staff) conducted extensive site visits and court observations in these 9 representative counties across Nebraska. The counties were selected based on a thorough analysis of state demographics, accessibility to juvenile court, and type of indigent defense delivery system. The goal in selecting these counties was to ensure that the information gathered would be representative of the delivery of juvenile defense services throughout the state, as practices vary significantly across jurisdictions. The assessment team included current and former public defenders, private practitioners, academics, and juvenile justice advocates, all possessing extensive knowledge of the role of defense counsel in juvenile court. During each site visit, investigative team members observed juvenile court proceedings, interviewed both public and private defenders, judges, county attorneys, clerk magistrates, parents and youth, using interview protocols developed by the NJDC specifically tailored to Nebraska's court system. The teams also visited detention centers, where they interviewed administrators, staff and incarcerated youth. Prior to all site visits, the NJDC and all other participants reviewed research, reports, and background information on the juvenile justice system in Nebraska.

Completed assessments are designed to provide policy makers and defender leaders with relevant baseline data to inform and guide the reform and restructuring process. The assessment evaluates whether Nebraska youth have timely and meaningful access to counsel in delinquency proceedings, identifies the systemic barriers to quality representation, highlights best practices where found, and provides recommendations and implementation strategies for improving Nebraska's juvenile indigent defense delivery system. The primary goal of this assessment is to encourage excellence in juvenile defense and to promote fairness for youth in Nebraska's juvenile court system

Chapter One contains background on the legal underpinnings, structure and other relevant data related to the juvenile indigent defense system in Nebraska. Chapter Two is an overview of relevant Nebraska juvenile law. Chapter Three details the assessment findings concerning access to counsel and the quality of representation in law violation proceedings. Chapter Four describes promising innovations and best practices uncovered by the assessment teams. Finally, Chapter Five contains comprehensive recommendations and implementation strategies designed to improve Nebraska's juvenile defense delivery system.

CHAPTER ONE

BACKGROUND ON NEBRASKA JUVENILE COURT SYSTEM

This assessment of access to counsel and quality of representation provided to youth in Nebraska facing delinquency proceedings was informed by the NJDC's reviews of juvenile indigent defense delivery systems and examinations of whether juvenile defenders are upholding both the constitutional rights guaranteed to their young clients and their own ethical obligations mandated by the legal profession. The purpose of this specific Nebraska assessment is to provide information about the role of defense counsel in Nebraska as it pertains to the juvenile delinquency system, to identify structural or systemic barriers that impede effective representation of youth, and to make recommendations that will serve as a guide to improvement of juvenile defender services in the state.

The role of a juvenile defender is multifaceted, challenging, and requires extraordinary sensitivity. In addition to having the legal knowledge necessary to be a strong advocate for any criminal defendant, a juvenile defender must also be cognizant of the additional issues that automatically arise in every case due to the fact that the client is a youth. From the moment of inception of a case, a juvenile defender must act with understanding and patience with regard to both the client and his or her family. In order to effectively communicate with a client, a juvenile defender must understand child and adolescent development to be able to evaluate a client's maturity and competency as it may affect the case; advocate for the client through the dispositional hearing and beyond, which requires a superior knowledge of and contacts at community-based programs that will match the needs of each individual client; be able to communicate effectively with a parent or guardian *ad litem* without compromising the ethical duties required as counsel to the child; be informed as to the complexities that arise in mental health and special education law, and how placement of a client into one of these categories may alter the course of a case and its outcome; and effectively communicate to the client all collateral consequences that exist once an adjudication of delinquency is made, especially as it relates to college acceptance, housing, financial aid, and entrance into the military. For all these reasons and more, it is crucial that juvenile indigent defense systems be comprehensively assessed to ensure that resources are dispersed wisely and that children are receiving the legal protections to which they are constitutionally entitled.

A. DUE PROCESS AND DELINQUENCY PROCEEDINGS

The first specialized juvenile court in the United States was created on July 1, 1899, as part of an Illinois legislative act establishing the juvenile court division of the circuit court for Cook County.⁵ Supporters of this reform sought to separate youth from the harsh conditions in prisons, and to improve children's

chances at becoming productive citizens.⁶ Because the intent of the 1899 Illinois legislation aimed to help youth rather than to punish them, the state law required only cursory legal proceedings.⁷ Defense attorneys were not part of this process. Instead, social workers and behavioral scientists assisted the court in carrying out the most appropriate disposition of the cases. Detained youths were separated from adult offenders and placed in training and industrial schools, as well as in private foster homes and institutions.⁸ Probation officers were hired to facilitate a child's adjustment. This type of specialized juvenile court was quickly duplicated in the larger cities of the East and Midwest, so that by 1925, some form of juvenile court existed in all but two states.⁹ In 1959, Nebraska passed a law mandating that counties with a population of 75,000 or more establish a separate juvenile court.¹⁰ As of this date, Douglas, Lancaster and Sarpy Counties have formed separate juvenile courts.

Until the 1960's, constitutional challenges to juvenile court practices and procedures were consistently overruled. Children were denied both the right to counsel and the privilege against self-incrimination, and could be convicted on hearsay testimony.¹¹ A court could find a child delinquent by only a *preponderance of the evidence* – a lesser standard. Juvenile proceedings were regarded as civil in nature and their purpose was to rehabilitate rather than punish a child.¹² Research on the juvenile justice system began to show that juvenile court judges often lacked sufficient or any legal training;¹³ that probation officers were undertrained and that their heavy caseloads often prohibited meaningful social intervention; that children were still regularly housed in jails; that juvenile correctional institutions were often, in reality, little more than breeding grounds for further criminal activity; and, that juvenile recidivist rates were high.

In 1963, the United States Supreme Court held in *Gideon v. Wainwright* that the Sixth Amendment requires that indigent adults charged with a felony offense be appointed an attorney at public expense.¹⁴ Justice Hugo Black wrote for a unanimous court that “any person...too poor to hire a lawyer cannot be assured a fair adjudication unless counsel is provided for him,” explaining that “lawyers in criminal court are necessities, not luxuries.”¹⁵

Following this historic decision, the Supreme Court recognized in a series of landmark cases that youth in delinquency proceedings must be afforded due process guarantees comparable to those provided to adult criminal defendants. Arguably the most significant of these cases, *In re Gault*,¹⁶ held that juveniles facing delinquency charges have the right to counsel under the Due Process Clause of the United States Constitution, applied to the States through the Fourteenth Amendment. The Court expressed concern that youth in juvenile court were getting “the worst of both worlds...neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”¹⁷ The Court concluded that regardless of the number of court personnel charged with the task of monitoring the accused child's interests, any

child facing “the awesome prospect of incarceration” needed “the guiding hand of counsel at every step in the proceedings against him” for the same reasons that adults facing criminal charges need counsel.¹⁸

The introduction of advocates to the juvenile court system was intended to infuse the informal juvenile court process and alter the tenor of delinquency cases with the addition of the zealously-guarded constitutional protections of adult criminal court. Noting that the “absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment,”¹⁹ the Court determined that a child’s interests in delinquency proceedings are not adequately protected without adherence to due process principles. In addition to the right to counsel, *Gault* also extended to youth the right to notice of the charges against them, the privilege against self-incrimination,²⁰ and the right to confront and cross-examine adverse witnesses.²¹ In subsequent cases, the Court raised the legal standard of proof establishing that a youth cannot be adjudicated delinquent unless the state proves his guilt *beyond a reasonable doubt*,²² that a delinquency proceeding constitutes being placed “in jeopardy” and bars further prosecution based on the same allegations,²³ and that youth have a right to a formal hearing and an attorney before being transferred to adult court.²⁴ In each of these cases, the Court made it clear that “civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile court[.]”²⁵

Perhaps the most significant development through this line of due process cases was that youth accused of delinquent acts were to become participants, rather than spectators, in court proceedings. The Court emphasized that youth charged with a crime needed defenders to enable them “to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the client] has a defense and to prepare and submit it.”²⁶ Although the role of defense counsel in delinquency proceedings was not explicitly stated in *Gault*, by the early 1980’s there was professional consensus that defense attorneys owe their juvenile clients the same duty of loyalty as adult clients.²⁷ That duty of loyalty demands that defenders represent the legitimate “expressed interests” of their juvenile clients, and not the “best interests” as determined by the attorney.²⁸

Through its decisions in *Gault* and later cases, the Court drew attention to the treatment of youth in juvenile justice systems across the country and pushed the issue into the national spotlight. Due to concerns about the rights and treatment of children in the justice system, Congress passed the Juvenile Justice and Delinquency Prevention Act (JJJPA) in 1974.²⁹ The JJJPA created a National Advisory Committee for Juvenile Justice and Delinquency Prevention, which was charged with promulgating juvenile justice standards and guidelines. The National Advisory Committee standards, published in 1980, required that children be represented by counsel in delinquency matters from the earliest stage of the process.³⁰

At the same time, several leading non-governmental organizations also recognized the importance of protections for youth in delinquency courts. Beginning in 1971, and continuing over a ten-year period, the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) worked together to produce 23 volumes of comprehensive juvenile justice standards.³¹ The IJA/ABA Joint Commission on Juvenile Justice Standards relied on the work of approximately 300 dedicated professionals from across the country with expertise in the many disciplines relevant to juvenile justice practice, including the law, the judiciary, social work, corrections, law enforcement and education. The Commission circulated draft standards to individuals and organizations throughout the country for feedback. The final standards, which were adopted by the ABA in the early 1980's, were designed to establish an ideal juvenile justice system, "one that would not fluctuate in response to transitory headlines or controversies."

In 1992, when Congress reauthorized the JJDP, it reaffirmed the necessity of the role of defense counsel in delinquency proceedings, specifically noting the inadequacies of the prosecutorial and indigent defense delivery systems tasked with providing individualized justice. Recognizing the need for more information about the functioning of delinquency courts across the country, Congress asked the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) to address the issue.

In 1993, OJJDP responded to Congress' request by funding the Due Process Advocacy Project, led by the then ABA Juvenile Justice Center, together with the Youth Law Center and the Juvenile Law Center. The purpose of the project was to build the capacity and effectiveness of the juvenile defense bar to guarantee that children have access to qualified and competent counsel in delinquency proceedings. One result of this collaborative project was the 1995 release of landmark report entitled *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, the first national evaluation of the legal representation of children in delinquency proceedings.³² This report laid the foundation for a closer examination of access to counsel, the training and resource needs of juvenile defenders, and the quality of legal representation provided by each state's juvenile indigent defense system. The report documented the gaps in the quality of legal representation for indigent children throughout the nation, and found that while many juvenile defenders represent their clients zealously, instances of quality advocacy are rarely found, and that effective juvenile representation is impeded by harmful systemic barriers. Forty years after *Gault's* recognition of the importance of the right to counsel for youth, the reality of effective delinquency representation remains a myth for many poor children.

The findings released in *A Call for Justice* were met with enthusiasm and interest by judges and lawyers throughout the country, as they voiced the need for state-specific assessments to guide legislative and legal reform. In response

to this concern, a methodology was developed to conduct comprehensive assessments of access to counsel and quality of representation in individual states. Since 1995, state-specific juvenile indigent defense assessments have been conducted in 17 states (including Nebraska): Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Montana, Mississippi, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington. Reassessments have been conducted in Kentucky and Louisiana. County-based assessments were conducted in Cook County, Illinois, Marion County, Indiana and Caddo Parish, Louisiana. And new assessments will be released shortly in South Carolina and West Virginia. NJDC works continuously with state leaders who are interested in conducting juvenile indigent defense assessments and this work is conducted on an ongoing basis.

In 1998, the deficiencies highlighted in *A Call for Justice* led to the creation of the National Juvenile Defender Center which was housed at the American Bar Association. Since 2005, the National Juvenile Defender Center has been an independent, non-partisan organization devoted to ensuring excellence in juvenile defense and promoting justice for all children.

B. STRUCTURE OF THE NEBRASKA COURT SYSTEM

Nebraska consists of 93 counties, divided into 12 judicial districts in matters before the District Court or County Court.³³ There are six Supreme Court judicial districts throughout the state, roughly serving the same number of citizens.³⁴ The 2007 Nebraska Judicial Structure & Administration Task Force Final Report states that the Nebraska Supreme Court is comprised of seven members, a Chief Justice and six Associate Justices – one from each of six Nebraska Supreme Court judicial districts. The Chief Justice is chosen from the state at large. Like all Nebraska judges, the Chief Justice and Supreme Court judges are appointed to the bench through merit selection. If a position becomes vacant, the judicial nominating commission, four lawyers and four non-lawyers, holds hearings to vet potential candidates. The commission then submits two names to the Governor, who appoints a replacement.

The Nebraska Supreme Court is the final authority on all legal matters and its decisions are binding on all lower courts.³⁵ The Supreme Court hears general appeals from the intermediary court of the state, and is required to hear appeals in cases regarding capital punishment, life imprisonment, constitutional matters and impeachment.³⁶ The Supreme Court also regulates the practice of law in Nebraska, which includes the admission of attorneys to the Nebraska State Bar Association and any disciplinary matters.³⁷

The Nebraska Court of Appeals operates as the intermediate appellate court of the state.³⁸ This Court hears appeals from lower trial courts in an effort to alleviate the often burdensome caseload of the Supreme Court; however parties are permitted to petition the Supreme Court for a bypass through the Court of

Appeals.³⁹ The Court of Appeals includes six judges who are representative of the six Nebraska Supreme Court Judicial Districts, and sits in two panels of three, hearing cases throughout the state.⁴⁰

There are separate juvenile courts located in 3 counties (Douglas, Lancaster and Sarpy) that function within the judicial system.⁴¹ Separate juvenile courts can only exist in counties with populations that exceed 75,000 people where voters elect to create a separate court.⁴² In the remaining 90 counties, the county court hears juvenile matters. When a juvenile is charged as an adult with a felony level offense, the proceeding takes place in district court.⁴³ A juvenile may also be charged as an adult in a misdemeanor case and be subject to the jurisdiction of the county or district court.⁴⁴ In both instances, the juvenile has the right to request that his case be transferred to juvenile court.⁴⁵ The geographical division of districts applies to both county and district courts, although the division for district court varies slightly.⁴⁶

C. STRUCTURE OF THE JUVENILE INDIGENT DEFENSE SYSTEM

There is not a statewide public defender system in Nebraska. Instead, each county determines its own procedure for appointment of counsel for indigent juveniles in court proceedings. Absent from Nebraska's Juvenile Code is a provision regarding the presumption of indigence for juveniles, leaving each individual court to determine whether appointment of counsel at the expense of the government is appropriate.

Nebraska law requires that counties with over 100,000 inhabitants create a public defender office.⁴⁷ A public defender office can be established in any county with approval from the county board.⁴⁸ Should the population of a county exceed 170,000, the public defender is required to devote all of his or her time to practice as a public defender and is prohibited from engaging in private practice.⁴⁹ The public defender is authorized to appoint assistant public defenders, secretaries, law clerks, investigators and any other employees they deem necessary to ensure competent and effective representation.⁵⁰ Nebraska law also vests authority in the county board to provide funding for staff as well as office space and supplies to guarantee the public defender can provide effective and competent representation.⁵¹

Counties operate using either the elected public defender system, the contract public defender system, or the assigned counsel system, where the court appoints private attorneys to clients deemed indigent. As of 2006, 24 counties operated with an elected public defender, 18 counties had a contract public defender, and 51 counties used the assigned counsel system to appoint counsel to indigent defendants.⁵²

Counties with a population that exceeds 100,000 people shall have an elected public defender.⁵³ Upon election, the public defender will hold the office for a

term of four years.⁵⁴ Counties with fewer than 35,000 people where an elected public defender is not present are able, through the county board, to appoint an attorney to serve as public defender.⁵⁵ The county board enters into a contract with an attorney who applies to be appointed the public defender that specifies the category of cases the attorney will take⁵⁶ as well as a specified amount the attorney will receive for such appointments.⁵⁷ The contract between the county board and the contracting attorney lasts for a minimum of two years.⁵⁸ Contract public defenders are required to complete at least 10 hours of continuing legal education in the area of criminal law on an annual basis.⁵⁹ Attorneys in the assigned counsel system of appointment receive a set amount per hour for court-appointed law violation cases, with no cap on the amount of hours they can bill.

D. RELEVANT DATA AND STATISTICS

Nebraska has made efforts to ensure that its youth are viewed as an important segment of the state's population. According to the Annie E. Casey Foundation's 2009 KIDS COUNT *Data Book*, Nebraska was ranked number 11 out of the 50 states in the overall well-being of the youth population.⁶⁰ According to data comprised from 2006 and 2007, while Nebraska ranked high on statistics involving teen birth rates (13)⁶¹, percentage of teens dropping out of high school (3)⁶² and percent of children in poverty (16)⁶³, the 2006 teen death rate (15-19 years old) was on the lower end of the spectrum as compared to other states, ranking 35th out of 50.⁶⁴

Importantly, according to state data, Nebraska's court-involved youth are overwhelmingly non-violent offenders. There is no minimum age for prosecution as an adult in Nebraska. Any juvenile aged 16-17 charged with a misdemeanor offense, or under the age of 16 and charged with a felony offense is subject to prosecution in the adult system.⁶⁵ Although criminal courts must consider a juvenile's motion to transfer back to juvenile court,⁶⁶ the reality is that many youth still find themselves subject to the adult penal system prior to reaching the age of majority.

In 2005, several Nebraska juvenile justice stakeholders, led by then Nebraska Supreme Court Chief Justice John V. Hendry, began to address the need to improve the lives of youth involved in the juvenile justice system due to out-of-home placements in what came to be known as "Through the Eyes of the Child Initiative".⁶⁷ This ambitious initiative continues to serve Nebraska youth and advocate for children who have become dependent upon the juvenile justice system to survive. While this initiative has changed the lives of many Nebraska children within the system, there remains an absence of other similar initiatives that focus on adherence to due process protections and the role and ethical obligations of defense counsel in law violation cases.

CHAPTER TWO

ROLE OF COUNSEL IN DELINQUENCY PROCEEDINGS

A. PURPOSE AND POLICY OF NEBRASKA’S JUVENILE COURT SYSTEM

The practice of defending juveniles is complex and requires specialized training in several different areas to be effective. The role of counsel in delinquency proceedings, from arrest through post-disposition, is vital to ensuring that juveniles are treated with respect, fairness, and are afforded all protections of due process of law.

The Nebraska Juvenile Code (Juvenile Code) was enacted to “acknowledge the responsibility of the juvenile court to act to preserve the public peace and security.”⁶⁸ The Juvenile Code contains sections for delinquent and dependent children, as well as procedures for the temporary and permanent termination of parental rights. With respect to delinquent children, the Juvenile Code’s stated objective is to “remove juveniles...from the criminal justice system whenever possible and to reduce the possibility of their committing future law violations through the provision of social and rehabilitative services to such juveniles and their families.”⁶⁹ In its adoption of the Juvenile Code, the Nebraska Legislature envisioned that it would be construed to “provide a judicial procedure...in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced.”⁷⁰

The Health and Human Services Office of Juvenile Services Act⁷¹ was passed by the Legislature to promote the idea that the juvenile justice system ensures accountability and treatment for juveniles who violate the law that is consistent with public safety.⁷² Goals outlined in this Act include providing the “least restrictive and most appropriate setting for juveniles while adequately protecting them and the community,”⁷³ while also providing “humane, secure, and therapeutic confinement to those juveniles who present a danger to the community.”⁷⁴ The Act emphasizes the need for community-based programs to not only reduce illegal activity by juveniles, but to “effectively minimize the depth and duration of the juvenile’s involvement in the juvenile justice system.”⁷⁵

B. JURISDICTION AND VENUE

The juvenile court has exclusive original jurisdiction over any juvenile fifteen years old or younger who commits a misdemeanor offense, any child who is homeless, dependent, or ‘habitually disobedient’ and truant from school, or who is mentally ill and dangerous as defined by statute.⁷⁶ Exclusive jurisdiction also exists with respect to parents or guardians of any juvenile, proceedings involving the termination of parental rights under the Juvenile Code, and for any juvenile

voluntarily relinquished to the Department of Health and Human Services.⁷⁷ Pursuant to Nebraska law, ‘juvenile’ means any person under eighteen years old.⁷⁸

The juvenile court has concurrent original jurisdiction with the district court as to any juvenile who commits a felony level offense under Nebraska law.⁷⁹ The juvenile court has concurrent original jurisdiction with both the district court and the county court in matters involving a juvenile who is sixteen or seventeen who commits a misdemeanor offense, any juvenile who has committed a traffic offense, and all proceedings involving termination of parental rights as well as paternity matters.⁸⁰ This concurrent jurisdiction exists for the purpose of cases involving a juvenile charged as an adult, enumerated later in this chapter. The juvenile court has concurrent original jurisdiction with the county court over any juvenile who was a ward of the juvenile court at the start of any guardianship whose guardianship has been disrupted or terminated, and the adoption or guardianship proceedings over a child where the juvenile court has jurisdiction provided by the Juvenile Code.⁸¹

Pursuant to the Juvenile Code, all references to the juvenile’s age are viewed as the age at the time of the offense that initiated the court proceedings.⁸² The jurisdiction of the juvenile court continues until the juvenile reaches the age of majority or is otherwise discharged from further juvenile court proceedings.⁸³ The age of majority in Nebraska is nineteen years.⁸⁴ The Juvenile Code does not provide a minimum age at which a juvenile may be charged with a criminal offense, meaning that especially young children are subject to charges and subsequent proceedings in juvenile court.

C. FILING A PETITION AGAINST A JUVENILE IN ADULT CRIMINAL COURT

As stated, there is no minimum age for prosecution as an adult in Nebraska. The process by which a juvenile can be tried in adult criminal court is prescribed by statute, with the initial decision to file a charge within the discretion of the county attorney. Therefore, a juvenile meeting appropriate age/offense criteria may find himself in adult criminal court for the initial hearing.

Any juvenile aged 16-17 who is charged with a misdemeanor violation or who is under the age of 16 charged with a felony offense under the Juvenile Code is subject to adult criminal charges. By statute, the county attorney must, in deciding both whether to file a juvenile court petition and to determine whether a juvenile is a candidate for pretrial diversion or mediation, consider the following factors:

- The type of treatment such juvenile would most likely be amenable to;
- Whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner;
- The motivation for the commission of the offense;

- The age of the juvenile and the ages and circumstances of any others involved in the offense;
- The previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence;
- The sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof;
- Whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile;
- Whether the best interests of the juvenile and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority, and, if so, the available alternatives best suited to this purpose;
- Whether the victim agrees to participate in mediation;
- Whether there is a juvenile pretrial diversion program established pursuant to the Juvenile Code;
- Whether the juvenile has been convicted of or has acknowledged unauthorized use or possession of a firearm;
- Whether a juvenile court order has been issued for the juvenile pursuant to the Juvenile Code; and,
- Such other matters as the county attorneys deems relevant to his or her decision.⁸⁵

Juveniles aged 16-17 who are charged with an offense constituting a felony may be charged as an adult and appear for arraignment in county or district court. Should this occur, the court must convey to the juvenile that he can make a motion to transfer the case to juvenile court.⁸⁶ This motion must be made within thirty days after arraignment, and upon receipt of the motion, the court must schedule a hearing within fifteen days.⁸⁷

At a hearing requesting transfer to juvenile court, the factors outlined above are considered by the parties and the court in making a determination as to whether a juvenile transfer request will be granted. The case must be transferred unless a “sound basis exists for retaining the case.”⁸⁸ The court’s decision regarding transfer of a juvenile is not a final appealable order.⁸⁹

Nebraska courts have continued to uphold that the factors outlined above must be weighed by the district court in transfer proceedings.⁹⁰ The Nebraska Supreme Court has routinely held that these factors provide a balancing test “in which public protection and security are weighed against practical, and not problematical, rehabilitation in determining whether there should be a waiver of

jurisdiction over a criminal proceeding to the juvenile court.”⁹¹ Further, in order to retain jurisdiction, the district court does not need to resolve every factor against the juvenile.⁹²

D. RIGHT TO COUNSEL

The Juvenile Code clearly states that juveniles have the right to counsel in delinquency proceedings. When a juvenile first appears in court and does not have an attorney, the court must advise the juvenile of his right to retain counsel, and that if the juvenile or his or her parent or guardian cannot afford an attorney, the juvenile has a right to counsel at county expense.⁹³ Upon conclusion by the court that a juvenile or parent cannot afford counsel, the court will appoint an attorney for the juvenile for all proceedings before the court.⁹⁴ There is no statutory provision that provides the manner in which indigency is assessed for purposes of appointing counsel.

The appointment of counsel occurs at the initial hearing, however any juvenile who has been arrested, detained, or deprived of his liberty in any way by law enforcement officials or other governmental agents has the right to call a retained attorney while in custody.⁹⁵ There is no mention in the Juvenile Code whether this provision applies to an indigent child who requests to call an attorney.

E. PARTIES

The court may appoint a guardian *ad litem* to a case either on its own motion or upon request by a party to the proceeding.⁹⁶ The court must appoint a guardian *ad litem* for a juvenile in a court proceeding under several circumstances, such as if the juvenile does not have a parent or guardian or none can be located, if the parent or guardian is incompetent, or if the parent is indifferent to the interests of the juvenile.⁹⁷ The guardian *ad litem* is responsible for protecting the interests of the juvenile, acting as a parent would throughout the court process.⁹⁸ A guardian *ad litem* appointed by the court must be an attorney.⁹⁹

A judge may also appoint a court appointed special advocate volunteer in any case falling within the jurisdiction of the juvenile court.¹⁰⁰ The judge can appoint this party to a proceeding involving a child who may benefit from this relationship, when it is in the best interests of the child.¹⁰¹ A court appointed special advocate must be appointed by court order as a friend of the court acting on the authority of the judge, and may offer into evidence a written report that contains recommendations that are in the best interests of the child.¹⁰² The relationship between a special advocate volunteer and juvenile is unique as the volunteer may be called as a witness in a proceeding involving the child.¹⁰³

F. CUSTODY

A juvenile may be taken into custody without a warrant when he has violated a state law or ordinance in the presence of a peace officer,¹⁰⁴ when a felony offense has occurred and the officer has reasonable grounds to believe such juvenile is responsible,¹⁰⁵ when removal of a juvenile appears necessary for his protection based on an observation that the juvenile is seriously endangered by his surroundings,¹⁰⁶ the officer believes the juvenile is mentally ill and dangerous as defined by statute and without removal harm is likely to occur,¹⁰⁷ and when an officer reasonably believes that the juvenile is a runaway.¹⁰⁸ Importantly, no juvenile taken into custody under any of these circumstances is considered arrested, except when determining the validity of custody under the Constitution of Nebraska or the United States.¹⁰⁹

After a juvenile is taken into custody, a peace officer must take immediate steps to notify the juvenile's parent, guardian, or legal caretaker of the situation. The officer must then either release the juvenile,¹¹⁰ release the juvenile after providing written notice to the juvenile that requires his presence in court at a later date,¹¹¹ or deliver the juvenile, if necessary, to a probation officer, who then determines if there is a need for continued detention.¹¹² When a juvenile is taken into custody to protect his safety or for mental health reasons, the officer shall deliver the custody of such juvenile to the Department of Health and Human Services for appropriate action.¹¹³

G. DETENTION

When a juvenile is detained either by law enforcement or probation officials, the juvenile must be released within 48 hours after the initial detention or placement, unless a petition has been filed alleging the child to be in violation of a court order, alleging the child to be delinquent, or a criminal complaint has been filed in a court meeting jurisdictional requirements.¹¹⁴

A probation officer must use the standardized juvenile detention screening instrument defined by statute when making a decision regarding continued detention.¹¹⁵ The Office of Probation Administration determines the risk factors and the format used in the screening instrument.¹¹⁶ The instrument is distributed for statewide use as an assessment tool for all probation officers, who are then trained to operate using this tool.¹¹⁷ The Juvenile Code asserts that the need for pre-adjudicatory placement may be determined by first analyzing the juvenile using the standardized detention screening instrument, and based on the results, making a decision whether secure or nonsecure detention is appropriate.¹¹⁸

Upon determination by a probation officer that a juvenile should be remanded to secure detention, the juvenile may not be held any longer than twenty-four

hours in any secure facility (excluding nonjudicial days) without a hearing to determine whether continued detention is necessary.¹¹⁹ Any juvenile taken into temporary custody may request a detention review hearing, which must occur within 48 hours after the request.¹²⁰ There is no indication in the Juvenile Code that a juvenile has the right to counsel at such hearings.

When a juvenile is lawfully taken into custody, the court has broad discretion pursuant to the Juvenile Code regarding the pre-adjudicatory placement of the juvenile.¹²¹ If the court orders that continued detention of a juvenile is appropriate, the juvenile, parent, guardian or attorney may request that the court hold a hearing to determine whether detention is necessary, and this hearing must be held within 48 hours of the initial request.¹²² At the hearing, the state must show probable cause that the juvenile court has jurisdiction over the matter, otherwise the juvenile will be released.¹²³

H. PETITION, SUMMONS, AND SERVICE

When a county attorney believes a juvenile has committed a misdemeanor or felony level offense under Nebraska law, a petition can be filed with the appropriate jurisdictional court, stating the facts of the alleged offense with specificity and verified by affidavit.¹²⁴ If the allegations contain information indicating the offense was nonviolent, the county attorney may offer mediation as an option to the juvenile, provided all other requirements to participate in mediation required by statute are met.¹²⁵

When a juvenile is lawfully taken into custody by a peace officer, and such officer determines that a juvenile is eligible for release to a parent, he or she must prepare a notice to appear in juvenile court, containing a concise statement of why the juvenile was apprehended, and serve this notice upon the juvenile or parent to be signed.¹²⁶ Once completed, the juvenile is released and the officer required to file the same notice with the county attorney and the juvenile court when necessary.¹²⁷

The Juvenile Code grants authority to the courts as to how to effectuate service upon a juvenile. No summons or notice is required in cases where the person to be served voluntarily appears in court and there is a record of such appearance.¹²⁸

In lieu of a summons, a juvenile court can elect to issue a notice upon a juvenile or a parent.¹²⁹ The notice must be delivered by mail and have a copy of the petition alleging the violation of law attached.¹³⁰

When issuance of a summons is deemed necessary, a parent or guardian of a juvenile will be notified by formal process with a copy of the petition, not less than 72 hours prior to the court hearing, that their presence, along with the child, is required before the court.¹³¹ When a petition alleges that a juvenile has

committed a misdemeanor, felony, or status offense a summons must be served with a copy of the petition attached on either the juvenile or the parent or guardian of the juvenile.¹³² If no parent, guardian or other relative of the child is located, the court may appoint a guardian *ad litem* to act on behalf of the juvenile.¹³³

Service of summons is perfected when the summons is served upon the party named in the petition or left at the usual place of residence with a person of suitable age and discretion.¹³⁴ Any party to the case may waive the service requirement provided the juvenile concurs with such waiver in open court and on the record.¹³⁵ Failure to comply with a summons could result in a party being held in contempt of court.¹³⁶ In addition, failure to appear after a summons is properly served or the inability to properly serve a summons can result in a warrant being issued against the parent/guardian or against the juvenile.¹³⁷

I. ADJUDICATION

For non-custodial cases, the adjudicatory hearing is held as soon as the court is able but must be conducted within six months of the filing of the petition.¹³⁸ A juvenile charged with a status offense must have an adjudicatory hearing within 90 days.¹³⁹ An extension of this 90 day period may be granted if good cause is shown to the court for the delay.¹⁴⁰

When a juvenile is in custody, an adjudicatory hearing must be held as soon as possible after a petition is filed.¹⁴¹ The hearing should occur within six months of the filing of the petition.¹⁴² Calculations for the six-month period are not prescribed by the Juvenile Code, but instead follow the procedure established for adult criminal offenses.¹⁴³ When a juvenile detained by statute appears in court and continued detention is ordered, the court may allow the parties to waive the probable cause hearing and proceed to adjudication as long as a reasonable amount of time is given.¹⁴⁴

Juveniles in Nebraska charged with a delinquency offense do not have the right to trial by jury.¹⁴⁵ Customary rules of evidence in a trial by judge apply.¹⁴⁶ When a juvenile comes before the court charged with a criminal offense, with or without counsel, the court must inform all parties of the following:

- The nature of the proceedings and the possible consequences or dispositions if the juvenile is adjudicated delinquent;
- The juvenile's right to counsel under the Juvenile Code;
- The juvenile's privilege against self-incrimination;
- The juvenile's right to confront any adverse witness and the right to cross-examine any adverse witness;
- The right to testify and to call witnesses to testify on his or her behalf;
- The right to a speedy adjudication hearing; and,
- The right to appeal and have a transcript provided.¹⁴⁷

After the advisement of these rights, the court may accept an admission by the juvenile provided it is first determined that the admission is “intelligently, voluntarily, and understandingly made and with an affirmative waiver of rights and that a factual basis for such admission exists.”¹⁴⁸

When a juvenile denies the allegations contained in the petition, the court will decide whether the juvenile is within the court’s jurisdiction due to the alleged commission of a criminal offense. After hearing evidence, the court will make a finding on the petition based on proof beyond a reasonable doubt as to the juvenile’s alleged conduct.¹⁴⁹ If the court determines the juvenile is not within the statutory provisions as alleged by petition, the court must dismiss the case.¹⁵⁰ If the court determines the juvenile, as described in the petition, does meet the statutory requirements to fall under the jurisdiction of the court, the court will adjudicate the juvenile under the Juvenile Code provisions and proceed to disposition after a reasonable period of time to prepare is given to all parties, if necessary.¹⁵¹

J. DISPOSITION

Any juvenile adjudicated by the court to have committed a misdemeanor, felony, or traffic offense is subject to a dispositional hearing. The Juvenile Code does not provide any specific time frame within which this hearing must occur. Strict rules of evidence do not apply at a dispositional hearing.¹⁵² The juvenile court judge has several options available when sentencing a juvenile, which include:

- Placing the juvenile on probation;¹⁵³
- Placing the juvenile in his or her own home or in another suitable residence while on probation;¹⁵⁴
- Placing the juvenile with a suitable family or in an appropriate institution, while on probation;¹⁵⁵
- Committing a juvenile to the Office of Juvenile Services;¹⁵⁶ or,
- Based on an adjudication finding a juvenile committed a nonviolent act(s), and provided the juvenile has not been adjudicated delinquent for committing a previous violent act, with cooperation from the victim, the juvenile may attend mediation counseling as prescribed by statute.¹⁵⁷

Should the court elect to place a juvenile at an institution as a dispositional order, there are situations where a juvenile will not be subject to certain placements. Juveniles adjudicated delinquent in juvenile court, adjudicated dependent by a juvenile court, or found to be mentally ill as defined by statute, cannot be sentenced to serve time in an adult correctional facility.¹⁵⁸ In addition, a juvenile deemed “uncontrollable” by the courts due to behavior such as habitual disobedience and/or habitual truancy from home or school¹⁵⁹ cannot be placed in an adult correctional facility, the secure youth confinement facility or a

youth rehabilitative treatment center through the Office of Juvenile Services.¹⁶⁰ No juvenile found delinquent of a misdemeanor, felony, or traffic offense can be committed to the secure youth confinement facility.¹⁶¹ This facility is reserved for juveniles guilty of adult offenses who are housed in a separate, secure facility until they reach the age of majority.

The court cannot place a juvenile less than 12 years of age adjudicated delinquent of a misdemeanor, felony, or traffic offense to the youth rehabilitation and treatment center unless the juvenile has violated probation or committed another offense that requires the court to consider the juvenile's best interests and the safety of the community.¹⁶² A juvenile committed to any facility under the Juvenile Code must be discharged upon reaching the age of majority.¹⁶³

K. POST-DISPOSITION

Juveniles adjudicated delinquent face additional court proceedings after their final disposition in juvenile court. Any juvenile adjudicated a status offender must come before the court for review once every six months.¹⁶⁴ Any juvenile adjudicated delinquent under the Juvenile Code, by motion of any party or the court, may be subject to a hearing regarding his amenability to the rehabilitative services offered through the juvenile court.¹⁶⁵ A court may issue an order following an evidentiary hearing stating that the juvenile is not amenable to juvenile services.¹⁶⁶ Such a finding can be used against a juvenile in any future proceeding when the county attorney considers whether he be tried as an adult, and also in any transfer proceeding before a judge.¹⁶⁷

No adjudication of delinquency is considered a conviction.¹⁶⁸ The Juvenile Code provides that an adjudication will not disqualify a juvenile from future civil or military service.¹⁶⁹

L. SEALING OF RECORDS

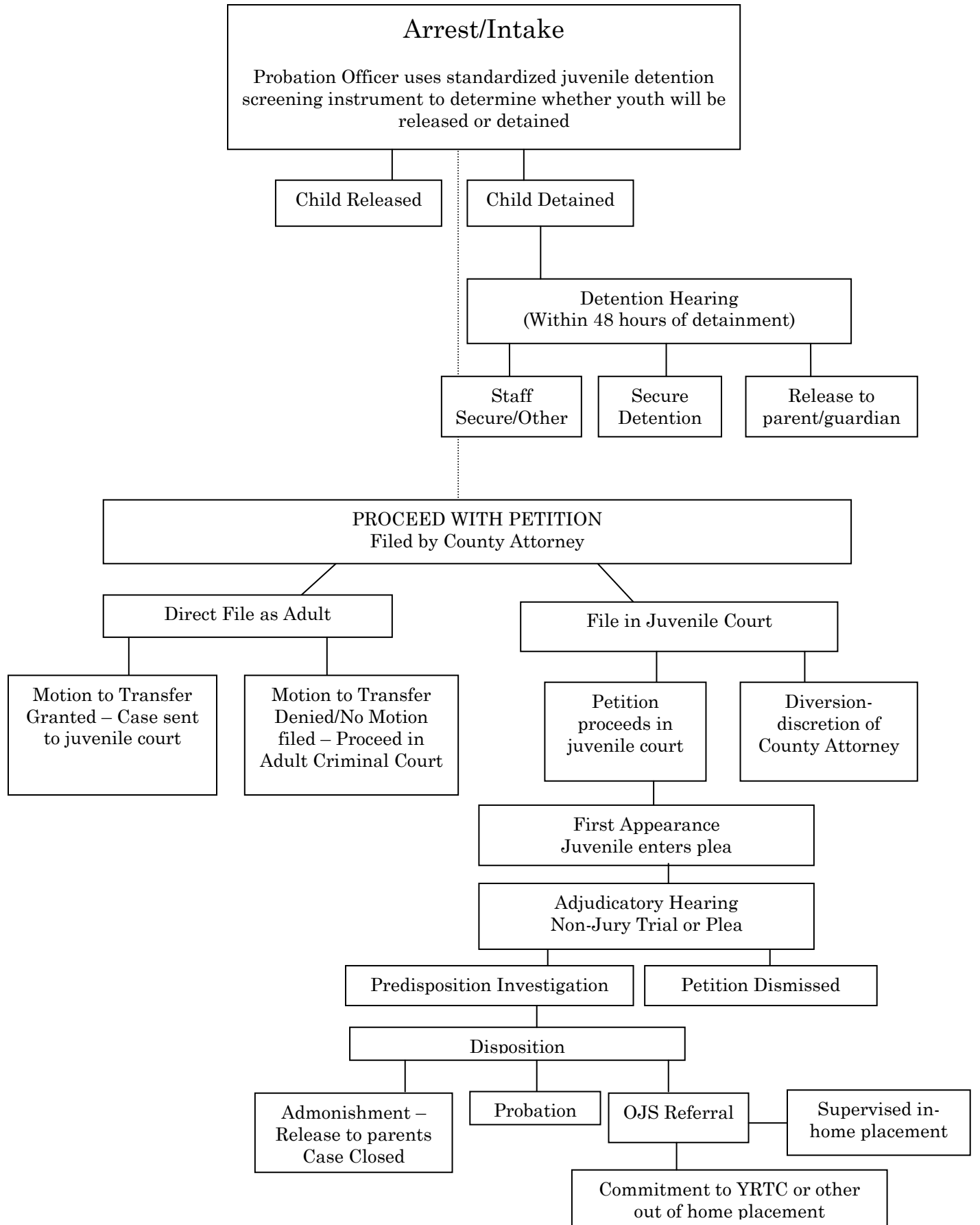
Upon a juvenile's satisfactory completion of requirements imposed as part of the initial disposition, any interested party may ask the court to set aside the prior adjudication.¹⁷⁰ In making the determination whether to set aside an adjudication, the court considers various factors, including the juvenile's overall behavior subsequent to the adjudication and behavior in rehabilitation programs, whether setting aside the adjudication will undermine the prior conduct or the law itself, and whether the juvenile will suffer consequences from the adjudication that are disproportionate to the previous conduct if the adjudication is not set aside.¹⁷¹ Once the court issues an order that a prior adjudication be set aside, the order must require that all records that were part of the adjudication be sealed.¹⁷² Records deemed by the court to be sealed will not be available to the public without good cause shown.¹⁷³

M. APPEALS

Any final order entered by a juvenile court may be appealed.¹⁷⁴ The appellate court is required to review a case in the same timeframe allotted for review of an order from district court.¹⁷⁵ An appeal may be filed by the juvenile, the guardian *ad litem*, the juvenile's parent, guardian, or custodian, or the county attorney.¹⁷⁶

After an appeal has been filed, the separate juvenile court or the county court acting as a juvenile court that entered the dispositional order will continue to provide supervision over the juvenile until and unless the appellate court reviews the case and enters an alternative disposition for the juvenile.¹⁷⁷ In reviewing a case involving a juvenile adjudicated delinquent, the appellate court must follow the lower court's original order of disposition unless it finds by a standard of clear and convincing evidence that such disposition is not in the best interests of the juvenile.¹⁷⁸ Following its ruling, the appellate court remands the case back to the county court, which must abide by the findings in any further proceedings.¹⁷⁹

Nebraska Juvenile Justice Process



CHAPTER THREE

ASSESSMENT FINDINGS

I. Access to Counsel

A. Waiver of the Right to Counsel

The National Council of Juvenile and Family Court Judges *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases*, an effort to elucidate the essential elements of effective practice in juvenile delinquency

“Kids proceed without counsel often. It’s judge by judge. A lot waive.”
–County Attorney

cases and to recommend best practices for juvenile delinquency court judges, admonishes judges against allowing youth in delinquency cases to waive the right to counsel.¹⁸⁰ A handful of jurisdictions across the country discourage or disallow waiver of counsel, by requiring youth to meet with counsel before waiving the right to counsel,¹⁸¹ or prohibiting waiver altogether.¹⁸² But, despite this discouragement, in many jurisdictions, large percentages of youth (up to 80 – 90%) are allowed to waive their right to counsel without first being given a meaningful opportunity to

consult with an attorney.¹⁸³ Consistent with this recommendation, several Nebraska judges told assessment team investigators they agreed that the right to counsel should be unwaivable in juvenile cases.

Although juvenile system participants did identify specific situations in which youths were generally not allowed to waive counsel - for example, in cases with perceived mental health issues, or serious felony allegations - waiver of counsel was the rule, not the exception. Across the state, juvenile justice system stakeholders reported that large percentages of children waived counsel at the initial hearing. In two counties, different juvenile justice stakeholders - in one county the clerk magistrate, in the other county, a public defender - estimated that 25% of juveniles waived counsel and proceeded through their cases without legal advice. In another county, the conflict attorney reported that 30-40% of youths waive counsel and plead to the allegations in the petition. Some counties had significantly higher estimates. The probation officer in one county observed that youths waive counsel in 50% of the law violations, adding that “Even still, every kid should have representation, regardless of the charge.” The probation officer in one county estimated that 60-70% of the juveniles on his caseload were unrepresented. In another county, the judge and public defender offered a similar estimate of close to 70% of children waiving their right to counsel. In another county, the prosecutor and public defender reported that, of the children brought to court, only 25% asked for an attorney - leaving 75% of children in

that county waiving their right to counsel, pleading, and proceeding to disposition at the initial hearing. It is clear that in Nebraska, the vast majority of youth charged with law violations – particularly those facing their first court appearances – waives counsel, pleads guilty at the initial hearing, and is sentenced, usually to several months of probation with conditions.

The problem with juvenile waiver of counsel is clear: juveniles lack the knowledge and decision-making capabilities of adults, and the consequences of waiving counsel can be devastating.¹⁸⁴ Allowing youths to waive the right to counsel means that children not yet old enough to drive, vote, drink, or, in many cases, sign a binding contract, navigate the justice system alone. They simply do not have the legal knowledge to understand the long- and short-term immediate and collateral consequences of waiving their constitutional right to counsel. As a result of immaturity or anxiety, unrepresented youth may feel pressure to resolve their cases and may precipitously enter admissions without obtaining advice from counsel about possible defenses or mitigation. Such admissions of guilt are unconstitutional, can result in inappropriate out-of-home placements, and subject youth to the consequences, direct and collateral, attendant to juvenile court adjudications.¹⁸⁵

Youth without counsel may be influenced by prosecutors or judges, who are sometimes pressured to clear cases from their calendars. Thomas Grisso's seminal 1980 study, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, showed that only 20.9% of juveniles understand the standard *Miranda* warnings; 63.3% of juveniles completely misunderstand at least one crucial word in the warnings; 44.8% of juveniles did not understand what it meant that they had the right to have an attorney present – meaning many did not understand that the attorney could actually be present during police questioning rather than at some later time; and 23.9% of juveniles did not understand the meaning of the warning that “statements may be used against them in a court of law.”¹⁸⁶ The rights to counsel, to go to trial, and to be represented at trial or at a plea, are far more complex. Or, as one judge stated, “Would you set your own broken arm with a two by four? You need someone with expertise.”

Practices Encouraging Waiver of Counsel

These rough estimations are notable for several reasons. First, it is interesting that stakeholders from every side of the system – judges, prosecutors, probation officers, as well as defense attorneys – all reported that waiver of counsel is an important fact of practice in their jurisdictions. It is also interesting that there is such a range in estimates – for example, two counties have exactly opposite numbers, so that in one county, 75% of youths waive counsel, but in the other county, 75% of youths do not. This wide range suggests that local practice, and not any statutory provision, dictates the percentage of children waiving counsel.

And in fact, assessment team investigators did recognize, in the counties with high waiver rates, practices by judges that subtly encouraged youths to waive counsel. Judges encouraged children to waive counsel by giving them the impression, by their own actions with a courtroom full of children as the audience, that children who waived counsel would be treated more leniently. In one county, the public defender noticed that “if the first kid on a big arraignment day gets nailed by the judge,” the subsequent kids all request an attorney, but “if the judge appears to go light on him, they all waive,” so, often the judge would “go soft first, because he doesn’t want all of [the respondents] to lawyer up.” When asked why so many children waive counsel, the public defender in another county opined that she thought the youth thought that “the judge would go easier on them” if they waived. In another example of judges’ indirectly influencing the decision to waive counsel, assessment team investigators in one county noted that the judge would not “require or emphasize the appointment of counsel [unless] the juvenile [was] facing out of home placement.”

“If the first kid on a big arraignment day gets nailed by the judge, the subsequent kids all request an attorney. If the judge appears to go light on them, they all waive [counsel]. Sometimes the judge will go soft first, because he doesn’t want all of ‘em to go lawyer up.”
—Public Defender

Several system participants linked waiving counsel to the perceived seriousness of the charge. In one county, a judge reported that he is willing to allow waiver of counsel in misdemeanor cases that, in the judge’s opinion, should have been diverted or otherwise screened out of the court system. A judge in another county stated a similar stance: he’ll allow children charged with minor offenses to waive counsel. This judge defined a minor offense as one requiring a fine and/or a “reprimand.” In another county, a public defender, commenting on a case that assessment team investigators had just observed, reported it is common for youth to waive the right to counsel when they viewed their cases as minor and they “didn’t see the need” for a defense attorney. In another county, assessment team investigators observed a child and his mother agree on the record that “no attorney was necessary,” because the charges were misdemeanors and therefore “not serious.”

There were also systemic practices that encourage youths to waive counsel. For example, assessment team members in several counties noted that initial hearings are mass arraignments at which defense attorneys are not present, and none of the stakeholders who are present take the time to explain the consequences of proceeding without defense counsel. In addition, in some counties, the court takes an ostensibly impartial position that, combined with

other factors, actually encourages waiver. The two judges in one county reported that they issue an advisement of the right to counsel, but take the position that the court is neutral, and so the court has no obligation to take special care to explain the right and the consequences of waiving it to the youth who appear before the court. Third, as the clerk magistrate in another county reported, there is a stark difference between the rules of appointment in dependency and law violation cases. In dependency cases, this county's judge always appoints attorneys for the parents and guardians *ad litem* for the children. In law violation cases, however, there is no automatic appointment of legal counsel. Also, by and large, the informality that assessment team investigators observed at initial and detention hearings across the state makes it easier for children to feel comfortable waiving counsel. Finally, the fact that juveniles are allowed to waive counsel at any point in the case makes it easier for children to waive counsel. Assessment team investigators observed initial hearings, detention hearings, pleas, disposition hearings, transfer hearings, and probation violation proceedings in which youth were allowed to waive counsel.

Finally, many juvenile justice system stakeholders observed that parents often caused their children to waive counsel. In several counties, parents effectively waive the youth's right to counsel. When asked for the reasons behind this common usurpation of the child's right to decide whether to waive counsel, juvenile justice participants surmised that, in many cases the child and the parents want to resolve the matter as quickly as possible, to avoid repeated trips to the courthouse and all that that might entail – transportation arrangements, days off from work, child care arrangements for siblings, and the other unavoidable inconveniences that might be associated with repeated court dates. A judge in one county offered a different reason, proposing that often a youth will waive counsel because “the parents want him to own up.” Assessment team members in a different county observed this very situation: asked by the court if she wanted an attorney, a youth replied, tentatively, “I don't think so,” and her father quickly added, with a castigating look, “She doesn't need an attorney.” It is critical to note that, in that particular case, the father was the complaining witness, but was still allowed to affect the child's decision to waive counsel. In another county, parents skewed the waiver decision more subtly: as one defense attorney described, “If [the child is charged with a] misdemeanor with minor consequences and there is parental structure in place, a waiver is likely to be accepted.” In other words, in that defender's county, a strong parental presence is allowed to take the place of counsel. In another county, the two judges interviewed were in complete agreement on the importance of deference to the parent's views. They both described a scenario where they issue an advisement of the right to counsel and then leave it up to the parents and child to decide whether to request counsel.

If the instances of waiver of counsel are numerous in law violation cases, they are near total in status offense cases. In addition, as the Institute for Law and Policy Planning's 2008 report, *Douglas County – Secure Juvenile Detention: A*

Study of Crowding established, high numbers of status offenders are, in fact detained. In county after county, system participants reported that no one invokes the right to counsel in status offenses. The position of one judge summarizes the near unanimous agreement on this point: “the judge thought most status offense cases were generally ‘not defensible’ and that juveniles will come to court and admit just to ‘get the case over with and go home.’” The prosecutor in another county reported similarly that the youth in the prosecutor’s county routinely do not have attorneys at truancy review hearings, and that the youths almost always plead. Although *In re Gault* extended the right to counsel to youth facing delinquency proceedings, the spirit of *Gault* is clear that the Court found that the assistance of counsel was essential for youth “facing the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.”¹⁸⁷

Practices Discouraging Waiver of Counsel

Assessment team investigators also observed systemic practices that discouraged waiver of counsel in limited circumstances. For example, detained children have an absolute right to counsel that operates, as a rule, unimpeded. System participants in one county reported that every child who is detained is appointed counsel as soon as the child is detained, and that courts were generally very permissive about allowing defense counsel to talk with the client before the hearing. In another county, the juvenile supervisor reported that a detained child does not have to ask for a detention hearing, and judges automatically appoint defense counsel for detained children, regardless of whether there has been a previous waiver.

Children accused of serious crimes or whose liberty interests are seriously imperiled are also, as a rule, discouraged from waiving counsel. The judge in one county reported that he simply will not allow youth to waive their right to counsel if they are charged with a felony. A judge in another county stated that he will appoint counsel in any case where the consequence would be more than a reprimand or a fine or there is a conflict with the parent; moreover, this judge’s practice is to appoint a public defender as standby counsel if the child waives and the court feels counsel is needed. He added that he is very liberal on appointments, and that other judges are likely less so. In another county, the probation officer reported that cases involving felonies, placement at the Youth Rehabilitation and Treatment Center (YRTC) in Kearney or Geneva, or significant mental health issues usually automatically garner an attorney even if the child has expressed a desire to waive counsel. In addition, in this county, as in several others, the judges reported that neither judge will accept a waiver of counsel in any case where OJS is likely to become involved or the prior history is such that higher levels of care – meaning more than mere probation – are a strong likelihood. Neither judge allows for the waiver of counsel when a felony is involved and both believe that a child can ask for an attorney at any time during the proceedings, even after adjudication and disposition.

B. Poor Understanding of the Waiver Decision

The United States Supreme Court has made clear that a waiver of fundamental rights like the right to counsel is valid only if the waiver is given knowingly, intelligently, and voluntarily.¹⁸⁸ Still, a great deal of evidence suggests that, in practice, courts do not ensure that youth understand the implications of waiving counsel.¹⁸⁹ Developmental brain research illustrates that juveniles' limited decision-making capabilities and understanding of legal rights raise serious questions about whether they can effectively exercise their waiver rights.¹⁹⁰

Assessment team investigators observed that the portion of the hearing in which children waived counsel tended to be perfunctory and rushed, so that children and their parents did not fully understand the import of waiving counsel. In one county, assessment team investigators observed that one prosecutor had four initial hearings on that day's docket. Three of those cases were resolved with unrepresented pleas; together those three cases took all of five minutes on the record. In another county, youths in four of six cases observed waived counsel. Those six cases took a total of twenty minutes, or about *three-and-a half minutes* per case. In most counties, the child did not have an opportunity to consult with counsel on the issue of waiver.

Two things necessary to the fair administration of due process are missing from these truncated waiver colloquies. First, the judge does not take the time to explain the long- and short-term consequences of waiving the right to counsel. Second and not surprisingly, assessment team investigators found that often, the poorly-informed youth who waive counsel in these lightning-quick hearings do not understand the full import of the decision to waive counsel or of the hearing in which they've agreed to represent themselves. In one county, the probation officer related that she sees more "pro se" kids than kids represented by attorneys, and noticed that, "if you're in the courtroom, they often look really confused. You're thinking, 'I really don't think they know what's going on.'" The detention center administrator in one county said that the biggest complaint he hears from his residents is that they need to know more information about the legal process. He went on to say that often youths do not understand what is happening in court, explaining, "Some of these kids have cognitive problems," and "people talking to kids in court don't understand what's going on – sequential learning is not these kids' strength."

"If you're in the courtroom, they (kids) often look really confused. You're thinking, 'I really don't think they know what's going on'."
—Probation Officer

There were a handful of exceptions to the norm of inadequate waiver colloquies and advisements. The judge in one county meticulously went through all of the rights and possible outcomes with each individual child on each individual case, stressing the right to counsel, much to the visible chagrin of the county attorney, who rolled his eyes and audibly sighed as the judge proceeded. The judge did not just rattle off a script; instead, the judge made an effort to make sure that the youth understood, by asking them developmentally appropriate questions. In one case, when the child's mother wanted to waive the child's right to an attorney, saying, "I don't want to deal with that attorney again so whatever," the judge reminded the youth that the youth was the one with the right to an attorney, and that the youth, not her mother, had the right to decide whether to waive counsel. The judge explained, "There are things that the court will order that Mom may not like and you want to talk to an attorney about. It is your decision not your Mom's." As a result, the youth decided that she wanted an attorney, and the case was continued for appointment of counsel. In a truancy case before this same judge, after the judge reminded the youth about his right to counsel, she asked the youth for his decision. He said he didn't know, and he turned and asked his mother. His mother said that he should proceed without an attorney – "we don't need one." The judge then went through all the rights and consequences of being found truant. The judge asked again, "Hearing all these consequences that could possibly happen, do you still waive your right to an attorney?" At this point, the youth's mother turned to her boyfriend, and then said that she thought they needed an attorney appointed after all – she was visibly shaken up and almost started to cry when the judge talked about foster care and removal from home as possible consequences of adjudication. In a different county, both judges relayed that, if they are concerned that the child does not understand what is going on, seems to be making a foolish decision, or seems to misunderstand the proceedings against him, the judges will often appoint the public defender to advise the child, rather than allowing him to proceed without talking to an attorney first.

Juveniles should be allowed to consult with counsel about the waiver decision before they decide to waive counsel. In some counties, the logistics of this may be eminently reasonable: in one county, for example, an assessment team investigator noticed that every courtroom was covered by a public defender every day, and there did not appear to be any reason in terms of accessibility of counsel why all the children could not discuss the waiver decision with counsel prior to their initial court appearance.

C. Waiver at Transfer Hearings

Some of the most egregious instances of waiver of counsel were observed in the cases of children who were charged in adult criminal court. Even if the short-term consequence is probation and release into the community, the long-term consequences of an admission in adult criminal court can be devastating to a young person who is trying to rehabilitate his life. Assessment team

investigators observed several instances in which youth were advised of some of these consequences after they admitted, instead of before. Assessment team investigators observed instances in which youth made decisions with long-term consequences without counsel. In one troubling case, a 17-year-old boy appeared before the court with his mother accused of a minor drug charge. In front of a packed courtroom, the Judge asked if he understood the rights given to the group at that day's earlier mass arraignment. The youth said yes. The judge then told him he had the right to request the case be transferred to juvenile court. The youth said he didn't want that. The judge then advised him again he had the right to counsel, and the juvenile decided to proceed without counsel. The court entered a guilty plea. This entire exchange happened in about three minutes. Once the youth had pled, the judge proceeded to disposition, and asked the juvenile if he planned on going to college. The youth answered yes, and named his top choice school. The judge then said "You realize that you have now lost any ability to receive federal funding for financial aid because you just pled guilty to a drug offense." There was an audible gasp of shock from both the youth and from the people waiting for their cases to be called. The judge had not stated this as a possible consequence of sentencing. In another example, a 16-year-old girl was charged as an adult with minor in possession. She was present in court with her mother. The judge again briefly went over her right to request transfer to juvenile court. She waived her right to transfer to juvenile court and to an attorney. The youth pled guilty and was fined, without having been advised that this admission would remain on her adult record.

System stakeholders all expressed very different perspectives on the frequency with which youths waived counsel at transfer hearings. A probation officer in one county said that she was frustrated by the lack of counsel for some kids in adult court. She said that in some cases the county attorney will tell the child and parents to just plead and waive counsel. A public defender in another county reported that he observed a lot of juveniles in transfer proceedings waive counsel; the prosecutor in that same county said that he believes that most transfer hearings are contested, and that most juveniles have attorneys, but he does see instances of waiver of counsel; that day, assessment team investigators had observed several instances of waiver in transfer hearings, including the two examples related above. In a third county, the court administrator told assessment team investigators that there is automatic appointment of counsel in transfer hearings, while the prosecutor in that same county reported that most juveniles in adult court waive their right to counsel.

D. Plea Colloquies

The high rates of waiver of the right to counsel are accompanied by high rates of plea agreements: the vast majority of juvenile cases are resolved by pleas, usually at the detention hearing, usually unrepresented, and usually without the benefit of any legal advice, examination of discovery, or independent investigation. Stakeholders offered several possible explanations for this fact of

Nebraska’s juvenile system. A probation officer in one county surmised that youth might plead early “to get the [services] ball rolling,” especially if it is clear that the case is headed toward an OJS evaluation. A public defender reported that her clients, desperate to return to their families and friends, will tell her, “I’ll say I did it, I just want to go home.” In such a plea-heavy system, the quality of plea colloquies is critical to the preservation of due process rights. Assessment team investigators observed dozens of plea colloquies, some good – some even excellent – and some inadequate.

“The judge told me that I had the right to this, this and this, but I did not know what this, this and this was.”

- Youth

Colloquies were observed to be insufficient in several ways. First, many judges did not use age-appropriate language or manner during plea colloquies with youth. For example, in one county, the contract counsel reported, and courtroom observations confirmed, that the judge was a “speed talker” who raced through a script of what he has to put on the record in plea colloquies so fast that “most youth [did] not understand what the judge said.” This judge used very formal language, and did not engage the youth beyond getting the required responses to the court’s questions asking the child to waive each right. A judge in another county was also observed to speed through the youth’s constitutional rights. Second, many judges simply did not provide complete plea colloquies that advise youth of all the constitutional rights they were relinquishing, the short-term consequences of pleading, like the possible punishments, and the long-term consequences of pleading. For example, in one county, after the accused pled guilty, the judge asked defense counsel if the trial waiver was knowing, voluntary and intelligent. Defense counsel informed the court that he and his client had talked about the plea before court and that counsel believed it was. The judge so found. Neither the judge nor defense counsel inquired on the record concerning the specific trial rights the client was giving up, his understanding of those rights, and his pretrial waiver of those rights. The plea, to a disorderly conduct charge, seemed to be based on failure to obey his foster parents, although no specific factual basis was established by the accused on the record.

There were also systemic contrivances that tilted the court process in favor of inadequate plea colloquies. For example, in one county, the case files from the clerk’s office contain a form that is filed in a child’s case when there is an admission. The rights that the child will waive are pre-typed on the form and the names are filled in. This pre-typed form of rights and possible dispositions lends itself to a checklist approach by the judge in going through the plea litany with the child. In addition, the fact that, in some counties, the first appearance hearings are “mass readings,” or feature “mass adjudications” also gives

colloquies short shrift. In these types of hearings, the judge reviews the rights of the youth one time for all of them, and then asks them individually if they waive their rights. On the stage of a packed courtroom, it is easy to imagine that youth (and, it seems, their parents and guardians) are loathe to stop the judge, ask questions, or confess ignorance, and there are no defense attorneys present to interject on their behalf.

In stark contrast, good plea colloquies took time, involved the use of age-appropriate language, and took the form of a conversation between the court and the individual youth in which the court tested the child's understanding. One judge, in the same county as one of the speed-talking judges, was observed to spend much more time with the youth, making a comprehensive effort to explain the proceedings to the children, and appeared to inject herself much more in the on-going planning for the children. Children pleading in that county would have a very different understanding of their rights and case proceedings depending on the judge they were assigned. In another county, a judge who told assessment team investigators that he believed that "the purpose of juvenile court is, simply, to help that kid," generally started his plea colloquies with a friendly, rapport-building demeanor. He took a slow pace, asked all of the necessary questions, asked the juvenile three separate times whether she had any questions, and asked her whether she understood she was giving up her right to a trial three times. The assessment team investigator noted that this colloquy "was probably the most impressive thing we observed in court." A judge in a third county was observed to do an excellent job at a probation revocation hearing, taking time to make sure the youth had received a copy of the revocation, explaining it, and then reviewing the possible consequences of the new filing and the affect on his existing probation. She was very careful to do this using child-friendly language.

Make no mistake: youth missed information when it was not provided. A young woman in one county remarked that the judge did go over her rights to her satisfaction, but she felt unadvised about the long-term consequences of pleading. Youth in another county reported that they were nervous when in the courtroom. Things moved very fast and they were unsure of what was being said or what happened. Another youth aptly stated that "The Judge told me that I had the right to this, this and this, but I did not know what this, this and this was."

E. Indigence Determinations and Legal Fees

Unique issues accompany the determination of a youth's eligibility for appointed counsel. Most youths are financially dependent on a parent or guardian and cannot afford private counsel on their own. But, in cases in which the parent may have a conflict of interests with the child, or may be otherwise unwilling to retain an attorney, the court's reliance on the parent's income can implicate due process. Some parents might pressure their children to waive the right to counsel and plead guilty to avoid having to pay attorney's fees because they do

not understand the long-term consequences of a juvenile adjudication, or the nuances of the possible legal defenses available to their child.¹⁹¹ In other instances, like domestic disputes, parents might be the complaining witness or witnesses; a sibling might be the complaining witness or witnesses; and parents might want the accused youth removed from the home.

In most counties, indigency is determined by parents' income. As for the process of determining indigency, according to the Nebraska State Bar Association Advisory Committee on Ethics Opinion 78-2, the defense bar cannot be involved in the determination of indigency. As a result, the court handles the indigency screening and appointment of counsel. There appear to be no set standards for indigency and eligibility for court-appointed counsel. The judge puts the parent under oath, and inquires as to the family's finances. The court asks about the parent's employment status, available money, savings, assets, etc., and then judge makes a final determination. As assessment team investigators in one county reported, "According to the judges, all juveniles are considered indigent for the purposes of appointed counsel. No child is denied an attorney based on their parent's income. Neither judge believes that a juvenile should be denied counsel if he or she asks, and neither would deny appointed counsel based on the income of the parents."

Court fees are minimal. A court fee of \$41 must be imposed in every criminal case (adult and juvenile). Parents are usually ordered to pay, but assessment team investigators did observe instances in which the court waived this fee in juvenile cases (usually in admonishment cases). Similarly, with respect to fees for representation: the clerk magistrate in one county gave assessment team investigators a copy of the fee schedule and reported that his office will collect what it can, but that it would often waive fees in indigent cases.

II. Quality of Representation

A. Case Preparation and Client Contact

Client Contact

Standard 4.1 of the Institute for Judicial Administration/American Bar Association *Juvenile Justice Standards for Private Counsel* provides that "Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. The lawyers should immediately inform clients of their rights and pursue any investigatory or procedural steps necessary to protection of their clients' interests."¹⁹² The *Juvenile Justice Standards* also command that "[t]he lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client."¹⁹³

Across the state, system-involved youth and their parents repeatedly raised the issue of the limited amount of and rushed quality of attorney-client contact, especially before initial hearings. In fact, 85% of youths interviewed raised the infrequency and poor quality of client contact as a problem. The consensus was that conversation was brief – if it took place at all – and focused not on the facts of the case, investigation, and exploration of potential defenses, but on whatever “deal” the defense attorney and the prosecutor had agreed upon. In one county, two youths said that they only got a chance to speak with their lawyers about five minutes before their hearings, and that this brief contact did not allow them to feel that their attorneys knew them or their side. Another youth in that same county reported that she met with her attorney the day of court, for about one hour, during which the lawyer kept telling her “fake things” that she did not believe, but that she did not feel comfortable asking questions. She felt like the lawyer was there to get it over and done with. He did not go over her rights, and

“Attorneys are supposed to be there to help you in court and fight for you.”

–Youth

told her to just admit. A third youth said that she wished that her lawyer would “take the case and facts from the juvenile’s point of view, and try to put themselves in our shoes.” A young man in a different county said that he never knew what was going to happen in court before he got there. Another youth told investigators that his lawyer was the public defender, who he said is “not really a lawyer, just someone who sits there and yells at you.” She has been his lawyer for two years and he says she doesn’t stay in contact with him and is very

busy. By and large, most of the children had very little interaction with their attorneys outside the courtroom.

System stakeholders, like a probation officer in one county, observed that “the children and parents express frustration that they don’t talk to their attorneys more often.” A public defender in one county admitted that the defense attorneys did not spend much time with the children beyond the time the attorneys felt was necessary to prepare for whatever hearing was pending. The public defender added that the attorneys did not routinely visit the clients in detention or in their homes. A probation officer in a different county said she did not see a lot of communication between attorneys and their clients when she is in court, and thought that defense attorneys could do a better job explaining the process to clients and make it less scary for the kids and their families. A defense attorney in another county admitted that when the defendant comes into court for their first hearing, he oftentimes hasn’t talked to them at all, and has to talk to them at counsel table while proceedings are occurring; he explained that his ability to form a relationship with his clients is constrained by how little time he has.

There were some youths and parents who were satisfied with the amount of contact they had with the defense attorney in advance of hearings. One youth expressed satisfaction with his attorney, saying that the public defender called him within 2 or 3 days of the petition being filed, and he went to the public defender's office, where the public defender explained the system and the alternatives. He said his public defender stayed in touch throughout his case, even calling him to see how he was doing while he was in inpatient treatment. Although since that initial meeting he usually meets his public defender in the hallway just before court, he was not dissatisfied with that arrangement, partly because of the relationship they had. Another youth in that same county said that the public defender is "awesome." The public defender explained things to him, like the meaning of "dismissed" or "deport." For his subsequent hearings, the public defender told him what to expect, and made the arguments that the youth wanted him to make. A young woman in another county said that her attorney "was very good at explaining her rights" during their meetings before her court hearings. She also had the feeling that "he tried very hard and did everything he could for me."

The remarks of the youth who were satisfied with their attorneys highlight how adequate client and case preparation serve to protect youths' due process rights. First, it is important to building a relationship with a youth. Or, as a judge put it: "It pisses me off that some bar attorneys don't seem to recognize their clients when they come to court." It is clear to him that many attorneys do not meet with their clients before they come to court. "You can't develop a rapport in 15 minutes," he said. More pointedly, building this kind of relationship ensures that the youth's voice is not lost in the shuffle as the case progresses. As one probation officer explained, private attorney-client consultations are extremely "important because there are so many other players that there needs to be an attorney acting on behalf of a child." Although defense counsels may understand their role to represent the express interest of their clients, the very limited time that they spent with their clients prior to a court proceeding necessarily diminished their ability to make sure their clients understood the nature of the proceedings and made informed choices about waiving their rights to various due process protections throughout the course of the case. Finally, it is important that the youth understands what is happening in his case. It was clear from talking to youth and reviewing the case files that many of the youth who complained of too little contact did not have a full understanding of the rights they had given up, the potential consequences, or the ongoing proceedings. Few of them accurately recounted what types of hearings they had, what matters they were charged with, and how their cases were resolved.

In addition, if the youth don't get the information they need from their attorneys, they will get it from someone else, like the probation officer who said that she feels that at times, she takes on the responsibility of making sure the juveniles understand the courtroom process, by asking questions such as "do you understand what's going on? Do you have questions?" and then trying to answer

the questions. A probation officer's case perspective is likely to be much different from the perspective of the youth's attorney, who can give legal advice that the probation officer cannot. Or they will guess. An open line of communication also calms children's anxiety. As one detention center staff member relayed, the facility would have an easier time operating if youth were more prepared before they go to court, because youth prefer to deal with concrete facts and concepts -- specific time frames and possible placements for detention, possible witness statements and testimony, and possible programs or release conditions, for example -- instead of the unknown.

Contact with Detained Clients

As might be expected in light of the infrequent contact between attorneys and their clients in the community, the attorneys did not routinely communicate with or visit their clients in detention either. One youth told assessment team investigators that the public defender she had did not visit her or call her in detention at all. She communicated with her lawyer through her father. Exacerbating matters, many youth were detained in counties far from their homes, families, and communities. As one detention center staff member relayed, because there are no detention facilities in her county, juveniles from her county needing to be detained are sent either to one of two nearby facilities. Both are too far for attorneys to make any kind of regular visit to their clients. Another detention center staff member reported that local attorneys visited on a more frequent basis, and out of county attorneys called at least once per week, and that generally, the frequency of visits and calls depended on the seriousness of the offense; in other words, youth charged with more serious offenses received more visits and calls from their attorneys than youth charged with relatively minor offenses. On the whole, however, children in detention complained of the same lack of communication that children in the community reported.

It is important to note that the lack of contact with detained clients does not have systemic roots. Chapter 12 of Title 83 of the Nebraska Minimum Jail Standards for Juvenile Detention Facilities provides that a detention facility's written procedures must detail juveniles' access to their attorneys; chapter 14 provides that indigent juveniles "shall be provided with writing supplies and postage for all letters to their attorneys, the courts, government officials, or officials of the confining authority,"¹⁹⁴ and that "Juveniles shall be allowed to make a reasonable number of telephone calls to their attorneys, caseworkers, probation or parole officers, and counselors at the juvenile's expense unless the juvenile has no funds."¹⁹⁵ It further states that privileged telephone calls shall not be monitored or revoked as a disciplinary measure.¹⁹⁶

In accordance with these provisions, assessment team investigators found that detained youth are able to call their attorneys upon request at detention centers and both YRTC facilities. At one detention center, the resident handbook given to youth upon arrival states that the youth has a right to access to legal representation and the courts, and the Director himself stated that he permits

youth to call an attorney upon request. Defenders are permitted visitation upon calling or arrival at this detention facility. The YRTC residential facility also affords the same rights to detained youth. Upon admission, each youth receives a Youth Rulebook which expressly states “Girls shall be allowed access to legal counsel. The facility administrator or his designee shall assist girls in making confidential contacts with their attorneys or their authorized representatives. Such contacts may include telephone communication, uncensored correspondence, and visits.” Youth interviewed by investigators also stated that although they do not usually contact their attorneys, they are aware they have the right to do so if necessary. In one facility, assessment team investigators were informed that youth were allowed to phone their attorneys only on certain days. When asked whether youth would be allowed to receive or make calls on days outside those certain days, assessment team investigators were told they would be.

Parents and Case Preparation

The attorney-parent relationship is a difficult tightrope to walk. A public defender in one county reported a common complaint in juvenile defense work – that a big impediment to zealous representation is dealing with parents who are angry that she represents the child, not the parents. Ethical canons are clear that even when the parents are paying the attorney, a juvenile defense attorney represents the child who is alleged to have broken the law, not the child’s parents. The attorney has a duty of loyalty and of confidentiality to the child, not the child’s parents. This arrangement is appropriate because, if the child is found involved, the child, and not the child’s parents, will suffer the loss of liberty or other penalty that the court imposes. Still, it would be struthious to take the position that a child’s parent or guardian is less than integral to the successful disposition of the child’s case. In most instances, because the parent’s willing participation is key to the child’s progress, the success of the case depends on the parent. And, while it often happens that a youth can fail to meet his release conditions, get in more trouble at a detention placement, or otherwise worsen his legal status without his parent’s help, it hardly ever happens that a youth will complete probation successfully, or otherwise improve his legal status without his parent’s support. Accordingly, the defender has to develop an independent, cohesive, and, most importantly, confidential attorney-client relationship with the client, while still enlisting the child’s parent or guardian as an ally in the case. Parents need to be just as informed and empowered in juvenile cases as the youth facing allegations.

Assessment team investigators observed that, for the most part, defense attorneys did not manage the flow of information to their juvenile clients’ parents. One contract attorney said he solved this problem in retained cases by having the juvenile sign a release in their initial client meeting allowing the attorney to talk to the parents. In one county, assessment team investigators observed as the public defender spoke to the mother and sister of his juvenile client. The child’s mother did not speak English, so the child’s sister was

translating. The public defender explained process and plea deal to mother and sister before he explained them to his own client. Another youth told assessment team investigators that, throughout the life of her case, she never met with the attorney alone, and felt the attorney focused more on her mother's interests and goals for the case than hers. A detained youth said that her lawyer did not visit her or call her while she was in detention, and communicated with her exclusively through her father.

Systemic Barriers to Adequate Client and Case Preparation Inadequate Courthouse Facilities

Across the state, there were few courthouses with facilities that allowed confidential communications between defense attorneys and their juvenile clients. Defense attorneys had confidential discussions with their clients in courtrooms, in hallways, and in waiting areas. Bailiffs walked in and out of court during private conversations. Sometimes, the judge was in the courtroom during these discussions, cutting off conversations by calling court to order. Other times, the parents were sitting at the same table, and it looked like the defense attorney was talking to both the parent and youth at the same time. In one county, the configuration of the furniture discouraged even courtroom conversations. The single counsel table, with almost no space between the respondent, defense counsel and the prosecutor, limited the ability of defense counsel to have any confidential communication with the client before, during or after the hearing. At that same courthouse, the close proximity of the clerk's office and chambers to the courtroom allowed conversations to float into the courtroom before and after the hearing unless both doors are shut which they rarely were. The county practice also seemed to interfere: in counties with adequate facilities, often public defenders reported that the practice was that defense attorneys did not use them. For example, the public defender in one county said there were conference rooms available in the courthouse, but often they spoke to their clients in the hallways. In another county, assessment team investigators observed a meeting space across the hall from the courtroom for private conversations, but did not see this used once by defense attorneys.

High Percentage of Pleas

It is likely that the fact that so many cases are resolved by admission contributes to the lack of client and case preparation that assessment team investigators observed. Like many other states' criminal systems, Nebraska's juvenile system relies on the prevalence of pleas to ensure judicial economy. Most juvenile cases are resolved at the initial hearing, often without counsel.

And, even if the case is not resolved at the first hearing, almost every case is resolved short of trial. The child can admit to the offense – plead guilty – or plead no contest. This high incidence of resolution short of trial is such a

*“I didn’t do what they said,
but I graduate next week
and I just want to get it over
with and get probation.”*

-Youth

prevalent fact of practice that system participants – including defense attorneys – reported that, in most cases, the defense attorney would negotiate the plea agreement without talking to the client, discuss it with the client in the five minutes before the court hearing, and then walk into court and enter the plea.

B. Pre-trial Detention and Probable Cause Determinations

Preparation and Client Contact

The process for detention hearings, relatively uniform throughout the state, is skewed so that defense attorneys did not have a meaningful opportunity to consult with new clients before their detention hearings. Sixty-five percent of the investigators observed problems arising out of detention advocacy, including issues such as appointment of counsel, periods of excessive detention for youth awaiting adjudication or probation violation hearings, and the absence of attorney-client contact prior to the detention hearing. In a new filing in the case of a detained youth, the initial hearing is held within 48 hours. In some counties, defense attorneys are not present at initial detention hearings. Youth are read their rights before the hearing. If a youth wants counsel, the hearing is continued.

In most counties, defense attorneys learned of their new appointments just moments before the hearing. In one county, a public defender reported that the detention hearing was set for 8:30 a.m. so he had only a few minutes to talk with the youth and his parents before the hearing; this defender could have benefited from having his hearing set later in the day. On a typical detention hearing day, the public defenders in one county reported that they may be notified of their appointment and hearing about a half hour before the hearing itself. Often they are not able to meet with the client until just minutes before the hearing, unless of course they were representing the individual on a separate charge. A contract attorney in another county acknowledged that, despite this systemic barrier, attorneys understand that they have an obligation to meet their clients before the detention hearing, and comply with that obligation. Defense attorneys employed different, creative means to talk to their clients before detention hearings. In two counties, the public defenders interviewed their clients by phone with the help of the office paralegal, who took screening intake information. In another county, contact with a detained client was typically done at the courthouse or by telephone. In fact, in one county, the public defender reported that some judges allow waiver of the detention hearing, because the judge knows that the public defenders have such a short lead time before the hearings.

Use of Secure Detention

Stakeholders had the impression that a small percentage of youth were placed in secure detention facilities. System participants offered several reasons for the perceived sparing use of secure detention. First, the cost of secure detention is very expensive. For counties that have no detention facility, the child is

detained in another county's facilities; this out of county placement requires payment for housing and transportation to and from hearings. Second, there are very few secure detention facilities throughout the state. This reality means that secure detention does not appear to be used much because the facilities are inconveniently distant. For one county, the closest facility is a two and a half hour drive away, and that facility charges \$280/day to house a youth. Finally, participants reported that there is a strong desire to keep juveniles out of detention and in the local community despite a lack of treatment resources and facilities in the region. As a result, children are not frequently detained but are usually released to parents with terms including curfew, school attendance, and ankle monitors.

As noted earlier, however, a May 2008 study of secure juvenile detention practices in Douglas County by the Institute for Law and Policy Planning revealed that at least in Douglas County, "where the bulk of Nebraska's youth population resides, detention of youth is overused (both in terms of high admissions and excessive lengths of stay) due to a long-standing lack of management and coordination." The overreliance on secure detention documented in this study persists despite its many negative impacts on public safety and public resources, and despite declining youth population levels, crime, and even arrests and admissions. These costs inure to the detriment of youth in countless ways. For example, according to this report, many youth wait over 50 days simply to receive evaluations. And, at any one time, five to ten percent of the youth detained in the Douglas County Youth Center are truants, detained merely for missing school. Also, annually, nearly 200 probation supervision cases involve truants. The dangers of this type of net-widening: once exposed to offenders through their detention, supervision, and treatment, these truants and other detained minors are more likely to reoffend, and to recidivate with serious offenses.

The importance of the pre-trial detention decision in both the life of the child, and in the life of the child's case, cannot be overstated. The detention decision is critical to the client's ability to prepare for trial. A detained client cannot assist as well in preparing for trial, and does not make as good an impression on the court, as a client who is on release status. In addition, a comprehensive literature review from the Justice Policy Institute found that time in detention can lead to negative mental and physical health outcomes. For example, "one psychologist found that for one-third of incarcerated youth diagnosed with depression, the onset of the depression occurred after they began their incarceration, and another suggests that poor mental health, and the conditions of confinement together conspire to make it more likely that incarcerated teens will engage in suicide and self-harm."¹⁹⁷ Detention also correlates with limited education opportunities and future earnings potential.¹⁹⁸ Importantly, evidence suggests that time spent in detention increases the likelihood that a child will recidivate.¹⁹⁹ In fact, detention, as a predictor of future criminality, has been

found to be more reliable than gang affiliation, weapons possession, or family dysfunction.²⁰⁰

Risk Assessment Instrument and Fifth Amendment Protection

Probation, and not the police, county attorney, or judge, decides whether a child should be placed in secure detention upon being taken into custody. As probation officers in several different counties explained the process, a probation officer is assigned to intake at regular intervals for a certain period, usually a week at a time. When police take a youth into custody, they call the intake probation officer to the police station. Upon arrival, the probation officer gets the police officer's version of what happened. To gather as much information as possible to determine release, the probation officer will then interview the youth, asking about the youth's home life, school life and other social factors, as well as the circumstances of the alleged offense, to complete a statewide Risk Assessment Instrument (RAI). Several probation officers estimate that, the final detention determination is 75% at the probation officer's discretion; if there is a high score, the probation officer will recommend detention. The probation officer can override the score, and make a recommendation contrary to what the score suggests, "when their judgment tells them to," as one probation officer explained.

It is unclear whether the child's statement about involvement of the offense is used in accordance with the child's Fifth Amendment rights. That is, it is unclear whether youths receive *Miranda* warnings before the probation officer asks them about their involvement; whether they are allowed to choose not to talk about the offense at all; or whether they are advised that they are allowed to choose to talk about it only in the presence of an attorney. One probation officer stated that when she is determining detention, the youth must talk about the offense for the risk assessment, and there is no confidentiality. Probation intake in another county has agreed to not ask about the facts of the case or the crime, since there is no attorney present. One prosecutor in another county admitted that she uses statements youth made to probation officers upon arrest and intake procedure against youth, but only at detention hearings.

Detention Hearing Advocacy

Across the state, detention hearings had an informal feel, with the focus on the issue of placement instead of on the issue of whether the statutory criteria for detention are met. The detention hearing has two discrete parts: the probable cause determination, and the detention decision. But in several of the hearings observed, there was no in-court discussion of probable cause regarding the underlying law violation. Instead, the focus of the probable cause hearing is the recommendation of probation, the basis for the recommendation, and whether there is a less restrictive alternative to detention.

When a child was in secure detention, the defense attorney usually argued for the child to either be placed at home with family, or in the alternative, to be placed in a less restrictive environment. If the child was Native American, the

options expanded due to the relationship to the tribe. The public defender in one county was observed making strong arguments from the documents that secure detention was not warranted, but there was no discussion of how inappropriate the petitioning of the truancy and law violation were for this neglected youth. Several defense attorneys said that, if the recommendation is for an OJS placement, they forego any argument because they know that they will lose, and ask for immediate adjudication or plea at detention hearing so time in detention is minimized. From this common statement, it is clear that, despite defense attorneys' arguments, probation officers have the most power in the courtroom. Asked whose argument holds the most weight in detention issues, one judge answered, revealingly, that "the court hears and considers arguments of all parties but the court has the probation officer's evaluation and recommendation."

C. Investigation and Discovery

Investigation can make or break a case. Prompt and thorough investigation and diligent pursuit of discovery are crucial to the fair administration of justice,

"[I]’ve got to confess, I don’t see lawyers bringing witnesses in—or even affidavits."

-Juvenile Court Judge

whether the case goes to adjudication or the child admits to the offense. If the case goes to adjudication, the utility of speaking to adverse witnesses, preparing defense witnesses, photographing the scene of the crime, and subpoenaing relevant documents and other tangible evidence is the heart of the case inside the courtroom. The child's fully informed appraisal of the strengths and weaknesses of his case relative to the

government's and his ability to make an informed decision about whether to admit are equally important to the heart of the case outside the courtroom – the child's experience of the (un)fairness of the juvenile justice system, and his feeling about whether he has been, as *Gault* intended, a full and fair participant in his case. Investigation provides an important opportunity to allow the child to take charge of his case and to see that his attorney is allied to his interests.

Unfortunately, Nebraska's juvenile defenders do not engage in vigorous discovery that tests the strength of the government's case. As one judge remarked, "I've got to confess, I don't see lawyers bringing witnesses in—or even affidavits." System participants offered several reasons for this lack of independent pre-trial investigation. Undoubtedly the fact that so many cases are resolved with plea agreements is a major factor contributing to the lack of investigation of juvenile cases. Add the cost of investigators to the high number of pleas, particularly in the present turbulent economic climate, and investigators seem like an even more convenient corner to cut. Finally, a

common belief that juvenile cases are not serious enough or complex enough to require investigation means juvenile cases are not investigated. As one assistant public defender told assessment team investigators, “I’ve never had a case where it was that serious or where there was that much doubt about what happened,” so his office does not use investigators on juvenile cases at all.

Open discovery practices may also contribute to the lack of investigation. A public defender reported that defense attorneys in his county did not have any problems getting discovery, because the prosecutor in that county had an open file policy. Discovery mechanisms included filing motions, asking for depositions, and calling the county attorney. A prosecutor in another county also related that she has an open file discovery practice. Juveniles in adult court are not as lucky. A prosecutor in a third county explained that “discovery is tricky” with attorneys of juveniles in adult court, because the child has to waive his right to a preliminary hearing to get to District Court to file a motion to transfer the case to juvenile court. While open file policies are admirable, they do not relieve defense attorneys of their independent ethical obligation to conduct a prompt and thorough investigation into their clients’ cases.

D. Motions Practice

Pre-trial motions, like motions for discovery and motions to suppress statements, identifications, or tangible evidence, are often critical components of an adequate defense. Unfortunately, motions practice is very limited across Nebraska. Most defenders reported that they do not routinely file any sort of motions, whether oral or written. A prosecutor in one county said that she might have a pre-trial evidentiary hearing every couple of months.

“[I]f an attorney representing a juvenile thinks they have a legitimate reason to file a motion, I want them to file it.”
-Juvenile Court Judge

An assistant public defender in another county concurred that pretrial motions are a rarity; he said he files a pretrial motion maybe 3-4 times a year. Usually this motion is a reverse waiver to juvenile court, or a suppression motion. A prosecutor in another county stated flatly, “There is not a lot of motion practice in juvenile cases.” One judge guessed that there was a pre-trial evidentiary hearing once every two months.

System participants offered several reasons for the apparently intermittent motions practice. One public defender related that he did not file motions in every case or as a discovery tool; that he filed them only in cases where he felt he had a very clear, winnable issue; and as a consequence, all the cases in which he filed motions to suppress were dismissed. Another public defender offered that she had never filed a motion to suppress because instances of custodial

interrogation are rare, and so few statements need to be challenged on voluntariness grounds. In one county where assessment team investigators spoke with two defenders, they reported that neither of them filed many pretrial motions. One said he filed suppression motions when he's going to trial; the other said she had filed some suppression motions, usually in drug possession cases, challenging the legality of the search. A defender in another county offered a commonly cited reason: he said he rarely filed motions because he fully expected to lose. As proof, he said the only motion to suppress he had ever had granted in his county, in over 15 years of practice, was one where there was a Nebraska case exactly on point saying that the police officer couldn't do exactly what he did. Another commonly cited reason: there is no reason to file a motion in law violation cases because "usually the kid has done something wrong."

Defenders also reported that they had filed discovery motions with varying degrees of success. In one county, the public defender reported that he filed a motion for discovery in every case. The public defender in another county talked about how filing a discovery motion backfired, to the horrible detriment of the youth: in a case that was going to trial, the public defender filed discovery motions, and, in response, the county prosecutor told the defense attorney that she would dismiss the case and re-bring it in adult court if the child did not admit in juvenile court.

The unifying factor in all these proffered reasons is the agreement that motions should be filed judiciously. An attorney in one county hedged, saying "There is some motion practice, but it is not abused." She added that most of the motions filed by attorneys in her county – perhaps because they are the least controversial – are to change placement. It is interesting that, though advocates perceived a need to monitor their motions practice, the statements from the bench were to the contrary. As a judge who said he does not see many motions brought before him, other than once in awhile for a detention hearing remarked, "If an attorney representing a juvenile thinks they have a legitimate reason to file a motion, I want them to file it."

E. Competency Determinations

System participants reported very different levels of engagement on the issue of competency. As the judge in one county explained, Nebraska uses the *Duskey* standard for adult competency. If the issue of competency is raised, then the proceedings are suspended, and the parties hire mental health experts to do competency evaluations. The public defender in that county reported that the public defender's office is aggressive about arguing competency, but that the private attorneys never raise the issue. The public defender also complained that the evaluator that the court was using was an adult psychiatrist and didn't know much about adolescence, and so the evaluator found even the most obviously incompetent youth to be competent. In stark contrast, most other counties seemed to have little to no competency-related litigation. A judge in one county

reported that he generally does not see competency raised as an issue; a contract attorney in that county said that he has never had an issue with competency; the prosecutor agreed, saying that competency motions are rare. The judge in a different county similarly reported that very few cases raise the issue of competency and both judges in that county seemed to agree that the most pertinent cases where competency may be an issue are cases where the juveniles are under the age of 12. When asked about the issue of competency, the prosecutor in another county talked about not guilty by reason of insanity pleas, not understanding the difference.

In instances when competency was raised, participants cited a similar resolution: the judge in one county explained that in one case, when the youth was found incompetent, the county attorney dismissed the delinquency charges and then filed a 3(a) “no fault of the parent” dependency petition with placement in the home in order to get the youth needed services. When she was directed specifically to competency to assist counsel, she said that if the child has a low IQ (70 – 80), she’ll dismiss the delinquency charges and just prosecute on the status offense, “deports,” or a 3A no fault. Similarly, a public defender in another county reported that when a client has a cognitive disability, he can usually get the case dismissed or reduced to a “no fault.” If that doesn’t work, he moves for appointment of a GAL for his client. Another public defender in that same county said she has filed a motion on competence and her office paid for a psychological evaluation. She mentioned age, as well as cognitive disability, as a factor she considers in determining whether to raise competency. She also looks for dismissal.

F. Adjudication

Each year only a handful of law violation cases go to trial in Nebraska. The more common practice –with or without counsel – is for the child to admit the allegations, so that the cynosure of the case is reaching an appropriate disposition and service-delivery package, which can become litigious. There was virtually unanimous agreement on this point. In one county, the public defender reported that he had had five trials in 18 months; the prosecutor in that county agreed that there had been very few law violations trials in the 15 months that he has been in the office. A public defender, contract attorney, prosecutor, and clerk magistrate in another county all reported that at least 95% of the cases in that county are resolved short of trial, so that there are usually five trials a year. A judge in another county said that juvenile adjudicatory trials are infrequent, that there is minimal litigation in his courtroom, and that most of it is “disposition involved.” A contract attorney in another county said that trials are “nearly non-existent” in his county. The judge in that county noted that most youth who do not plead out at their initial hearing (prior to receiving counsel) do so eventually, after an agreement is reached between the parties. He said that juvenile trials are rare—he may have presided over one every few months. An assistant public defender in that same county confirmed their perceptions: he

has had only one juvenile case go to trial in the nearly four years he's been with the office.

Reasons offered to explain the low number of trials varied. The prosecutor in one county opined that the reason children did not go to trial was that “the parents want the children to take responsibility for their acts.” But both defense attorneys and county attorneys reported that they did not want to try cases that they knew would lose. As a public defender in one county put it, even though the prosecutor in his courtroom does not like to go to trial, and the judge does not penalize children for going to trial, he does not go to trial unless there is a good factual or legal dispute, because “otherwise, a trial just drags out the process.” A defense attorney in another county put a finer point on the same explanation, arguing that there is no use in going to trial because a guilty verdict is a certainty: “The judges advise you of your rights, they jump through all the hoops—but unless you have a right to a jury, you’re going to be found guilty. The concept of ‘beyond a reasonable doubt’ has a different meaning over here than it does here [in other places.]” Another public defender explained, “From the bench, there’s a lot more best-interest type decision-making than beyond a reasonable doubt decision-making when it comes to kids.” A prosecutor in one county offered the flip side of this argument, saying that he will only go to trial on cases that are close, because he feels he has a defense-oriented judge. And in fact, very few defense attorneys reported winning trials; and very few prosecutors reported losing any trials. Almost no one goes to trial because no one wants to lose.

Prosecutors seemed to think that it was not worthwhile to take law violations to trial because Nebraska’s indeterminate sentencing scheme means, as one county attorney summed it up, “It doesn’t matter what they are convicted of, the sentence is the same.” Prosecutors in another county explained that law violation hearings were less adversarial than the abuse/neglect hearings, in which the youth’s liberty is not at stake, because defense attorneys know that whatever the child is convicted of, “the sentence is the same, so why go to trial?” This rationale is a bit counterintuitive, as, at least from the defense’s perspective, the fact of indeterminate sentencing could also be offered to explain a culture of vigorous trial advocacy. Accordingly, this commonly held belief reveals that prosecutors lack a clear understanding of the defense role in law violation proceedings.

Although the prosecutors reported that they did not go to trial because the charges did not make a difference with respect to sentencing, defense attorneys and youth reported the charges mattered to them quite a lot – and that, no matter what prosecutors say, the charges matter to prosecutors as well. Public defenders across the state reported that prosecutors routinely overcharge cases, charging the most serious possible charge along with a much less serious charge, to encourage pleas. As one public defender noted, there is a “disincentive to have trials with multiple charges,” that encourages admissions over adjudications. A youth in another jurisdiction told assessment team

investigators that he ultimately chose not to take his case to trial for fear that he would be convicted of several serious charges instead of one minor charge.

Participants also posited that the low number of trials is a symptom of Nebraska's healthy juvenile justice system – clear evidence that the system works. Both prosecutors and defense attorneys talked about how they “get along [so] well” that they can “reach a plea deal” in the vast majority of cases. One contract attorney reported that he does not go to trial very often because he “gets what he wants” from the county attorney. He added that contested hearings are generally disposition related, like a hearing on a motion to compel DHHS for services. The prosecutor in another jurisdiction said that she thinks “the results are more just” without going to trial because youths are getting “the help they need” and DHHS has the money for programs. “They all want the same thing.” A prosecutor in another county said that generally, juveniles in his county plead to what they would get sentenced to if (or, as he would argue, when) they were found guilty.

This plea culture has permeated practice so thoroughly that defense attorneys rarely advise their clients to go to trial. One defense attorney explained, “Kids always come in wanting to fight it. It's a hard conversation to have: ‘yeah, maybe you didn't do it, but the chances are you'll be found guilty, so you're just putting it off by fighting it.’ It gets frustrating.” He takes only a very small percentage of his juvenile cases to trial in his county, because he cannot get a fair trial from his judge. A youth from a different county reported that she has admitted to all four of her minor in possession of alcohol cases, even though two times she was actually drinking and two times she was not; her lawyer told her that the fact that she was not drinking did not matter since there was alcohol in the room she was in. She thinks she was in the wrong place at the wrong time, was convinced that having a trial would help, and believed she did not do anything wrong. Another youth in the same county, when asked if he had ever talked to his lawyer about going to trial or what a trial is, said he just keeps going to court until he says he is guilty or the case is “dropped.” He never talked to his attorney about going to trial.

G. Disposition

Disposition is perhaps the most important stage of the youth court process, the “heart of the juvenile justice system.”²⁰¹ Certainly, based on observations and reports from Nebraska's stakeholders, Nebraska's juvenile justice system is set up to be more of a service-delivery system than a court system that protects the due process rights of youth accused of crime. However, actual observation of dispositions belied stakeholders' statements about the importance of nuanced and responsive disposition packages designed to help a court-involved youth become a law-abiding citizen. A contract attorney in one county reported the oft-repeated experience of having the vast majority of his cases – especially first offenses – plead and proceed directly to disposition. Assessment team

investigators observed the same rapid resolution of cases in another jurisdiction, in which the case proceeded directly from adjudication to disposition. Defense counsel presented no information, evidence, or background on his client.

Even in cases in which the disposition hearing was convened after the court had ordered and reviewed a predisposition report, there was little advocacy by defense attorneys on behalf of their clients in court. A public defender in one county explained that he believes that a lot of advocacy is not necessary at disposition, since there is nothing to argue if there is a probation or OJS referral. A probation officer in the same county noted that she does not see a lot of communication between attorney/client when she is in court. In one example, counsel argued that this was her client's first time in court and requested probation. The county attorney requested random drug testing and defense counsel did not object. Participants in another county told assessment team investigators that an expert could be hired for disposition but is rarely done. One probation officer told assessment team investigators that she has not had a contested disposition or revocation in her three years with the probation department. A probation officer from another county said that defense attorneys have rarely objected to her office's recommendations for a minor's disposition. She has never been cross-examined at a dispositional hearing where she made a sentencing recommendation. In one county, where assessment team investigators were observing a defense attorney who was reputed to be one of the best in the area, they were surprised to find that no written disposition report had been submitted by the defense, no family or friends were called as witnesses, no experts were hired to rebut the pre-disposition report, and there was no defense-developed community-based disposition package.

Some defense attorneys took the opportunity to work behind the scenes, but by and large, defense attorneys missed opportunities to advocate for their clients outside of court as well. One contract attorney reported that he sentences his clients the day they walk in his office, meaning he starts to diagnose their disposition needs immediately so that he can have a plan in place by the time they are sentenced. A defense attorney in another county said he took a similar approach to disposition advocacy, saying that he refers clients to community service work, for example, right after arraignment, so that he can argue to the judge at disposition that the client has already started community service. He might also get them signed up for anger management or errors in thinking classes before disposition.

But, by and large, these were the exception, and not the rule. A probation officer in one county told assessment team investigators that she is completely open to having an attorney involved in the disposition process, but "they never offer." She observes that attorneys don't communicate the disposition orders to their clients. She stated that defense attorneys could do a better job explaining the process to clients and make it less scary for the kids and their families. A probation officer in another county related that she has never had a defense

attorney ask to be present at her pre-sentencing report interviews. One probation officer across the state said that occasionally, an attorney will contact her for information about their recommendations. However, counsel's involvement at disposition is not likely. A probation officer in another county, when asked to describe the role of defense counsel in disposition, answered, "None." He elaborated that "There are no issues regarding conditions of probation, and I never hear from defense attorneys."

In practice, the defense attorney's role at disposition is very unclear, ranging from an expressed interest advocate to the proverbial potted palm. One contract attorney delineated the roles this way: "Attorneys do not help with the disposition plan - that is probation's job. Attorneys will sometimes object to the services recommended by probation, but we do not come up with the plan." In a different case, the defense attorney acted as both defense counsel and GAL at the disposition hearing. The county attorney asked for a reprimand (a common occurrence for minor charges in juvenile court) but the public defender chimed in and said that the child's mother wanted drug and alcohol testing for the child, conditions that the child likely did not want. In a case in another county, the public defender acted as a traditional, expressed interest counsel, arguing for what the youth wanted, even though the attorney was certain, and had warned the child that, the child would likely be sent to YRTC. The public defender argued for a less restrictive placement. In yet another variance on the defense role in disposition, the court told the mother of a youth who had been released to his mother's custody pending disposition with an OJS referral, that if he violated any of his release conditions prior to the next hearing, she should call the county attorney and the judge would order the juvenile's lock-up without a hearing.

Perhaps predictably in light of the lack of defense advocacy, probation officers enjoy an enormous amount of deference at disposition. A public defender in one county suggested that the judges will follow the recommendation of probation regarding the disposition at least 8 out of 10 times. In several counties, the prosecutor did not even attend disposition hearings – the probation officer served as the *de facto* representative of the state's position. And a prosecutor in a county that does require the county attorney's presence at disposition told assessment team investigators that at disposition, she usually agrees with the probation officer's recommendations. Probation officers all across the state said that defense attorneys rarely argue against their recommendations. Public defenders who argued for alternatives based on different conclusions from the probation officer's disposition report, rather than developing a dispositional package for the judge on their own, are considered particularly effective.

In this context, defense advocacy at disposition has been artificially limited to the four corners of the predisposition report. Generally, the predisposition report is filed with the judge about two days before disposition. The probation office handles the compilation of the report exclusively. For example, in one county, one person in the probation office does all probation predisposition

reports. He does about 20 to 25 per month. He has the child and parent fill out extensive questionnaires, meets with them for one to two hours, and collects relevant records. Defense counsel has access to this report in advance and can challenge it or argue against the recommendation. An expert could be hired for disposition but this is rarely done. Accordingly, these reports have taken on an enormous importance. One disposition hearing for a case in which a juvenile charged as an adult was transferred back to juvenile court jurisdiction shows the enormous importance of the predisposition report. At this hearing, the judge announced that he had read the 28-page OJS report that he received the day before the hearing three times and asked if the parties had seen it. The County prosecutor then asked that the report be marked and admitted into evidence. Defense did not object and the report was the only evidence submitted to the court. There was a very short discussion of the report's recommendation of commitment to the Youth Rehabilitation Treatment Center for Boys in Kearney, Nebraska, and then the youth was committed. In light of the fact that this report sets the hearing agenda and priorities, it is critical to note that, in at least some counties, the public defender must go to the judge to get the report, and can read it only in chambers. Defense attorneys are not allowed to take the report out of the judge's chambers, and they generally do not review it with their clients. They can take notes, and review the recommendations with clients before court that way. Certainly, this arrangement impedes defense efforts to advocate zealously at disposition hearings.

H. Probation

Probation Department Structure

Probation is not a county agency; it is a division of the state judiciary, so probation officers report to the Supreme Court. There are 15 districts of Nebraska State probation. Probation officers supervise law violators and some truants, though usually DHHS supervises status offense cases. The division of labor between the juvenile probation department (Office of Probation Administration – run by the State Court Administrator's office), the Office of Juvenile Services, a division of the Department of Health and Human Services' Office of Protection and Safety, and the part of DHHS that supervises wards of the state in abuse and neglect cases seemed imprecise to assessment team investigators. There did not seem to be clear standards on which agency supervised which kind of cases at different stages.

In some counties, probation officers are assigned to adult or juvenile caseloads; in others, they had both adult and juvenile clients. Juvenile probation officers do not follow the case from beginning to end. The jobs of intake, pre-disposition assessment, and supervision are all divided among different officers. Juvenile probation officers do not specialize in a certain phase of the case. That means, for example, that probation officers rotate through intake; in some districts, this means that probation officers have intake as infrequently as once every three months, because probation officers throughout the district will share intake

duties for all the counties. Many juvenile probation officers do not become involved in a specific case at all until they are assigned the predisposition investigation report. Probation officers do specialize in the type of supervision, so that there are community-based intervention officers for youths who require little supervision, and medium/high supervision probation officers.

In one county, probation did not provide pre-sentencing reports; probation officers first saw the youth after they were sentenced to probation, and conditions of probation were decided by the court. In most cases, however, after the intake process, a juvenile probation officer would become involved in a case when the court ordered a pre-disposition report. In the pre-disposition report – and system participants stated that typically a judge would order an investigation after adjudication before disposition in cases in which disposition did not immediately follow adjudication or a plea – probation officers make recommendations as to the appropriate sentence. These reports contain information on a youth’s background, school history, drug/alcohol history, peer interactions, and use of free time, as well as interviews with the youth’s parents, and a risk assessment score. Because in most counties, probation officers are assigned to individual youths only after disposition, the probation officer is not in court at disposition. Instead, the pre-disposition report is admitted into the record and frames the discussion.

Probation Officers’ Discretion

At every stage of the case, probation officers have a great deal of discretion. In the beginning of the case, probation officers have the power to take youths into custody and detain them. Probation also prepares the pre-disposition report, which contains recommendations concerning risk level and appropriate disposition conditions, including the intensity of probation (high, medium, or low risk), how often the child will be called in for urine tests, various treatment programs, evaluations, and therapy. Once a child is under probation’s supervision, the probation officer has the authority to order curfews, order a tracking bracelet, or mandate other programming or changes in release conditions without returning to court. In one county, a probation officer described “gang sweeps,” an activity probation officers do in conjunction with the local police department. She explained that “if we’re afraid a kid is really getting into the gang lifestyle, we’ll do room checks at his house, to see if he has any paraphernalia.” According to this probation officer, the decision on who might be gang-involved and whose house needs to be searched is entirely up to probation and police officers. When assessment team investigators asked her how they justify the search legally (e.g. if the youths or parents ever refuse consent to search), she explained that probation orders releases to be signed by youth and their parents consenting to allow their home to be searched.

In some counties, it is up to the probation officer to decide to request an OJS evaluation; an OJS evaluation takes 30 days, an additional month during which a detained child must remain detained if the child is being evaluated. In the

post-disposition phase, unless a youth has been taken into custody on allegations of committing a new offense, in which case, in most counties, the probation officer is required to file a violation, probation officers have broad discretion in filing violations. Although many of their decisions are based on the results of various assessment instruments, the interpretation and implementation of the results of these instruments fall squarely within probation's purview.

Role of Probation outside the Courtroom

Juvenile probation officers wear many different hats: they make sure that the juveniles comply with court orders, parental rules and counseling recommendations; they complete the pre-dispositional investigations and report their recommendations to the court; and they set up probation conditions based on the YLS score determined by the OJS evaluation and the PDI. Additionally, probation largely handles the issuance of orders for detention when a juvenile continues to get into trouble. Probation officers reported that their focus shifted depending on the stage of the case. For example, one probation officer reported that she sees her role at intake as making sure both the juvenile and society are safe. As an ongoing probation officer, she views her role as "leading a juvenile in the right direction," involving them with appropriate programs, surrounding them with positive peers, and being a sounding board for the youths on her caseload. Another probation officer runs the boys and girls groups at the probation office, and considers herself an advocate to get services. Another probation officer, when asked about how she viewed her role as a juvenile probation officer, responded that she tries to help the youths on her caseload comply with their probation order. She also looks out for other areas she thinks they need help with that aren't addressed on the probation order-and will sometimes add or modify conditions to their order without going to court and having the judge modify the order formally. No defense attorney has ever challenged her unilateral actions.

Role of Probation in the Courtroom

Commensurate with their broad discretion outside the courtroom, probation officers enjoy an enormous amount of deference inside the courtroom. One public defender suggested that 8 out of 10 times, judges follow the recommendation of probation regarding the disposition. He added, "Everything is so dependent on the juvenile probation officer making a recommendation and assessments being done." Probation officers recognized the influence they have. One probation officer said she feels she does have some power, because she knows the Judge takes her recommendations seriously. A probation officer in another county went further, saying that "judges almost always follow the probation officer's recommendation," and even explaining that probation officers can talk to judges in chambers about cases. A probation officer in one county stated that the strength of the juvenile system lies in the fact that the judge trusts her judgment and takes her advice, adding that she doesn't really see much benefit from juvenile defense services. The judge in that same county, when asked whose argument holds the most weight in detention issues, answered that the

court hears and considers arguments of all parties, but that the court has the probation officer's evaluation and recommendations. Probation officers across the state agreed that they have more control over the outcome of the case than the defense attorney does, because the judge gives the most weight to their recommendations.

I. Post-Disposition

Absence of Appellate Advocacy

Appeals of law violation cases are very rare. Except for a smattering of mentions – for example, one prosecutor angrily told assessment team investigators about a law violation case she had up on appeal with the public defender she works with – appeals are virtually non-existent in juvenile court. One judge could recall only one juvenile appeal since 2003, and it was not even in the judge's own county. A public defender in another county remarked that he is working on his second appeal in the thirteen years he has been a public defender. A public defender in that same county told assessment team investigators that she has not had an appeal, although she wanted to bring a sufficiency of the evidence appeal for one case, but the client declined.

Review Hearings

The practice with respect to post-disposition review hearings varies from county to county. While the probation officer in one county remarked that it “stood out for her” that juvenile defense attorneys “seem to disappear after the dispositional hearing,” another one county builds in regular post-disposition follow-up by courts and defenders through semi-annual review hearings. In this county, which offers a viable model practice on this point, law violation and status offense cases are closed by the public defender's office at the first disposition. The office opens a "Review" file to monitor any case activity during the six month (sometimes more often) review hearings in the juvenile court. In other words, if a child is placed on probation, then the matter is closed, but can be re-opened upon an allegation of a probation violation. Judges can also schedule probation reviews at intervals ranging from 45 days to about six months. If a child is committed, his case is scheduled for review hearings every six months, and stays on the attorney's active case list. A review of the case files in one county indicated that these types of cases typically stretched across years, with numerous court hearings and continuances for changes in placements or additional evaluations. Finally, for youths pending placement, some counties hold a placement review every two weeks, because, as one judge admitted, “some kids wait a couple of months at the juvenile hall” for a mental health bed or substance abuse treatment bed to come open. Not only do youths wait for services, as one attorney explained, “she gets frustrated in law violation cases when children get locked up and have to wait 60-90 days in the detention center for an evaluation,” because “children do not even get credit for this time in detention center.” At review hearings, the court can convene all the necessary

parties, review the youth's progress, and make changes to the child's disposition package, adding or subtracting treatment as the case demands.

Although these review hearings are an important and admirable facet of Nebraska's post-disposition monitoring scheme, it is unclear whether youth receive meaningful, individualized representation at these post-disposition hearings. In theory, these review hearings allow public defenders to hold probation and DHHS accountable in ensuring that youths in out of home placements receive the services from which they can benefit, and enable closer monitoring of conditions of confinement. But, in practice, there are systemic flaws that undermine the goals of these review hearings. First, many system participants believe that the attorney's role changes at post-disposition: according to one judge, at the post-disposition stage, the child's attorney becomes more that of a guardian *ad litem*, instead of a defense attorney. In addition, as the judge in one county recounted, the public defender does not have contact with the youth before the day of the hearing, so that the attorney-youth contact is not meaningful. Despite these review hearings, absent an appeal, no real advocacy exists once a case is disposed of in juvenile court.

Probation Revocation

The vast majority of youth is placed on probation with terms and conditions. Probation officers do have discretion with respect to filing violations. As a probation officer in one county confirmed, youths are automatically violated if they commit a new law violation; otherwise, not necessarily. Sometimes, probation officers use intermediate sanctions. "If it's a technical violation, we really try to work with them to get them back on track," she explained. But, once an allegation of a probation violation is lodged, for several reasons, the accused youth is likely to have probation revoked. First, the lack of resources in close proximity to the youths' homes often means they have difficulty complying with court orders once placed on probation. In addition, defense advocacy is almost nonexistent. As one probation officer reported, he has never heard of a contested probation revocation hearing. In another county, despite the probation officer's belief that 90% of probation violations had defense participation, assessment team investigators observed a probation violation hearing at which there was no defense attorney.

Parole Revocation

Nebraska's juvenile justice system also allows for parole hearings for committed youth. Much like parole hearings in adult criminal court, juvenile parole hearings are completely extrajudicial. The parole revocation process consists of caseworkers stating their opinion, usually that a youth should go back to a detention facility. There is a local preliminary hearing with a supervisor in Health and Human Services. If they come back to Kearney, they are given counsel, usually from the local public defender's office, and have a hearing to determine if their parole will be revoked. The hearing is with the caseworker, the Director and another person from the facility. Youth have the option to

waive the hearing after talking with the public defender. Virtually all youth waive this hearing. One defense attorney who handles all the parole revocation hearings for juveniles committed to a particular facility stated that he advocates for the client's expressed interest, and will often communicate there is nothing more he can do, unless a less restrictive option becomes available. Often, as a result of violations of parole, many children ended up with multiple placements and years of supervision from very minor charges.

III. Systemic Barriers to Just and Balanced Outcomes

A. Ethical and Role Confusion

The professional rules of responsibility, relevant legal scholarship,²⁰² and professional standards and guidelines²⁰³ are unanimous that juvenile defense attorneys have an ethical duty to advocate for the client's expressed interests, as opposed to the client's best interests as determined by the attorney, the judge, the prosecutor, the probation officer, or the client's parents. These roles are very distinct, with different, often opposing, ethical mandates. Ethical canons require defense counsel to act in the child's expressed interest, serving as the child's voice in court proceedings and zealously advocating for what the child wants. In contrast, the GAL, unmoored from the child's expressed interest, acts in the child's best interest. In other

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-Public Defender

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lawyering.”*

-Juvenile Court Judge

words, the GAL can substitute her own judgment for the child's, and advocate for what she believes should happen in the case, regardless of the child's wishes. Juvenile defenders owe their clients the same ethical duties of loyalty, communication, and confidentiality that adult criminal defense attorneys owe their clients, and are bound by the Model Rules of Professional Conduct, the ethical code for attorneys, to “zealously assert the client's position under the rules of the adversary system.”²⁰⁴

Although the practice varies from county to county, Nebraska attorneys representing youths in law violation hearings often act as both legal counsel and GAL for the child. Role confusion among defenders was identified as a significant problem by

over two thirds of the investigative team, and some investigators highlighted questionable ethical conduct. A judge expressed his frustration with defense counsel saying “Just be a lawyer. We need real lawyers in juvenile court. We need lawyers who understand the nuts and bolts of lawyering.” Many defense attorneys expressed a clear understanding that their mandate was to serve their clients’ expressed interests. The public defenders in one office were very adamant that they were expressed interest attorneys, and that they followed through on what their clients wanted to do in the cases. A contract attorney in that same county reported that she views her role with law violations cases the same way she does with adult criminal defendants – serving the client’s expressed interest. A public defender in another county described her role as being an advocate for the child, and acting on the child’s stated interests. She added that she does keep the child’s best interests in mind, and tries to advise her clients about their rights and consequences for different actions, “but in the end it’s their decision and I will argue what is their position.” Another contract attorney in a different county, who practices in both Iowa and Nebraska, was able to provide a unique perspective on the workings at his courthouse. He said he considers it his role to give legal advice (here’s what should happen), and practical advice (here’s what will happen in this particular county), and then leave it up to the client to decide what to do. Defense attorneys in a different county summed up their role this way: “Our role as advocate allows us to help kids feel like they matter in the system and that they feel like they have a voice in the court.”

Through their actions, defense attorneys across the state showed that they erroneously thought that their role was to act in the client’s best interest. For

“He (lawyer) did what he thought was best for me, not what I wanted.”

- Youth

example, in one instance of courtroom observation, during a hearing, a defense attorney who was acting as both defense counsel and GAL to the same client on the same matter asked a client’s mother what she thought would be helpful in the case. The client’s mother said she wanted drug and alcohol testing done, and the attorney requested it, without checking with the client, and without going over any of his client’s rights with respect to drug and alcohol testing. At this

point, he was clearly acting in the youth’s best interests. One public defender said that as GAL, he argues best interests, and as counsel, the youth has input in the decisions, but that ultimately, he did not see a lot of difference between the two roles. A youth in another county, who had been represented by a public defender, felt that her lawyer did not do a good job representing her, because “he did what he thought was best for me, not what I wanted.” She said she did not have a chance to tell him her version of what happened; that the witnesses testified under oath but her lawyer did not ask them any questions; and that her lawyer did not argue for the things she wanted. In some counties, particularly because the vast majority of youths charged with felonies are charged in adult

criminal court, leaving misdemeanants and status offenses in delinquency court, the practice of juvenile defense is virtually non-existent, substituted largely by a “best interests” GAL practice.

One contract attorney stated that he believes he and other attorneys are able to separate out the roles. Different attorneys offered ways to resolve the conflict that many individual defense attorneys have – and that Nebraska’s juvenile justice system encourages – over the nature of defense counsel’s ethical mandate in law violations. One contract attorney reconciled the roles by stating, frankly, “I honestly believe I know what’s best,” and he can always convince his clients to see the case the way he does. “Attorneys want what is best for the juvenile,” he added. A public defender from another county also said that he leaned toward expressed interest over best interest. However, he hedged, saying that in a case where what a juvenile client wanted conflicted with what he believed would be in their best interest, and the juvenile didn’t have an adult around, he would ask the judge to appoint a GAL to represent the minor’s best interest. Assessment team investigators from several cites mentioned that they constantly had to remind the attorneys that they wanted to learn about their representation of juveniles charged with crimes rather than their representation of juveniles in child welfare cases.

As in many other states, other stakeholders also muddle the defense attorney and guardian *ad litem* roles. The explanation offered by a probation officer in one county is typical: as a probation officer, he feels it is his job to safeguard the best interests of a child, and thinks that every system participant – including defense counsel – should collaborate as part of a team for the child. He noted that the juvenile public defender in his county has an “adversarial” concept – defined as advocating for what the client wants – and this viewpoint interferes with the ideal team approach he described. In another county, when assessment team members asked the probation officers to describe the role of the public defenders, one said “to argue for what the children want,” and the other said “to represent the children’s best interests,” but they both agreed with one another as if they’d said the same thing. One of the probation officers explained, saying he believes the public defenders “care about the well being of the child, as opposed to trying to get them off.” The other added that the juvenile defense attorney in their county is a “good mix” between a public defender and guardian *ad litem*. One clerk magistrate said that he thinks that there is a need for separate legal counsel in a proceeding. “From minute one,” he explained, “it’s a better sense of security for the kid.”

B. Impact of High Caseloads

Although the sizes of caseloads varied, by and large, defense attorneys reported that although they could adequately handle their caseloads, they could name benefits from having smaller caseloads. It should be noted, however, that in a recent report measuring the workload of public defenders in one county, the case

weight for juvenile cases, representing the average amount of time an attorney spends representing a client for certain types of cases, was 3.5 hours. In contrast, the case weight for juvenile drug court cases was 14.5 hours; for cases involving violent felonies, 13.5 hours; for felony drug and property cases, 11.2 hours; and for child support/paternity cases, 2.2 hours.²⁰⁵ An attorney in one county reported a juvenile caseload, including law violations and status offenses, of about 160 open cases; another in the same county had about 184. A public defender in another county reported handling 400 cases each year; sixty of these were appointments in juvenile law violations and in abuse and neglect cases. A public defender in another county commented on the usefulness of caseload caps, saying that she thought that things had gotten more manageable after caseload standards were implemented there, so that if public defenders go over the caseload in a given month, all the new cases are referred to the conflicts attorneys.²⁰⁶

System participants blamed high caseloads for many practice deficiencies. One judge surmised that since the public defender and the prosecutor have heavy caseloads and are busy, they both take steps to “reach accords and get to adjudication quicker.” One defense attorney explained that his ability to form a relationship with his clients is constrained by the lack of time he has. He admitted that when the defendant comes into court for their first hearing, he oftentimes has not talked to them at all, and has to talk to them at counsel table while proceedings are rushing by. A public defender in a different county said that the public defenders felt that their large number of cases meant that they lacked resources for lengthy investigations, experts, and social workers.

Caseload demands constitute “one of the most pressing issues facing indigent defense programs,” and wreak significant disparities in the quality of representation between paying clients and indigent clients.²⁰⁷ High caseloads also adversely impact indigent juvenile clients more than indigent adult clients. Public defenders who handle caseloads of both criminal and delinquency cases, and contract attorneys who handle juvenile cases along with other types of possibly more lucrative cases, often triage cases, so that defenders focus most of their attention on other cases at the expense of their delinquency clients.²⁰⁸

C. The Culture of Juvenile Court

Informal, Non-adversarial Nature

Law violation proceedings are infused with an informal, non-adversarial nature that facilitates less than zealous defense advocacy. The juvenile public defender in one county, a former felony attorney, said he “felt handcuffed in many respects.” He was used to a more adversarial system in adult court and people were “shocked” by his aggressiveness in trying to get matters dismissed. In another county, assessment team investigators observed that the attorneys did not stand when they addressed the court, and the probation officers were sworn in at the table and spoke from their seats. Often law violations took place in

smaller hearing rooms that had tables, chairs and pews for the participants, instead of a judge's bench, witness box, and counsel table set apart in the well of

“Children in Nebraska don’t have much political power, and therefore don’t have the resources available to them. Nebraska is a great place to grow up as a kid, unless the kid gets in trouble – then they don’t have squat.”
– Court Appointed Juvenile Defender

the courtroom away from spectators. The informality made the hearings resemble a meeting rather than a court hearing. In another county, a defense attorney said that everyone knows their juvenile clients aren't going to get due process. “The judges advise you of your rights, they jump through all the hoops—but unless you have a right to a

jury, you're going to be found guilty. The concept of 'beyond a reasonable doubt' has a different meaning here.”

Second-class Status

In part because of the informality, juvenile court was accorded second class status across the state. Defense attorneys across the state reported that the overall courthouse culture looks down on juvenile court practice. As one public defender told assessment team investigators, “Juvenile delinquency cases are the poor stepchild in the state.” Juvenile court is considered a treatment court; or, as one county attorney remarked, it is a “discovery process for adult cases;” or, as another county attorney explained, it is “more about rehabilitation” than vigorous advocacy. The remarks of a county attorney in one county are particularly telling: at the beginning of the interview, she asked if the interview was about the juvenile jury trial issue, and was told no. She then walked over to close the door, and stated that “juvenile jury trials would be such a waste of time.”

Reliance on Quick Case Processing

Quick case processing is an important goal in Nebraska's juvenile system. For example, according to the judge in one county, they hold “Big Monday” every Monday. The aim of Big Mondays is to try to dispose of as many cases as possible as quickly as possible. In another example discussed earlier, in at least one county, the first appearance hearings are mass adjudications or “cattle calls” in which the judge reviews the rights of all the youth once, and then asks each individual youth if he or she waives his or her rights. This reliance on quick case processing enables a juvenile court culture that considers zealous advocacy an impediment to rehabilitation.²⁰⁹

To that end, the juvenile system seems to rely on systemic mechanisms that facilitate judicial economy, often at the expense of a youth's due process rights. First and most glaringly, waiver of counsel certainly shortens the case processing time. In addition, whether because in many cases the child and parents wanted to resolve the matter as quickly as possible, or because judges and other courtroom actors subtly encouraged youths to plead, the large number of pleas means that juvenile court cases are fast-tracked. And, even these pleas were rushed, with the typical practice seeming to be a checklist approach by all system players. In addition, many cases proceed straight to disposition, without adjourning for a pre-disposition investigation report. Also, both the defense and the prosecution have large caseloads that demand that they dispose of cases more quickly.

Some system participants perceived this quick case processing as a strength of Nebraska's juvenile system. Stakeholders, including defense attorneys, expressed the belief that delay does not help the child – especially if the case seems to be headed towards some period of detention – so it is more prudent to try to get everything resolved at arraignment, get services in place as quickly as possible, and speed the youth through the process. The thinking behind this strategy is obvious: the quicker the child begins disposition, the quicker the child finishes disposition, and with as little invasiveness from the state as possible. In addition, a significant amount of research says that adolescents experience the passage of time differently from adults, so that the connection between an offense and a sentence fades quickly as the time between the two points increases. Any lesson that might be gleaned concerning accountability and responsibility is lost. If the juvenile is detained, there is added potential for harm.²¹⁰

While it is true that there are significant disadvantages to allowing youths to languish as their cases shuffle through the process, it is also true that youths' due process rights cannot be allowed to take a back seat to judicial economy. However, as *Pathways: Reducing Unnecessary Delay*, a publication of the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative, points out, the goal should be elimination of unnecessary delay, not quick case processing for its own sake: in other words, "the end goal is not speed; it is improved justice. All of the sites' experiences underscored the pitfall of speeding up case processing as an end in itself; . . . The key [is] eliminating wasted time, whether time between events— court hearings, generally—or the time taken for the events themselves."²¹¹ Delay is not necessarily synonymous with disruption in the justice system. And, "in fact delay — orderly, rational delay — can enhance the justice process."²¹²

"At 9 a.m. I can have 5 adjudication hearings and can make 5 deals in a few minutes."

-Public Defender

D. Resources

Many participants expressed frustration that there are virtually no resources within the county to help delinquent youth, either pre-adjudication or post-disposition. Much of this is due to funding. The lack of resources in close proximity to the youths' homes often means youths have difficulty complying with court orders once placed on probation. As one county attorney elaborated, "Children in Nebraska don't have much political power, and therefore don't have the resources available to them."

Experts

The use of experts in juvenile law violation cases appears to be extremely rare. There may be several reasons for the sparing use of experts. First, there is the issue of access: if a public defender needs an expert, he must ask the court. Of course, there are serious strategic disadvantages to having to file a motion with the court for expert funds. Asking the judge, who is also the fact finder in law violation cases, to approve an expert witness voucher, requires the defense attorney to reveal enough of his legal theory to justify the expense of an expert. Taking this step will hurt the defense case immeasurably if, for example, the defense attorney later uncovers evidence that demands a change in the legal theory, or if the expert's evaluation does not support the defense theory and so the expert is ultimately not called to testify. Second, there is the issue of compensation: if the court grants a motion for expert services, the county must pay for it. One defense attorney suggested that, in the county public defenders contract, the County Board create a fund for this expense with court involvement. Whatever the reason, juvenile defense attorneys are not using expert witnesses in their law violation cases. The judge in one county could not recall an expert being used in front of him in any of his several counties. According to a prosecutor in another county, "Rarely, if ever, is an expert called to testify in a delinquency proceeding."

Pay Parity

According to the *Ten Principles of a Public Defense Delivery System*, and the *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*, there should be resource parity between defense counsel and the prosecution. System stakeholders reported that, either there is no resource disparity between the public defender and county attorney offices, or there is a resource disparity, but the existing pay gap is closing. According to a 2008 report investigating the workload at a particular Nebraska public defender office, comparisons of paralegal and support staff indicated differences between prosecutors and defense attorney resources. In another county, a defense attorney pointed out that the issue boils down to political will: when assessment team investigators asked about pay and public defender resources, the attorney said the last public defender did not make equal pay a priority, so the defender was being paid substantially less than the county attorney. The current public defender has made equal pay a priority, so pay scales are much closer now.

Attorney Fees

Several investigators reported that a majority of public defenders have part-time private practices to help supplement their income. In one county, both the public defender and the county attorney have private practices. In another county, a public defender often works on the weekends to accommodate his county caseload along with his private clients.

Fees allocated for juvenile court-appointed attorneys vary depending on the county's indigent defense delivery system. Counties with no public defender who assign court-appointed attorneys on a case-by-case basis pay approximately \$45 - \$75 an hour. There is no cap on the number of hours that attorneys can bill for a single case. In one county, a defense attorney admitted to taking court appointments in criminal cases to supplement his private practice.

Contract public defenders submit a bid to the county for a fixed salary in exchange for providing representation to indigent clients. One judge noted that contract public defenders are viewed as independent contractors, who are hired by the County Board, and who receive no benefits. Once a contract is accepted by the County Board, there is no reopener clause or case cap provision to accommodate an increase in caseload.

Elected public defenders in counties with more than 170,000 inhabitants are not permitted to have a private practice and must therefore dedicate all their time to the delivery of indigent defense services.²¹³ Any assistant public defender in such an office is also barred from having a private practice, as long as their annual salary is equal to that of an assistant county attorney with comparable ability and experience.²¹⁴ The majority of public defenders interviewed did not identify pay parity as an issue.

Resources for Public Defender Offices

In Nebraska, each of the state's counties is charged with organizing its own indigent defense system. Pursuant to state statute, counties with a population greater than 100,000 must have elected public defenders; this requirement affects just three of Nebraska's 93 counties. Most funding is county-based; however, the Nebraska Commission on Public Advocacy provides limited legal services and resources to assist counties through its capital litigation and appellate divisions and major case resource center.²¹⁵ In cases involving the Commission on Public Advocacy, counties are not responsible for any costs of the defense.²¹⁶ The Commission, which was created by the state legislature in 1995, "consists of nine attorneys appointed by the governor from a list of attorneys submitted by the executive council of the Nebraska State Bar Association after consultation with the board of directors of the Nebraska Criminal Defense Attorneys Association."²¹⁷ The Commission appoints a chief counsel to manage the office.

In 2001, the Commission was allowed to reimburse counties for 25% of their felony case representation costs if they met Commission-developed standards and guidelines.²¹⁸ In FY 2002 the Commission received funding, but, before the Commission could begin reimbursing the counties, due to a state budget deficit, the funding was removed from the Commission's budget. That money is yet to be reinstated.²¹⁹

In the 2004 legislative session the Commission successfully sought to change the way in which it is funded.²²⁰ Now the Commission is funded by filing fees. "An across-the-board increase in the filing fee in criminal and civil cases was enacted to create non-general revenue funds for the Commission."²²¹ The purpose of this change was to allow the Commission to continue the programs that were already staffed.

A 2005 report from the Spangenberg Group details the following budgetary information for the Commission:

The total amount received in FY 2005 from non-general revenue sources was \$1,074,414. Of this, \$845,781 was appropriated for the Commission's operating budget, and the remainder was deposited into a cash fund for future use. In FY 2006, \$1,150,704 was collected from nongeneral revenue sources, and of this, \$936,879 was appropriated for the Commission's operating budget, with the remainder deposited into a cash fund for future use.²²²

Many system participants expressed the impression that public defender offices were under-resourced. A public defender in one county reported that, the public defender's office seems to run low on resources. The judges in that same county agreed, telling assessment team investigators that the public defenders and privately appointed attorneys do a very good job of being prepared for the cases, but the system does not have all the funding necessary to provide for defense services. An attorney in a different county observed that the public defenders are always lacking in services and resources. In another county, both defenders interviewed believed that an increase in resources would allow them to be more diligent.

E. Training

Juvenile Defense Attorneys

Most juvenile public defenders had significant legal experience before they began to do juvenile defense work. However, nearly 74% of investigators reported that stakeholders do not receive juvenile specific training on a regular basis, with some openly stating they have never participated in any formal training prior to practicing juvenile defense. In one public defender office, one was new and had been in the office for 18 months; the other was on rotation from the felony division and had been in the juvenile division a few months. A public defender

in another county had been an attorney for 19 years, starting out as a prosecutor and then working as a defense attorney for the last 13 years. In another public defender office, assessment team investigators met with several attorneys who have been doing juvenile work for many years; the least experienced of the group had six years of juvenile experience. Another public defender has been an attorney for 14 years, handling juvenile cases since 2000; another in the same office has practiced for 28 years, handling juvenile cases since 1999.

Contract attorneys had a similar depth of experience. One contract attorney has been an attorney for 15 years. He has a private practice near the courthouse. He has private cases and takes court-appointed cases. He began as a criminal defense attorney and then started taking juvenile cases. Another contract attorney reported that he has been doing public defense work for his firm for approximately three years. A contract attorney in another county told assessment team investigators that he has been practicing law for 28 years. One defense attorney, who has been the elected public defender in his county for over 30 years, also works as conflict counsel in surrounding counties.

Training: Lack of Juvenile-Specific Training

Despite this depth of experience, defense attorneys uniformly reported that there were very few opportunities for training on juvenile-specific issues, and that juvenile-specific defender education and training would be helpful. For example, one assistant juvenile public defender said that he has never had any juvenile-specific legal training, but thinks “it would be a great thing to attend an event where he could pick people’s brains” on difficult legal and ethical issues related to juvenile practice. Another public defender in that same county agreed that there is a need for specialized training for representing juveniles. Even other system stakeholders, like probation officers, saw the merits of juvenile law-specific training for defense attorneys. One probation officer suggested that juvenile public defenders should be only those attorneys who have an interest in working with juveniles in particular.

Faced with few juvenile training opportunities, most juvenile defense attorneys learned on the job. A public defender in another county pointed out a common training tack: instead of formal training for attorneys new to the juvenile division, a new attorney would shadow a senior attorney, so training was mainly courtroom observation. A contract attorney in another county reported that he trained himself largely by watching people and attending juvenile seminars; he thinks a mentor program would be helpful.

Nebraska practitioners had suggestions for improving training for practice in juvenile delinquency court. For example, several defense attorneys suggested that the state bar should have more juvenile-specific trainings, and that the trainings should be held in different parts of the state. As a defense attorney in one county explained, the reason he has not had any training on juvenile issues is that almost all attorney trainings are held in Lincoln or Omaha, both more

than five hours away by car. Attending trainings in these locations would become very expensive as the costs for gas, a hotel stay, meals, materials, missed time from work and the training registration fee add up. A contract attorney went so far as to suggest that juveniles would benefit from having attorneys appointed that practice juvenile law exclusively. A probation officer believed that juvenile representation is compromised because “a lot of defenders represent both youths and adults, but they do not know how to make the transition to advocating for a juvenile.” Finally, one judge suggested that efforts should be made to normalize training opportunities for both contract attorneys and public defenders. As he explained, “public defenders get needed training, but the private attorneys do not have the same training opportunities or do not avail themselves of any training opportunities.”

While there is considerable overlap between the role of the juvenile defender and the role of the criminal defense attorney, juvenile defense practice requires a unique set of skills, knowledge, and training.²²³ In addition to understanding criminal law and procedure, juvenile law and procedure, and trial advocacy, juvenile defenders must be trained in areas of law that intersect juvenile delinquency work, including dependency, education, public benefits, and immigration.²²⁴ Juvenile defense attorneys need to be able to address the unique issues impeding the fair treatment of youth of color, girls, and lesbian, gay, bisexual, and transgender youth in delinquency courts.²²⁵ Moreover, defenders who represent youth must understand normative adolescent development, as well as the impact of disabilities and trauma on development.²²⁶ As an ever-expanding body of research has shown, and the United States Supreme Court has acknowledged, adolescents differ from adults in critical ways that affect both the legal issues in a case²²⁷ and the attorney-client relationship.²²⁸ Continuous training on these and other issues is critical. Unfortunately, many juvenile defenders receive minimal training at best.

Perhaps the new continuing legal education requirements slated to begin in 2010 will provide an opportunity to address the deficiency in training on juvenile-specific issues for juvenile court practitioners. Attorneys told assessment team investigators that there were on-going CLE opportunities from the Bar Association, but none focused on juvenile matters. County attorneys have an on-going 20 hour/year CLE requirement, two of which must be on child abuse, but they do not get any specialized training on juvenile issues. However, beginning in 2010, Nebraska will join the 43 other states that have mandatory continuing legal education. Pursuant to Nebraska Supreme Court Rule §3-401, active Nebraska State Bar Association members are mandated to earn ten credit hours at annual education sessions starting January of 2010. Two credits each year must be in the area of professional responsibility, which is defined as instruction in the following areas: legal ethics; professionalism; diversity in the legal profession; malpractice prevention; recognizing and addressing substance abuse and mental health issues in the legal profession; Nebraska Supreme Court Rules Relating to Discipline of Attorneys; ethical standards as they relate

directly to law firm management; and duties of attorneys to the judicial system, public, clients, and other attorneys. Neb. Ct. R. § 3-401.2(J). Perhaps the Nebraska State Bar Association will offer some training with a juvenile focus that intersect with this requirement. All system stakeholders could benefit from training in several practice skills areas, including other ancillary topics suggested by Nebraska practitioners such as: what happens at YRTC-Geneva; special education issues; adolescent development and *Roper v. Simmons*, 543 U.S. 551 (2005).

Juvenile Court Judges

While judges have substantial legal experience before they take the bench, most do not have any specific juvenile training before they hear juvenile cases. Judicial vacancies are filled by the governor, who receives recommendations from a committee concerning judicial appointments. Once appointed, a judge faces a retention hearing three years after appointment and then every six years thereafter. Assessment team investigators spoke with judges with many years of experience. Judges had a range of employment experience, with some judges being former defense attorneys; others being former county attorneys; and others with experience on both sides of counsel table. Most judges, like the judge in one county, said that they had never received any juvenile law-specific training since in all their years on the bench. Only two of the judges interviewed, however, mentioned attending juvenile-specific trainings. Two judges, in the same county, talked about attending regular mandatory juvenile justice training. Additionally, these two judges felt qualified to handle juvenile matters because they assist with CASA training where they explain their roles to all members of the system. These judges also engage in training with the Through the Eyes of the Child Initiative, a program in the state of Nebraska that focuses largely on abuse and neglect cases. All the judges handled dockets that include both delinquency and abuse/neglect cases.

In counties in which there is a single judge handling juvenile law violation and status offender matters, that judge will often develop an expertise in a family – a very specific expertise which should not be mistaken for expertise in juvenile matters. For example, the judge in one county has been on the bench for many years, and is well-known throughout the community. Many conversations demonstrated that participants and the community have a great deal of respect and admiration (and a bit of protectiveness) for the Judge. Because of the Judge's length of service and his use of an on-the-bench computer, which appears to access statewide data, the Judge has extensive knowledge of the accused, the accused's family and, the accused's circumstances. Both defenders in this county lamented that, because of the nature of small counties, the Judge they are appearing in front of has extensive knowledge of the client, families and activities in the community. As a result they can predict what the Judge will do and it is difficult to change his opinion with advocacy. The parent in another county told assessment team investigators that she liked the judge she appeared

before, and said that that judge was the judge “for all five of her kids.” Judges in that county had all been on the bench for several years.

There was no evidence that judges presiding over specialized juvenile courts received more, better, or even any juvenile-specific training. Still, stakeholders in counties in which juvenile cases were heard by county court judges often recommended that their counties should create their own specialized juvenile court. The clerk magistrate in one county stated that he would like to see a separate juvenile court system in all counties, noting that in many counties, there are specialized courts for everything except juvenile matters. He also believed that separate juvenile judges should be assigned to these courts. Based on cost and demand, he realizes that a separate court in every county is unlikely, and suggested that, instead, a specialized juvenile court could be established for a 3-county radius. He suggested establishing specialty courts would allow stakeholders to focus more on the juvenile, with a judge who has had specialized training. The judge in another county was supportive of the idea of creating a specialized juvenile court, but thought there weren’t enough cases in his county to justify a dedicated judge; he also stated that whoever was chosen to preside over a dedicated juvenile court would probably have a lot of “windshield time” driving from county to county. In another county, a judge who has been on the bench for 10 years told assessment team investigators that he has a lot of experience with juvenile cases and would be interested in being the dedicated juvenile court judge. This judge endorses the idea of a dedicated juvenile court because, the judge opined, in a specialized juvenile court, a judge can really invest time in careful consideration of each youth’s individual circumstances, but he thinks there would be logistical problems. The detention center administrator in another county stated that he would like to see more juvenile courts, but, again, noted that such a court does not seem feasible in small areas. Finally, the public defenders in one county expressed a desire for a separate juvenile court, as they felt such a court would allow them to handle the matters before one highly specialized judge who would, theoretically, be well-versed in juvenile issues.

Probation Officers

Probation officers had a similar depth of overall experience, but a dearth of specific juvenile training. Most juvenile probation officers had college degrees, and many either had a master’s degree or were working towards one. Most also had mixed caseloads of adults and juveniles. Of all the probation officers interviewed by assessment team investigators, only two mentioned juvenile-specific training. One, who had been with the probation department for nine years talked about attending a week-long training on juvenile-specific issues, and the other, in a different county, talked about periodically attending trainings on evidenced based programming for

“[T]reatment is inadequate.”
-Juvenile Prosecutor

offenders. The rest, though many of them had been with the probation office for several years – one for five years, another for seven years, another for nine years, and another for ten -- had not attended any juvenile-specific trainings on, for example, working with clients with special education needs, understanding adolescent development, using age-appropriate language and interviewing skills. Most reported, as one probation officer who had been with the department for four years did, that they had never been required to attend any juvenile-specific training courses.

F. Mental Health and Substance Abuse

Lack of Mental Health and Substance Abuse Treatment Programs

Stakeholders reported overwhelmingly that Nebraska's juvenile system suffers from a severe lack of mental health and substance abuse services. Specifically, nearly 70% of investigators found that stakeholders commented on the absence of adequate mental health resources within their jurisdictions, and the detrimental impact this has on youth. Nebraska does not have a juvenile mental health facility. Nebraska also does not have any state-run chemical dependency programs except at the YRTC's. Assessment team investigators in every county reported that stakeholders listed the dearth of services for youths struggling with mental health and substance abuse issues as one of the most glaring problems of Nebraska's juvenile system. A contract attorney in one county complained that, in mental health cases, the judge in his county is favorable to treatment, but there are no facilities nearby. Observing that there is a lack of mental health beds, a judge in that same county estimated that over half of the youths he sees have mental health issues. A judge in another county remarked that there is a huge and urgent need for state run chemical dependency and mental health in-patient and out-patient services for youth. The detention center administrator in one county identified mental health services as the biggest need for residents. The detention center administrator in another county talked about the overall lack of placements and funding for children with mental health issues, lack of funding and resources for drug and alcohol addictions and lack of programs for anger management as a huge burden on the facility, as it tries to deal with these very serious issues in a concentrated population of youths. The prosecutor in another county, when asked if there is sufficient available treatment, replied "treatment is inadequate." As an example, she explained that her county and one of the adjacent counties share one psychiatrist versed in juvenile issues. The public defender, judges, and detention center administrator in another county cited the lack of any available programs to help juveniles deal with significant mental health or addiction issues as a searingly important problem. The probation officer in another county named the lack of resources for children with mental health needs as one of the biggest weaknesses in that county's juvenile system. There is a dire need for state run chemical dependency and mental health in-patient services for youth.

In addition to a lack of inpatient treatment programs, there is also a dearth of community-based options for youths who are released pending trial or disposition or who are placed on probation. When assessment team investigators asked about services available for the youths in his county, one judge listed the Boys and Girls Home, Boys Town, and a drug treatment program affiliated with the boys' juvenile prison as his only real options to get services for kids. He mentioned nothing about community-based services. He appeared to feel constrained in his dispositional orders to sending youths where there are existing contracts with DHHS. "It's all controlled by state funding," he explained. A defense attorney in that same county, who was able to list a handful of community-based programs, concurred, stating that in his experience, the first time a youth is adjudicated delinquent, the youth will typically be put on some form of probation with community service and a requirement that the youth pass in school. "The second time around, however," he continued, "the judges around here have much less tolerance. Things get stepped up, and instead of probation, the youth is most likely going to get involved in OJS—which means an out-of-home placement, because there aren't enough placement options for kids." A probation officer in that same county reported that she sometimes has to send youths to another city just to get them into programs that don't exist in her county. Another probation officer lamented the paucity of programming with, "All we want to do is keep [kids] from graduating to the adult penitentiary – but our toolbox is shallow." As one contract attorney summed it up, "Nebraska is a great place to grow up as a kid, unless the kid gets in trouble – then they don't have squat."

Reliance on the Juvenile Court to Access Treatment Services

Unfortunately, as many system participants explained, youths often become system-involved, in both the law violation and status offense cases, to get sorely-needed services that they could not otherwise get in the community. Prosecutors in one county admitted this openly, explaining that there is a lack of mental health and substance abuse services, and that families often come to the county attorney's office asking them to file an "ungovernable" petition or a 3(a) "through no fault of the family" petition so that the youth can receive services. A probation officer in that same county told assessment team investigators that, in their experience, obtaining Medicaid money is an issue for families, so youths and their families will allow the youth to be committed to access money through Medicaid for services they could not access on probation. A detention center administrator in another county offered a different perspective, pointing out that his particular detention facility does not have a mental health professional on site, and overall resources are lacking. He explained that detention in a juvenile facility is often the last resort for kids who are severely mentally ill.

The inability to access these services crosses class and income level. As evidenced by the recent press surrounding Nebraska's "Safe Haven" law, people are desperate for services for their children. Stakeholders in several counties made references to Nebraska's recent national notoriety due to the "Safe Haven"

law, which was designed to keep new parents from abandoning newborns in unsafe places; they reported that the law wasn't written well, and so parents of teens were dumping them at hospitals because of an inability to get mental health or substance abuse services. Stakeholders told assessment investigators that there is definitely a shortage of these services and many middle class families wind up enmeshed in the juvenile justice system because they cannot afford or their insurance will not cover the scarce services.

Beyond the fact that there are very few out-patient or community-based options, the fact that youths on probation have to pay for their services, while youths who are committed do not, exacerbates the problem of families being encouraged to use the juvenile system to access services. One probation officer, frustrated by the paucity of resources for youth in her county, pointed out the glaring inconsistency that, in her county, parents pay for probation services, even if they have been sufficiently indigent to qualify for a public defender. A probation officer in another county opined that the cost to the defendants may be one reason these community services are not used more frequently; more services are available through OJS. As one contract attorney observed, since youth need to have money to last on probation, poor children are more likely to end up committed and in detention.

Quality of Mental Health and Substance Abuse Services

Stakeholders gave terrible reviews of the Magellan, an HMO corporation that manages mental health care services funded by Medicaid. As one judge explained, Magellan is "the gatekeeper who tells you if you can or cannot spend state money." In one county, the probation officer, judge, juvenile facility director, and the special education teacher at juvenile detention facility had nothing but negative reports about Magellan. As a result, they thought, many youth languish in the juvenile detention facility awaiting mental health placement or services, because the probation officers, therapists, and attorneys are battling Magellan to get placements and services approved. A judge in another county explained that, while he could simply override the denial of services, order that the services be provided, and enforce the order with the threat of a contempt finding, this approach is not practical. Two judges in another county also expressed frustrations over Medicare screeners and getting funding to pay for needed treatment. Nearly every interviewee in another county, when discussing trying to get services to youths, lamented Magellan's involvement in the process. One judge called the process Magellan uses to make these determinations, foolishness, just foolishness." Another judge put it simply: "The money needs to follow the child, not the agency." Magellan makes these determinations based purely on a "paper review," so they do not meet any of the children face to face and have no individual knowledge of the children for whom they are making these recommendations. A defense counsel in this county told us that the judge in this county actually has issued contempt orders on Magellan because they refuse to follow his order re services, and that, when faced with a contempt threat, they sometimes relent. Another judge in this county also

complained about how Magellan’s authority curtails his discretion to order appropriate services.

Stakeholders also expressed frustration about OJS and DHHS’s handling of requests for services. One judge had such strong feelings about OJS that the assessment investigator observed that the judge “turned nearly every point in the interview back to his frustrations with OJS.” As the judge explained, OJS has too much control over what happens in a case. The Judge is frustrated that his “ability to use tools” is diminishing, and that, in his opinion, everything that happens in a case is driven by money. In court in this same county, the judge remarked, on the record, “I see this all the time: OJS is requesting dismissal before the child has completed services.” A contract attorney in this same county remarked that “the system works fine when people do what is expected of them, but often DHHS is not doing their job.” He explained, “HHS blames clients for behavior they do every day,” meaning HHS workers do not call clients back; or show up late for appointments; or do not follow through with referrals; or in other ways make promises to the court that they do not keep. The prosecutor in that same county was also critical of DHHS/OJS because she thinks that the agencies are both trying to keep their numbers low and are kicking kids out of care; she said there was a recent study that showed a massive amount of kids were placed out of home and this behavior is a reaction to that study. There used to be 7 to 8 levels of placement and now there are only 3 levels, and this change, according to this prosecutor, gives them “massively broad power.”

G. Overreliance on Juvenile Court

Juvenile Court as a Dumping Ground for the Dependency System

As in many jurisdictions around the country, stakeholders observed a great deal of overlap between the populations in the abuse and neglect and law violation cases. One public defender summed up this common sentiment with, “Way too many kids cross over [from dependency to law violations],” often for minor offenses in group homes or foster placements (i.e. breaking furniture, “terrorist” threats, etc.), and that there are certain group homes and residential treatment facilities that are “notorious” for “using the police department for time-outs.” She added that if a dependent child is sent to one of those facilities “it’s only a matter of time” before a charge is filed against them in delinquency.

Juvenile Court as a Dumping Ground for the School System

Similarly, stakeholders noted a large influx of cases from school as well. According to 60% of the investigative team, multiple stakeholders expressed frustration that the juvenile courts were being used as a way for the schools to deal with truant youth. There are several ways in which school serves as a gateway to involvement in juvenile court. First, as in many jurisdictions around the country, it was observed to be typical for a child to enter the system as a truant and, during the course of the truancy case, to be petitioned with a law violation and land in detention. Truancy charges are brought based on the

number of periods the child misses at school rather than the number of days – a very literal interpretation of truant behavior that can result in inflated numbers of truancy cases, as there is little distinction between the child for whom cutting class signals developmentally appropriate rebellious behavior, and the child for whom missing school is symptomatic of a larger, more serious issue. There are also a large number of status offense and truancy notifications filed; defense attorneys in one county reported that between 50% and 70% of their cases were status offenses and truancy. The clerk magistrate in another county said that he had a “constant caseload” of “uncontrollables,” youths who are cited with status offenses.

In addition, stakeholders reported that often children will have minor offenses, mess up a school-related probation condition, and get committed. Also, assessment team investigators heard about many school based incidents that were prosecuted as disturbing the peace by fighting or “mutual consent assault,” or third-degree assault. Stakeholders in several counties found a correlation between an increase in school-related referrals and placement of law enforcement officers in schools.

Prosecutors seemed to have wide-ranging discretion in deciding whether to prosecute school-based cases. Some prosecutors reported taking a hard line on not prosecuting school incidents. Others offered reasons for taking the exactly opposite position, and prosecuting all school-related cases, like the prosecutor who explained that, after Columbine, juvenile prosecutors are more reluctant to exercise discretion on school cases. Another county attorney told assessment team investigators that her office had “pledged” to enforce rules on fighting in school by filing assault charges. One prosecutor in a large county said she would sometimes hold onto a truancy report and wait to see if the truancy improves and, petition the case only if the truancy does not improve; in addition, the prosecutors in this county expressed some annoyance with the number of truancy cases that they handle, stating that “Well-run schools don’t send truancy referrals over to us.” The prosecutors complained that some of the schools are “pretty sloppy” about researching the reasons behind the absences before forwarding them on. They also agreed that the truancy cases were “widening the net” and bringing youths into juvenile justice system who really should not be there. It should be noted, however, the defense attorneys in this same county characterized the county attorney’s office as being “super aggressive” on status offenders and truant youth. One public defender said “it’s always been like that here,” but that the supervising County Attorney in the juvenile unit has increased the prosecutions of youth for truancy, and that the local public school system automatically sends referrals on any youth who has missed 20 days of school.

The danger of this influx of school referrals, of course, is net-widening. As one judge noted, the school cases are a big problem in his county because he is seeing cases coming before him that should not be screened into court; interestingly, he

specifically mentioned “scuffles” at school as an example of the kinds of cases that should not see the inside of a courtroom. The dictates of the NCJFCJ *Guidelines* are very clear on collaboration between school and court systems: “It is critical for juvenile delinquency court judges to demonstrate judicial leadership and engage school systems to collaborate with the juvenile delinquency court to commit to keeping school misbehavior and truancy out of the formal juvenile delinquency court.”²²⁹ The Guidelines suggest several different means to this end: “by ensuring early identification of, and appropriate educational assistance for, youth with learning disabilities; by early identification of attendance problems and immediate engagement by the school and community to address the underlying issues causing the problem; through teacher training in behavior management, the impact of poverty on communication and interrelationships of children and families, and de-escalating conflict; and by ensuring the school is following federal and state laws on expulsion and suspension.”²³⁰

H. Transfer to and Prosecution in Adult Court

Overreliance on Transfer to Adult Court

Almost 75% of the investigators expressed serious concern with the direct file process in Nebraska, noting that stakeholders commented on how frequently 15-17 year olds are charged as adults, entering guilty pleas without consulting counsel and with little understanding of the consequences. Older juveniles charged with felonies are frequently charged directly in the district court, at which point their options are to 1) petition the court to be returned to the juvenile court or 2) face trial as adults. Stakeholders across the state reported that the *de facto* cutoff age for juvenile court jurisdiction, even though the statute allows otherwise, is 16 years old. As one defense attorney explained: “If you’re 16 or 17 years old and have anything significant at all as far as a charge in [this] county, it’s standard practice to file in adult court.

The prominence of this practice is exacerbated by several factors. First, each county operates so independently of other counties that the counties are essentially completely autonomous, and there is no larger oversight, monitoring, or any other check to counter this practice. In addition, the perception of how many youths were charged in adult court varied widely. For example, in one county in which the clerk magistrate told assessment team investigators he did not have any statistics on the number of juveniles charged as adults, the number of transfer hearings, or the number of cases transferred back to juvenile court, stakeholders who were asked the exact same question, “how often are juveniles prosecuted in adult criminal proceedings,” answered both “seldom” and “often.” Similarly, when asked about the frequency with which cases are transferred back to juvenile court jurisdiction, participants in this same county answered either “often” or “rarely.” Finally, the county attorney, who makes the decision of not just whether, but also where, to file a particular case, has enormous discretion to make this decision.

Direct file transfer laws undermine the explicit purpose of juvenile courts by discounting the well-established research on adolescent development, which indicates that youth are categorically less culpable for their actions than adults.²³¹ In addition, studies show that transfer policies actually increase recidivism.²³² Youth facing transfer need the assistance of counsel to help protect them from the serious negative consequences associated with being tried in adult court. As a report from the Campaign for Youth Justice explained, “[t]he best way to prevent youth from entering the adult criminal system . . . is to have effective legal advocates to help make the case for keeping the youth in the juvenile justice system.”²³³

“[I]f the juvenile is acting like an adult he should be charged as an adult.”
-Juvenile Prosecutor

Prosecutorial Discretion and No Minimum Age

In Nebraska, the county attorney decides whether or not to file the charges on a juvenile as an adult. The burden then shifts to the juvenile to move for a transfer back to juvenile court using the factors set forth in statute. System participants across the state reported that generally, once a youth turns 16 years old, the youth is almost certain to be charged as an adult in district court if the charge is a jail-eligible offense; some people reported youths as young as 15 years old being charged in district court. The prosecution has wide-ranging discretion to choose which case will handle a given juvenile’s case. Moreover, the system works so that the prosecution’s discretion is virtually untrammelled on this point. For example, there is no age limitation, as Nebraska’s statute does not delineate a minimum age for bringing a case in adult criminal court. Although one of the statutory factors in determining whether a case should be brought in criminal court is maturity, maturity is a subjective assessment, vulnerable to almost any justification. In addition, any felony is eligible to be prosecuted in Nebraska criminal court. Also, assessment team investigators discerned no standard, statewide set of guidelines for prosecutors in making this decision. A prosecutor in one county, when asked how she decides who is charged in juvenile court and who is charged in adult criminal court, appeared flustered, saying “it really depends on the case,” and could not give a number of how many direct cases she files. She elaborated that if the case is a first degree sexual offense she will likely file, (unless the youth is younger than 16, in which case, she will examine the case more closely, but will not rule out bringing the case in district court), and she will look at the seriousness of the offense. If it is a driving offense and the juvenile is 16 or older, she will file the case in adult court. It usually depends on the alleged offense, age, and the youth’s record in juvenile court. She mentioned that 16-17 year olds are in a “gray area” —there’s nothing in her opinion that juvenile court can do for them anymore, so they are more likely to be charged as adults. A prosecutor in a different county, when asked the same question,

answered that he will direct file a case on all juveniles 16 years or older who commit a traffic or drinking offense. His rationale: “if the juvenile is acting like an adult he should be charged as an adult.” A third prosecutor, asked the same question, responded that she direct files only serious cases, in consultation with an adult criminal attorney in her office.

Transfer as a Tool in Negotiations

The disturbing frequency with which the threat of adult court prosecution is used in plea and other negotiations goes hand-in-hand with the prosecutor’s broad discretion on the transfer decision. Participants across the state reported that, as the judge in one county and the public defender in another county explained, the defense and prosecution often work out deals in transfer hearings that a transfer to juvenile court will be granted in exchange for an admission to charge(s) as a juvenile. Transfer was also used to avoid responding to motions or other examples of zealous advocacy. For example, in one county, the public defender reported that, for a recent case that was going to trial, when the public defender filed discovery motions, the county prosecutor said that she would dismiss the case and re-bring it in adult court if the child did not admit in juvenile court. In another example, a prosecutor told assessment team investigators that “discovery is tricky” with attorneys of juveniles in adult court because the child has to waive his right to a preliminary hearing to get to District Court to file a motion to transfer the case to juvenile court. One public defender summed up a sentiment expressed by many defense attorneys as the appropriate response to the broad prosecutorial discretion and use of transfer in negotiations: “If we’re going to bother having a juvenile system, then make it hard and fast. That’s the only way it’s not going to get jerked around. If you are [a certain] age, you are a juvenile; if you are [over a certain] age, you are an adult.”

Access to Counsel at Transfer Hearings or Adult Court Proceedings

In some counties, there is automatic appointment of counsel in transfer hearings or in adult court proceedings in which juveniles have been charged in district court. In other counties, however, participants reported that most juveniles in adult court waive their right to counsel. However, assessment team investigators also observed many hearings in which youths whose cases had been filed directly in district court proceeded in their hearings unrepresented. For example, a probation officer relayed that, when she went with one of her clients to the child’s adult hearing to tell the child to ask for transfer to juvenile court, the child did not have an attorney, and the county attorney took the child and the parent outside to the hall and asked them to plead out.

Quality of Representation at Transfer Hearings or Adult Court Proceedings

In at least two counties, youth in direct file cases are represented by adult misdemeanor or felony public defenders, instead of public defenders from the juvenile unit. In one of those offices, the adult defenders often confer with a senior juvenile defense attorney, who showed assessment team investigators a

sample brief for use in transfer hearings; in the other, the office does not have a policy of automatically challenging all direct-filed cases, and the adult defense attorneys do not automatically notify the juvenile unit attorneys if their clients are arrested and direct filed. The adult public defenders are responsible for filing and arguing the transfer motion. Many stakeholders agreed, as the probation officer in one county explained, that it is often faster to plead in adult court because if the case involves a fine, the matter is resolved quickly.

Across the state, participants had varying ideas as to how successful defense attorneys were in having direct file cases transferred back to juvenile court. A defense attorney in one county was of the opinion that once a matter is filed as an adult case, it is very difficult to transfer it back to Juvenile Court. He explained that the county court judge who hears the motion to transfer the case back to Juvenile Court is the same judge who has heard all the juvenile cases the youth has previously had. “The judge will have the history and you have a pretty good idea what he will do.” A defense attorney in another county explained that he had successfully petitioned to remand a case back to juvenile court in January of this year. In another county, a judge observed that defense attorneys do not file many motions to transfer a case back to juvenile court. The Judge stated that the main reason is “the county attorney does a good job of deciding who to take to adult court. He is fair.” Of course, the decision about filing a motion to move jurisdiction to juvenile court should be made in accord with the client’s wishes, whether or not the judge or other system participants perceive the prosecutor as being “fair.” In other counties, participants stated that they had the impression that a lot of cases are transferred to juvenile court.

There are few evidentiary transfer hearings, as most juvenile cases that land in adult court are the result of direct file. There was evidence that defense attorneys take these hearings very seriously, and go to effort to mount a defense for their clients. A judge in one county explained that, although the attorneys appearing before him generally do not call experts, they will usually call parents and teachers to testify, and present letters to the court. The public defender in another county told assessment team investigators that occasionally evidence is put on in the form of court appointed evaluations and family member testimony in order to ensure the judge that the most appropriate venue would be juvenile court. In a third county, the public defender hired and worked closely with a nationally-renowned child development expert in the case of a youth charged with murdering a close family member.

I. Status Offenders

A status offender is defined as any juvenile who, “by reason of being wayward or habitually disobedient, is uncontrolled by his or her parent, guardian, or custodian; who deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others; or who is habitually truant from home or school.”²³⁴

Whether the result of truancy or difficulties stemming from the home environment, status offenses are routine in almost all counties visited. Although seemingly minor in the possible consequences, a majority of youth interviewed stated that the first charge that landed them in the juvenile justice system was a status offense. As several investigators observed, it was typical for a child to enter the system as a truant and during the course of the truancy case, be petitioned with a law violation and end up in detention.

While no provision of the Nebraska Juvenile Code expressly states that juvenile status offenders can be detained, there are implied references in several sections indicating that the detainment of status offenders is permitted. Any juvenile who a peace officer reasonably determines is a runaway from his or her parent or guardian may be taken into temporary custody by the officer without a warrant.²³⁵ When a juvenile is in the temporary custody of a peace officer and a probation officer is called to determine whether detainment is necessary, any juvenile subject to the court's jurisdiction, with the exception of a status offender, can be detained in an adult facility separate from adult inmates for a time not to exceed 6 hours.²³⁶ This section protects status offenders from incarceration in an adult facility, but does not specifically exclude this population from other means of juvenile detention.

Several stakeholders in many counties reported that youth do not request the assistance of counsel when charged with a status offense. In one county, a judge thought that most status offense cases were generally "not defensible" and that youth will come in and just waive counsel and admit to get the case over with and go home. In another county, a prosecutor stated that approximately 10-25% of her caseload consists solely of status offenses.

Status offense filings are often used to garner funds to assist youth who otherwise would be unable to afford services. In one county, a probation officer explained that if law enforcement finds a child is "uncontrollable" they make a referral to DHHS, which has the money, before the case gets to court. The youth is then assigned a DHHS caseworker. If the youth is sentenced to probation and things are not working, the judge will refer the case to OJS for an evaluation, where Medicaid funding becomes available.

J. Race, Class and Gender

Disproportionate Minority Contact

The fact of disproportionate minority contact (DMC) in Nebraska's indigent defense system has been extensively researched and documented. In January 2003, in one of the most comprehensive reports of its kind, the Nebraska Minority and Justice Task Force released a report that concluded a two-year study of the Nebraska court system and legal profession.²³⁷ The 40-member Task Force was established by the Nebraska Supreme Court and Nebraska State Bar Association. The 206-page report found that Nebraska's racial and ethnic

minorities are overrepresented among those arrested and incarcerated and underrepresented among those employed in the state's legal system. In Nebraska, minority youth, including African American, Hispanic, Native American, and Asian, represent 14% of the population, 19% of all juvenile arrests, 40% of commitments, and 44% of those in secure detention. These numbers mean that youths of color are more likely to be arrested than white youths, and are much more likely to remain detained than white youths.²³⁸ However, while a number of stakeholders reported that they perceive a problem with DMC, others – sometimes in the same county – reported that they did not see any such problem. Still others reported that they saw overrepresentation, but did not think race-based decision making was the cause.

Although one public defender estimated that 50% of her clients were black and 10-15% were Hispanic, many stakeholders expressed a concern that they have noticed an increase in the number of Latino youth in Nebraska's juvenile justice system. In one county, while the prosecutor stated that he does not believe that DMC is an issue, the judge and clerk magistrate both remarked that they believe that Latino youths are disproportionately represented in Nebraska's juvenile justice system. In another county, assessment team investigators observed that most of the youth present in drug court were Latinos.

In other counties, stakeholders expressed concern about the relatively high number of Native American youths in juvenile court. One public defender stated that, in her county, which has a small Native American population, of the minorities in the juvenile justices system, the largest race represented is Native American children. A defense attorney from another county related that a high percentage of his serious felony clients are Native American from the Oglala Sioux Reservation. A clerk magistrate in a third county told assessment team investigators that she believed that about 50% of the juveniles arrested are Native American.

Stakeholders offered different explanations for their observations. The judge in one county said that he believed that “the police absolutely, without a doubt, target Hispanic youth;” the clerk magistrate in that same county attributed a perceived rise in the Latino youth population to a “growing number” of “increasingly violent” gangs. The clerk magistrate also remarked that Latino youth seem to be pulled over more frequently for very minor infractions, like driving without an operator's license. The prosecutor in another county posited that there is an influx of minorities, mostly Latinos and some Somalis, due to a nearby meat processing plant, which is a source of jobs. He continued that he doesn't see juveniles treated differently due to race, but that more minorities are arrested and charged due to socioeconomic conditions, and often have more probation violations. A judge in another county proffered that, rather than race or class, he feels that the type of parent a child has is the factor that determines which youth will end up in his courtroom.

Their suspicions are supported by empirical research and legislative initiatives. For example, in 2001, Sen. Matt Connealy of Decatur successfully passed legislation requiring Nebraska police agencies to collect racial profiling data. It banned racial profiling by police officers and required that data be collected for two years, starting in 2002, on all stops made by officers involving a minority. The deadline was extended through January 2006.²³⁹ And in its 2003 study, the Minority and Justice Task Force also found, not only did Nebraska arrest a higher percentage of minorities than whites – it also found that Nebraska arrested a higher percentage of minorities, especially African Americans, than surrounding states. According to the report, African Americans were, at that time, five times more like to be arrested than whites and while blacks made up only 4% of the state’s general population they made up nearly 25% of the prison population.²⁴⁰

Use of Interpreters

In several counties, assessment team investigators listed the availability of Spanish-speaking and other interpreters as a strength, likely due to the successful efforts of the Nebraska Supreme Court Interpreter Advisory Committee.²⁴¹ Stakeholders reported that often parents, more often than youth, need interpreter services. Many counties work to share the interpreter’s services, and schedule cases that require the interpreter for a particular day to maximize the use of the interpreter’s time. In one county, the Court has an interpreter present every Tuesday for Spanish-speaking cases. The assessment team investigator, a Spanish speaker, noted that “the interpreter was excellent in his communication abilities” – so good that, in one case, the youth seemed to talk more openly with the interpreter and trust more in the interpreter’s opinion than in his attorney. As a judge in another county explained, they try to schedule the cases that need a Spanish interpreter on Thursdays and have an interpreter present. They also make interpreters available on a case-by-case basis for Russian and Vietnamese language speakers. The interpreter in another county reported that he has translated constitutional rights for both parents and juveniles. It appears he is one of the only Spanish-speaking interpreters the county has access to, and he tries to be present at meetings with counsel whenever possible. He also works with probation to translate for their meetings. The probation officer in another county reported that the interpreter comes to her office the third Friday of every month to help with parent conversations. Assessment team investigators reported seeing brochures about juvenile court in the waiting area - in English, Spanish, and a few other languages.

LGBT Youth in the System

Generally, there is a dearth of special training surrounding working with lesbian, gay, bisexual and transgender youth in the system, and there are no programs to address the unique needs of LGBT youth. The prosecutor in one county reported that he sees more recognition of LGBT issues by system stakeholders, but acknowledged that Nebraska is a “red state,” meaning it votes Republican, and so at times, there can be a lot of ignorance surrounding LGBT

issues. He said the local high school has a gay and lesbian club. A probation officer in another county also reported having a small number of LGBT youth in his caseload. He said he has received no special training on working with LGBT youth. In particular, detention center staff told assessment team investigators that they would like guidance on working with LGBT youth. There are no statewide policies in effect for relating to this population. They reported the different ways that they work with LGBT juveniles. One detention center administrator reported that they would keep LGTB with their own gender but “they don’t have that;” the administrator in another county reported that an initial screen is done once the youth arrives at the facility, and they try to be accommodating. They “may try to pull kids aside, tell them to tone it down a bit for their safety.” He went on to report that many of LGBT youth are very pretty open about their gender identity with staff. This particular facility had its own separate policies for dealing with girls as opposed to boys.

K. Collateral Consequences

There is almost no acknowledgement of the serious collateral consequences of juvenile adjudications, not in colloquies with the court to waive counsel or to plead, not in discussions with defense attorneys, and not in plea negotiations with prosecutors. In one example, in a case in which a juvenile was charged as an adult for possession of a small amount of marijuana, waived counsel, pled guilty, and proceeded straight to sentencing for a drug offense, the judge asked the youth if he planned on going to college. The youth answered yes, and proudly named his top choice school. The judge then said “You realize that you have now lost any ability to receive federal funding for financial aid because you just pled guilty to a drug offense.” In another example, an assessment team investigator asked a contract attorney about her practices with respect to sealing and the contract attorney had no knowledge of what it would take to seal a youth’s record. A public defender in another county explained that if a juvenile is adjudicated, the judge can order the record, including all police records, sealed. But if, instead, the juvenile successfully completes diversion, they do not get an adjudication, but the judge does not have jurisdiction to order the record sealed. Everyone believes that this provision creates absurd results– it should be changed to allow sealing of records for children who successfully complete diversion – but youths are rarely advised of this provision before they enter into diversion, even if it might not change the decisions of the vast majority of youths who do diversion.

CHAPTER FOUR

PROMISING APPROACHES AND INNOVATIVE PRACTICES

Juvenile defender programs across the nation that appear to be of high quality have the following characteristics in common:

- Limited caseloads;
- Support for entering the case early, and the flexibility to represent the client in related collateral matters;
- Comprehensive initial and ongoing training and availability of resource materials;
- Adequate non-lawyer support and resources;
- Hands on supervision of attorneys; and,
- A work environment that values the role of the juvenile defender.

In addition, a successful juvenile indigent system is one that recognizes juvenile defense as a specialty, ensuring that juvenile defenders have the unique skills, training and resources necessary to do their job. Delinquency cases are highly complex and a juvenile adjudication carries with it lifelong consequences. Every child client should have access to qualified, well-resourced defense counsel. These resources should include the time and skill needed to adequately build the trust necessary to support the attorney-client relationship.

In pursuit of these goals, the National Legal Aid and Defender Association and the National Juvenile Defender Center promulgated the following the *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems* that should be used to guide and measure juvenile defense systems. They include:

1. The Public Defense Delivery System upholds juveniles' constitutional rights throughout the delinquency process and recognizes the need for competent and diligent representation.
2. The Public Defense Delivery System recognizes that legal representation of children is a specialized area of the law.
3. The Public Defense Delivery System supports quality juvenile delinquency representation through personnel and resource parity.
4. The Public Defense Delivery System uses expert and ancillary services to provide quality juvenile defense services.
5. The Public Defense Delivery System supervises attorneys and staff and monitors work and caseloads.
6. The Public Defense Delivery System supervises and systematically reviews juvenile defense team staff for quality according to national, state and/or local performance guidelines or standards.
7. The Public Defense Delivery System provides and supports comprehensive, ongoing training and education for all attorneys and

- support staff involved in the representation of children.
8. The Public Defense Delivery System has an obligation to present independent treatment and disposition alternatives to the court.
 9. The Public Defense Delivery System advocates for the educational needs of clients.
 10. The Public Defense Delivery System must promote fairness and equity for children.

While there were examples throughout the state indicating that Nebraska's youth receive strong advocacy from juvenile defenders when faced with law violations, large systemic barriers often impede the quality of that representation. Despite these circumstances, many professionals in the system have nonetheless employed strategies and developed ideas that help to strengthen the overall juvenile justice system, thus improving juvenile defense along the way. Some of the positive environmental and systemic highlights include:

I. An Environment Receptive to Change

Nebraska is a state that is able to modify its juvenile indigent defense system and presents an environment that is receptive to change. Prior to this assessment, several practitioners within the juvenile justice system published reports highlighting the deficiencies of the juvenile justice system. These reports included topics ranging from the quality of indigent defense representation to the overcrowding of specific juvenile detention centers resulting in serious consequences for detained youth. Many juvenile justice practitioners, witnesses to these deficiencies for several years, advocated to the Nebraska Legislature that an objective, comprehensive assessment of the juvenile indigent defense system be undertaken. The enactment of Legislative Bill 961, authorizing, in detail, a study of the juvenile legal defense system, recognized this call for action.

The Nebraska Legislature is to be commended for recognizing the need for such an assessment and enabling the process to take place. In addition, investigators in several counties heard from juvenile defense attorneys and other juvenile justice practitioners that they would welcome the opportunity to participate in juvenile specific training to become stronger advocates for their young clients. As continuing legal education credits become mandatory for attorneys in Nebraska beginning January 1, 2010, there is a strong possibility that specialized juvenile defense training will be developed and begin to emerge throughout the state.

II. Rehabilitative Juvenile Treatment Facilities

In jurisdictions throughout the nation, juveniles are sentenced to serve time in secure confinement facilities that are not rehabilitative. Many practitioners in the juvenile justice community believe that the over-incarceration of juvenile

offenders in secure facilities makes it more likely that juveniles will re-offend and become part of the adult system. The facilities that house the most problematic youth in Nebraska, as reported by investigative team members, are rehabilitative in nature and provide excellent services to the youth sentenced at disposition to time outside of their home and community. One investigator noted in her first impressions that “The facility blends into the campus well and to the untrained eye, it would be almost impossible to know that this was a correctional center... The parking lot is marked with homemade wooden signs at each parking space with staff nick names. The facility has a very homey feel to it.”

It appears as though the facilities have appropriately-trained staff, accredited school programming, access (although limited), to mental health and substance abuse specialists, and significant recreational activities. Certain youth are permitted to leave the grounds of the facility for weekend trips, and at one facility, youth whose families are unable to visit due to transportation and distance are connected with a local family who visits the child regularly and takes the youth off grounds. The average stay at these facilities is 4-6 months. Youth are permitted to have regular contact with their families, and upon request, with their attorney. There is also a rehabilitation and treatment center that offers services to young males dealing with substance abuse issues. These youth receive specialized treatment focusing on their successful reentry to the community. As these facilities are the worst outcome for a youth involved in a law violation case, it should be commended that Nebraska has adopted a rehabilitative treatment system for its juveniles.

III. Increasing Cultural Awareness

The representative population of the United States is constantly changing as new generations of immigrant families enter its states in an effort to provide a better life and future for their families. Nebraska is no exception to these changes, and in almost every county, investigators observed youth charged with law violations who spoke English as their second language. The youth were often able to speak English without a problem, but the parents of the child required the use of interpreters to understand the court process. Interpreters were available in every case where there was a perceived language barrier. Access to court interpreters and the cultural sensitivity this displays is integral to upholding the fairness of the system. The availability and use of interpreters to aid a defender in a case is invaluable and can only strengthen the level of advocacy provided.

IV. Separate Juvenile Courts

Nebraska has separate juvenile courts in three of its 93 counties, which represent the majority of the state’s population. The ability of judges, defenders, county attorneys and all other juvenile court personnel involved with a separate juvenile court to interact daily with juvenile issues exclusively demonstrates an

awareness that juvenile law is a specialized area of practice. This approach is so crucial to the juvenile justice system that its practice should be explored throughout Nebraska. Investigators and juvenile court participants in several counties recommended that separate juvenile courts be established to serve the juveniles in their respective jurisdictions. This promising approach must serve the state as a whole, and not just the juveniles who live in heavily populated areas. The creation of specialized juvenile courts and an acknowledgement of juvenile law as a unique area of practice can only assist defenders and clients who encounter these systems on a daily basis.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

This assessments calls for collaborative action to address systemic deficiencies in the juvenile legal defense system and urges a renewed commitment to ensuring that youth have a meaningful opportunity to be heard in delinquency proceedings. Juvenile defenders alone cannot solve these problems. The Core Recommendations that are set forth below are followed by Implementation Strategies. These recommendations and strategies require the support of all branches of state and local government and communities in order to succeed. They include:

Core Recommendations:

1. Revise Nebraska’s Juvenile Code

For several reasons, Nebraska’s juvenile code should be relocated and renumbered together in one section that is easily accessible to juvenile defenders. First, it should be reformed for the sake of clarity. As it stands, Nebraska’s juvenile court provisions are scattered throughout Nebraska’s statute. The Supreme Court itself has called Nebraska’s juvenile code “a maze of statutory redundancy.” *In re Interest of A.M.H.*, 233 Neb. 610, 619 (NE 1989). A consolidated and revised code could also take into account the ever-expanding body of adolescent development psychology and other social scientific research that illuminate the impact that legal practices have on children and youth - including practices concerning, for example, waiver of counsel, interrogation, review of Miranda warnings, and competency.

2. Increase Youth’s Access to Counsel

The right to counsel in delinquency proceedings is a constitutional right. Fundamental fairness requires that defense counsel: is appointed early in the youth’s case; has a meaningful opportunity to consult with the youth, investigate and test the strength of the government’s case, explain potential short- and long-term consequences of a conviction, and review the sufficiency of the case prior to the court’s accepting a plea agreement; and is afforded facilities, including interview rooms or other private areas in the courthouse, to hold confidential client meetings. Regardless of the alleged offense, youth who would not otherwise be able to vote, drink, marry, or enter into binding legal contracts should not be able to enter into plea agreements or navigate their cases without the assistance of counsel. In addition, the fact that the length of detention does not necessarily correlate with the severity of the charge, since many youth charged with minor offenses end up detained for long periods of time

because of probation violations or because they are awaiting placement, means that the severity of the charge is unrelated to the need for defense counsel.

Accordingly, Nebraska should either prohibit juvenile waiver of counsel altogether, or follow the leads of Florida and Washington, whose Supreme Courts have recently enacted juvenile court rules requiring that youth have a meaningful opportunity to consult with counsel about the waiver decision before being allowed to waive counsel. Limits on the waiver of counsel will lead to improvements in many other areas. For example, the early and timely availability of counsel at detention hearings will discourage the troubling practice of allowing youth to enter pleas at the initial hearing in law violations, of employing mass arraignments, and will complement insufficient judicial colloquies with a defense explanation of plea provisions.

3. Address Ethical and Role Confusion

The Nebraska Supreme Court Commission on Children in the Courts should clarify the ethical and role confusion that characterizes juvenile court practice in many counties. Consistent with the American Bar Association's (ABA) Model Rules of Professional Conduct, the Institute for Judicial Administration/ABA *Juvenile Justice Standards*, and the National Coalition of Juvenile and Family Court Judges Delinquency Court *Guidelines*, the Commission on Children in the Courts should take the position that youth in law violation proceedings must be represented by defense attorneys who advocate for the clients' stated interest and protect their clients' due process rights, and acknowledge that juvenile courts are adversarial fora in which zealous advocacy is expected and not penalized.

4. Reduce the Overreliance on Transfer to Adult Criminal Court

The cases of the vast majority of 15- and 16-year olds charged with felonies are direct filed in adult criminal court. The 2007 research study conducted by the Centers for Disease Control and Prevention showed that transfer policies are largely unsuccessful, as they do not lead to either specific deterrence (i.e., they do not prevent the transferred youth from reoffending) or general deterrence (i.e., they do not prevent youth who may have observed the example of the transferred youth from reoffending). The authors added that "The findings in this report indicate that transfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system. To the extent that transfer policies are implemented to reduce violent or

other criminal behavior, available evidence indicates that they do more harm than good.”²⁴²

There is another troubling result of Nebraska’s overreliance on the use of direct file provisions. The system that is left when all the felonies are transferred out is the second class juvenile system tilted towards a non-due process based courtroom culture and best interest practice that encourages pleas and discourages zealous, client-based legal advocacy. It is easier for a “kiddie court” mentality to thrive when most of the cases processed in juvenile court are misdemeanors. The sense that there are no real consequences for the youth is buttressed by the impression that most youth get probation – although their liberty is easily jeopardized if they are accused of violating a court order. Limiting the use of direct file provisions might have the ancillary benefit of changing a juvenile court culture that diminishes youth’s rights.

5. Establish Ongoing Oversight and Monitoring

Nebraska’s indigent defense systems have been subjected to numerous studies throughout the past two decades. “The Indigent Defense System in Nebraska,” also referred to as the Spangenberg Report, was released in 1993 and identified 23 areas in need of improvement.²⁴³ In 1995, L.B. 646 was signed into law, creating the Commission on Public Advocacy to provide assistance to counties in major cases by offering the services of staff attorneys.²⁴⁴ In 2004, the Nebraska Minority and Justice Task Force/Implementation Committee published “The Indigent Defense System in Nebraska: An Update.” This extensive study compared the state of indigent defense to the recommendations outlined in the Spangenberg Report more than ten years prior, and found some improvements but also highlighted several deficiencies still present in the delivery of indigent defense services. Although the state of juvenile indigent defense was not the focus of any of these reports, it was the focus of a 2006 report by the Attorneys Representing Children and Youth, a subcommittee of the Nebraska Supreme Court Commission on Children in the Courts, titled, “Legal Representation in Delinquency and Status Offense Cases in Nebraska.” That report, finalized three years ago, contains many of the recommendations included in this report.

A mechanism or commission should be created to provide ongoing oversight and monitoring of the juvenile defense system in Nebraska to ensure the equitable and fair distribution of resources; to collect data; to promulgate and implement best practice standards; to ensure the availability of juvenile defender-specific training; and to identify, develop, and implement specific policies and practices that will improve juvenile defense as required.

Implementation Strategies:

1. *The Nebraska Legislature should:*

- Enact a code provision that allows for the development and use of graduated sanctions for probation violations that casts detention, either as a sanction or while awaiting placement, as a last resort.
- Allocate more funding for judicial resources, and create more judgeships, so that the pressures of judicial economy are not so onerous as to require immediate plea agreements, lack of advisements, and mass arraignments. Concomitant with these resources, additional resources also need to be allocated to juvenile defenders and prosecutors accordingly.
- Promulgate guidelines on the length of stay in detention for youth awaiting service placements or those held on probation violations.
- Increase access to and improve the quality of mental health and substance abuse services available for system-involved youth by providing appropriate additional funding.
- Increase access to and improve the quality of pre-trial and post-disposition community based services by providing appropriate additional funding.
- Amend discovery provisions to allow filing of *ex parte* motions for funds for experts in law violation cases.
- Enact a code provision creating the automatic sealing of juvenile records for youth who have not been rearrested for two years after the end of the completion of their disposition, and for adult court convictions where the youth was younger than 21 years of age at the time of conviction; and,
- Replace direct file provisions with provisions that allow transfer to adult criminal court only after a hearing before a judge;
If the legislature will not repeal direct file provisions:
 - Create a minimum age for direct file in adult criminal court;
 - Create a narrowly-delineated list of specific crimes for which direct file is eligible;
 - Prohibit judges from considering a previous finding that a youth is not amenable to rehabilitation from being allowed as evidence in a subsequent amenability proceeding.

2. *The Nebraska Supreme Court should:*

- Adopt a court rule that allows a youth to waive counsel only after the youth has had a meaningful opportunity to fully consult with counsel about the consequences of waiving.
- The Nebraska Supreme Court Commission on Children in the Courts should clarify the different roles of the juvenile defense

attorney and the guardian *ad litem*, possibly in the form of a standard or court rule adopted by the Court.

- In order to use resources most effectively, deploy attorneys where most needed, and to improve the overall functioning of the juvenile defense system, the Supreme Court should create a mechanism to collect an additional range of data included but not limited to: the number of youth who waive counsel; the number of cases that result in plea agreements; the number of youth charged in juvenile court but transferred to adult criminal court; the number of youth charged in adult criminal court; the number of youth charged with first-time offenses in adult criminal court; the number of youth charged with misdemeanors in adult criminal court; and the number of youth transferred from adult criminal court to juvenile court.
- The Nebraska Supreme Court Commission on Children in the Courts should promulgate and adopt practice standards that:
 - Clearly describe the role of juvenile defense counsel in law violation cases;
 - Clearly describe the role of GALs in dependency cases;
 - Proscribe attorneys from acting as both defense counsel and GALs in a single case; and
 - Proscribe attorneys from acting as both defense counsel and GAL for a single client, even in different cases.
- Require people practicing in juvenile court to devote two of their newly-mandated CLE hours to juvenile-specific training in order to be allowed to appear on juvenile cases each year;
- Convene defenders, judges and others to draft a model waiver colloquy that is age-appropriate and grounded in principles of adolescent development for use by judges in juvenile proceedings; and,
- The Nebraska Supreme Court’s Judicial Branch Education Committee, which governs education for judges, court employees and probation officers, should offer juvenile-specific training.

3. *Juvenile Court Judges should:*

- Provide, in age-appropriate language, comprehensive plea colloquies that advise the child about each of the rights the child is relinquishing, and verify that the child understands the consequences of relinquishing those rights prior to accepting any waiver of counsel or guilty plea, in accordance with *State v. Shulte*, 687 N.W. 2nd 823, 827 (Neb. 1997), prevailing law, and rules.
- Insist on decorum and respect in the courtroom, discouraging the “kiddie court” mentality.
- Fully honor the due process rights of the youth before the court and encourage a culture of zealous defense advocacy; and,

- Insist that school officials make every reasonable effort to address a given student’s truancy issues before filing a case, and, if the school has not complied, dismiss the case.

4. *Chief Public Defenders and Public Defender Offices should:*

- Dedicate appropriate resources, including funding for training and professional development, access to investigators, social workers, and support staff, for juvenile defense attorneys.
- Work with the legislature to ensure resource and pay parity for juvenile defense attorneys.
- Ensure a work environment that values due process and cuts out the “kiddie court” mentality so pervasive in juvenile courts.
- Implement appropriate supervision structure for juvenile defense attorneys and require periodic performance reviews.
- Adopt a case tracking system that logs and helps defenders remember to file motions at different points throughout their juvenile cases.
- Ensure adequate support for post-disposition representation.
- Ensure representation at probation violation hearings; and,
- Provide professional support and camaraderie to contract attorneys.

5. *Public Defender and Contract Attorneys should work together to:*

- Create a state-based juvenile defense resource center.
- Create a model juvenile court training that focuses on juvenile-specific topics, including adolescent development and education.
- Create mentoring opportunities, whereby newer attorneys are mentored by more experienced attorneys familiar with juvenile court practice.
- Add juvenile-specific trainings to the statewide trainings held for judges, prosecutors, and probation officers – in particular, for those handling juvenile cases.
- Coordinate efforts across counties to share resources, information, and training opportunities; and,
- Receive training on the overlap and unique differences between status offender and delinquency cases.

6. *Prosecutors should:*

- Develop uniform criteria for prosecutors for the cases in which transfer to adult criminal court is appropriate.
- Disallow the use of transfer or direct file as plea negotiation tools; and,

- Develop criteria concerning what school cases should be brought and which should be diverted, so that the vast majority of school cases, including minor assaults, are not referred to juvenile court.

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- ¹ Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, available at <http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf>.
- ² The Indigent Defense System in Nebraska: An Update, A Report of the Nebraska Minority and Justice Task Force/ Implementation Committee at 13-19 (2004).
- ³ www.lincoln.ne.gov/cnty/pdefen/history3.htm (last visited November 17, 2009)
- ⁴ Nebraska LB 961 (2008)
- ⁵ U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 2006 National Report*, 94 (2006).
- ⁶ *Id.*; see also *In re Gault*, 387 U.S. 1, 15 (1967).
- ⁷ U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 2006 National Report*, 95 (2006).
- ⁸ *Id.* at 95-96.
- ⁹ *Id.* at 94.
- ¹⁰ Neb. Rev. Stat. §43-2,111 (2008).
- ¹¹ Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 Harv. L. Rev. 775, 794-95 (1966), cited in *In re Gault*, 387 U.S. 1, 11 (1967).
- ¹² *In re Gault*, 387 U.S. 1, 17 (1967).
- ¹³ *Id.* at 15 fn. 14.
- ¹⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- ¹⁵ *Id.* at 344.
- ¹⁶ 387 U.S. 1 (1967).
- ¹⁷ *Gault*, 387 U.S. at 19 n.23 (internal quotations and citation omitted).
- ¹⁸ *In re Gault*, 387 U.S. 1, 36 (1967).
- ¹⁹ *Gault*, 387 U.S. at 18.
- ²⁰ *Gault*, 387 U.S. at 55.
- ²¹ *Gault*, 387 U.S. at 56-7.
- ²² *In re Winship*, 397 U.S. 358 (1970).
- ²³ *Breed v. Jones*, 421 U.S. 519 (1975).
- ²⁴ *Kent v. United States*, 383 U.S. 541 (1966).
- ²⁵ *In re Winship*, 397 U.S. 358, 365-66 (1970).
- ²⁶ *In re Gault*, 387 U.S. 1, 36 (1967).
- ²⁷ Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 255-56 (2005).
- ²⁸ *Id.*
- ²⁹ Pub. L. 93-415 (1974).
- ³⁰ National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* §3.132 Representation by Counsel – For the Juvenile (1980).
- ³¹ For a description of the project, see *IJA/ABA Juvenile Justice Standards Annotated: A Balanced Approach* xvi-xviii (Robert E. Shepherd, ed., 1996).
- ³² ABA Juvenile Justice Center, Juvenile Law Center & Youth Law Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (1995), available at <http://www.njdc.info/pdf/cfjfull/pdf>.
- ³³ <http://www.supremecourt.ne.gov/> (last visited November 11, 2009).
- ³⁴ Nebraska Judicial Structure & Administration Task Force Final Report at 7 (October 2007).
- ³⁵ <http://www.supremecourt.ne.gov/> (last visited November 11, 2009).
- ³⁶ Nebraska Judicial Structure & Administration Task Force Final Report at 8. (October 2007).
- ³⁷ *Id.*
- ³⁸ <http://www.supremecourt.ne.gov/> (last visited November 11, 2009).
- ³⁹ Nebraska Judicial Structure & Administration Task Force Final Report at 9 (October 2007).
- ⁴⁰ *Id.*
- ⁴¹ <http://www.supremecourt.ne.gov/> (last visited November 11, 2009).
- ⁴² Neb. Rev. St. §43-2,111
- ⁴³ Neb. Rev. St. §43-247.
- ⁴⁴ *Id.*
- ⁴⁵ Neb. Rev. St. §29-1816

⁴⁶ <http://www.supremecourt.ne.gov/> (last visited November 11, 2009).

⁴⁷ Neb. Rev. St. §23-3401(1)

⁴⁸ *Id.*

⁴⁹ Neb. Rev. St. §23-3401(3)

⁵⁰ Neb. Rev. St. §23-3403

⁵¹ *Id.*

⁵² Elizabeth M. Neeley, *Report to the Nebraska Supreme Court on Indigent Defense Systems and Fee Structures*, Nebraska Minority Justice Committee at 5 (Summer 2006).

⁵³ Neb. Rev. St. §32-523

⁵⁴ *Id.*

⁵⁵ Neb. Rev. St. §23-3404(1)

⁵⁶ Neb. Rev. St. §23-3406(1)

⁵⁷ Neb. Rev. St. §23-3406(4)(a)-(c)

⁵⁸ Neb. Rev. St. §23-3406(2)

⁵⁹ Neb. Rev. St. §23-3406(6)

⁶⁰ Annie E. Casey Foundation, *KIDS COUNT Data Book*, 41 (2009), available at http://datacenter.kidscount.org/Databook/2009/OnlineBooks/AEC186_sum+find_FINAL.pdf. It is important to note that statistics and rankings in this report were issued prior to the economic downturn in 2008-2009, and therefore may not be representative of the current difficulties faced by youth in Nebraska.

⁶¹ *Id.* at 51.

⁶² *Id.* at 53

⁶³ *Id.* at 59

⁶⁴ *Id.* at 49.

⁶⁵ Neb. Rev. St. §43-247.

⁶⁶ Neb. Rev. St. §29-1816.

⁶⁷ <http://www.throughtheeyes.org/about.php> (last visited November 11, 2009).

⁶⁸ Neb. Rev. St. §43-246

⁶⁹ Neb. Rev. St. §43-246(3)

⁷⁰ Neb. Rev. St. §43-246(7)

⁷¹ Neb. Rev. St. §43-401 through 43-423

⁷² Neb. Rev. St. §43-402

⁷³ Neb. Rev. St. §43-402(2)

⁷⁴ Neb. Rev. St. §43-402(4)

⁷⁵ Neb. Rev. St. §43-402(11)

⁷⁶ Neb. Rev. St. §43-247

⁷⁷ *Id.*

⁷⁸ Neb. Rev. St. §43-245(6)

⁷⁹ Neb. Rev. St. §43-247

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Neb. Rev. St. §43-247

⁸³ *Id.*

⁸⁴ Neb. Rev. St. §43-245(1)

⁸⁵ Neb. Rev. St. §43-276

⁸⁶ Neb. Rev. St. §29-1816

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *State v. Reynolds*, 246 Neb. 802, 523 N.W.2d 377 (1994).

⁹¹ *State v. Trevino*, 230 Neb. 494, 499, 432 N.W.2d 503 (1998). See also *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987), when factors considered did not support the motion to transfer to juvenile court.

⁹² *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000).

⁹³ Neb. Rev. St. § 43-272(1)

⁹⁴ *Id.*

⁹⁵ Neb. Rev. St. §43-248.01

⁹⁶ Neb. Rev. St. §43-272(2)

⁹⁷ *Id.*

⁹⁸ *Id.*
⁹⁹ Neb. Rev. St. §43-272(3)
¹⁰⁰ Neb. Rev. St. §43-3710(1)
¹⁰¹ *Id.*
¹⁰² Neb. Rev. St. §43-3710(2)
¹⁰³ Neb. Rev. St. §43-3712(5)
¹⁰⁴ Neb. Rev. St. §43-248(1)
¹⁰⁵ Neb. Rev. St. §43-248(2)
¹⁰⁶ Neb. Rev. St. §43-248(3)
¹⁰⁷ Neb. Rev. St. §43-248(4)
¹⁰⁸ Neb. Rev. St. §43-248(5)
¹⁰⁹ Neb. Rev. St. §43-249
¹¹⁰ Neb. Rev. St. §43-250(1)
¹¹¹ Neb. Rev. St. §43-250(2)
¹¹² Neb. Rev. St. §43-250(3)
¹¹³ Neb. Rev. St. §43-250(4)-(5)
¹¹⁴ Neb. Rev. St. §43-255
¹¹⁵ Neb. Rev. St. §43-253(2)
¹¹⁶ Neb. Rev. St. §43-260
¹¹⁷ *Id.*
¹¹⁸ Neb. Rev. St. §43-260.01
¹¹⁹ Neb. Rev. St. §43-253(3)
¹²⁰ Neb. Rev. St. §43-271(2)
¹²¹ Neb. Rev. St. §43-251(1)
¹²² Neb. Rev. St. §43-256
¹²³ *Id.*
¹²⁴ Neb. Rev. St. §43-274(1)
¹²⁵ Neb. Rev. St. §43-274(4)(a)
¹²⁶ Neb. Rev. St. §43-250(2)
¹²⁷ *Id.*
¹²⁸ Neb. Rev. St. §43-262
¹²⁹ *Id.*
¹³⁰ *Id.*
¹³¹ Neb. Rev. St. §43-263
¹³² Neb. Rev. St. §43-264
¹³³ Neb. Rev. St. §43-265
¹³⁴ Neb. Rev. St. §43-268(1)
¹³⁵ Neb. Rev. St. §43-268(3)
¹³⁶ Neb. Rev. St. §43-269
¹³⁷ Neb. Rev. St. §43-270
¹³⁸ Neb. Rev. St. §43-271(1)(b)
¹³⁹ Neb. Rev. St. §43-278
¹⁴⁰ *Id.*
¹⁴¹ Neb. Rev. St. §43-271(1)(a)
¹⁴² Neb. Rev. St. §43-271(1)(b)
¹⁴³ *Id.*
¹⁴⁴ Neb. Rev. St. §43-256
¹⁴⁵ Neb. Rev. St. §43-279(1)
¹⁴⁶ Neb. Rev. St. §43-279(1)
¹⁴⁷ Neb. Rev. St. §43-279(1)(a)-(g)
¹⁴⁸ Neb. Rev. St. §43-279(1)
¹⁴⁹ Neb. Rev. St. §43-279(2)
¹⁵⁰ Neb. Rev. St. §43-279(3)
¹⁵¹ *Id.*
¹⁵² Neb. Rev. St. §43-283
¹⁵³ Neb. Rev. St. §43-286(1)(a)(i)
¹⁵⁴ Neb. Rev. St. §43-286(1)(a)(ii)

¹⁵⁵ Neb. Rev. St. §43-286(1)(a)(iii)

¹⁵⁶ Neb. Rev. St. §43-286(1)(b)

¹⁵⁷ Neb. Rev. St. §43-286(3)

¹⁵⁸ Neb. Rev. St. §43-251.01(1)

¹⁵⁹ Neb. Rev. St. §43-247(3)(b)

¹⁶⁰ Neb. Rev. St. §43-251.01(2)

¹⁶¹ Neb. Rev. St. §43-251.01(3)

¹⁶² Neb. Rev. St. §43-286(1)(b)

¹⁶³ Neb. Rev. St. §43-289

¹⁶⁴ Neb. Rev. St. §43-278

¹⁶⁵ Neb. Rev. St. §43-2,106.03

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Neb. Rev. St. §43-280

¹⁶⁹ *Id.*

¹⁷⁰ Neb. Rev. St. §43-2,102

¹⁷¹ Neb. Rev. St. §43-2,103

¹⁷² Neb. Rev. St. §43-2,105

¹⁷³ *Id.*

¹⁷⁴ Neb. Rev. St. §43-2,106.01(1)

¹⁷⁵ *Id.*

¹⁷⁶ Neb. Rev. St. §43-2,106(2)(a)-(d)

¹⁷⁷ Neb. Rev. St. §43-2,106

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 25 (2005), *available at* <http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/juveniledelinquencyguidelinescompressed.pdf>.

¹⁸¹ Jerry R. Foxhoven, *Effective Assistance of Counsel: Quality of Representation for Juveniles Is Still Illusory*, 9 BARRY L. REV. 99, 107 n.110 (2007).

¹⁸² *See* 705 ILL. COMP. STAT. ANN. 405/5-170(b) & 725 ILL. COMP. STAT. ANN. 5/115-1.5 (referencing an Illinois law prohibiting children under the age of 17 from waiving their right to counsel in any judicial proceeding); *State v. Doe*, 621 P.2d 519 (N.M. 1980) (stating a child cannot waive the initial appointment of counsel provided for by N.M. Child. Ct. R. 22(d)); N.C. GEN. STAT. § 7B-2000 (prohibiting juveniles from waiving their right to counsel at any stage of their proceedings, under any circumstances).

¹⁸³ *See* Judith B. Jones, *Access to Counsel*, OJJDP JUVENILE JUSTICE BULL., June 2004, at 2, *available at* <http://www.ncjrs.org/pdffiles1/ojjdp/204063.pdf>.

¹⁸⁴ *See* Jay D. Blitzman, *Gault's Promise*, 9 BARRY L. REV. 67, 91 (2007) ("Having waived counsel, youth have thrown themselves on the mercy of the court.").

¹⁸⁵ *See* Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 175-76 (2007).

¹⁸⁶ Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1153-1154 (1980).

¹⁸⁷ *In re Gault*, 387 U.S. 1, 36-7 (1967).

¹⁸⁸ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹⁸⁹ *See* Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 601 (2002)(citing *Zerbst*, 304 U.S. at 464 (1938)).

¹⁹⁰ Berkheiser, at 582.

¹⁹¹ *See* Andrea L. Martin, *Balancing State Budgets at a Cost to Fairness in Delinquency Proceedings*, 88 MINN. L. REV. 1638, 1659 (2004) ("The co-payment statute frustrates the juvenile's straightforward due process right to counsel by making a parent, whose interests may conflict with the juvenile's interests, responsible for paying for the juvenile's right to counsel.").

¹⁹² IJA/ABA STANDARDS FOR PRIVATE COUNSEL, Standard 4.1.

¹⁹³ IJA/ABA STANDARDS FOR PRIVATE COUNSEL, Standard 4.2(a).

¹⁹⁴ Nebraska Minimum Jail Standards for Juvenile Detention Facilities, Title 83, *available online at* http://www.ncc.state.ne.us/documents/jail_standards/jsd_min_rules_juv.htm (last visited November 11, 2009).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See, e.g.*, BARRY HOLMAN & JASON ZIEDENBERG, *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2* (JUSTICE POLICY INSTITUTE 2006), available at

http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf (last visited November 11, 2009).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 2-3.

²⁰⁰ Bart Lubow, 11 Juvenile Justice Update, *Reducing Inappropriate Detention: A Focus on the Role of Defense Attorneys* at 2 (Aug/Sep 2005).

²⁰¹ NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 25* (2005), available at

<http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/juveniledelinquencyguidelinescompressed.pdf> [hereinafter NCJFCJ GUIDELINES].

²⁰² For more in-depth discussion of the ethical duties of juvenile defenders, *see* Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 *FAM. CT. REV.* 466 (2007); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 *NOTRE DAME L. REV.* 245, 256 (2005); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 *MD. L. REV.* 288, 356 (2003); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1412, 1424 (1996); *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301, 1312 (1996); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 *LOY. U. CHI. L.J.* 259, 270 (1995).

²⁰³ *See* IJA/ABA, *STANDARDS FOR PRIVATE COUNSEL*, at 17, § 3.1(a). & § 3.1(b)(ii)[a]; *see also* NCJFCJ GUIDELINES, *supra*, at 30.

²⁰⁴ *CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT*, at PREAMBLE (2009) (zealous advocacy); *id.* at R. 1.4, 2.1 (communication with client); *id.* at R. 1.6 (confidentiality of information); *id.* at R. 1.7-1.12 (loyalty to client); *id.* at R. 1.14 (requiring that attorneys maintain a normal attorney/client relationship with young clients "as far as reasonably possible").

²⁰⁵ Elizabeth Neeley, Lancaster County Public Defender Workload Assessment July 2008, pp. 4-5, available at <http://ppc.unl.edu/userfiles/file/Documents/projects/Public%20Defender/Public%20Defender%20Workload%20Assessment.pdf> (last visited September 11, 2009)

²⁰⁶ *Id.*

²⁰⁷ BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, *KEEPING DEFENDER WORKLOADS MANAGEABLE 1-2* (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf> [hereinafter *KEEPING WORKLOADS MANAGEABLE*].

²⁰⁸ *Id.* at 4.

²⁰⁹ *See* Thomas F. Geraghty, *Symposium on the Future of the Juvenile Court: Justice for Children: How Do We Get There?* 88 *J. CRIM. L. & CRIMINOLOGY* 190, 231 (1997).

²¹⁰ Annie E. Casey Foundation, *Juvenile Detention Alternatives Initiative, Pathways*, p. 12

²¹¹ D. Alan Henry, *Pathways: Reducing Unnecessary Delay*, p. 15

²¹² *Id.*

²¹³ *Neb. Rev. St.* §23-3401(3).

²¹⁴ *Id.*

²¹⁵ The Spangenberg Group, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2005*, pp. 19-20 (December 2006), available at http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL_REPORT_FY_2005_Expenditure_Report.pdf (last visited November 11, 2009).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ IJA/ABA STANDARDS FOR PRIVATE COUNSEL, *supra*, at 2.2(b)(iii); GEORGIA PUBLIC DEFENDER STANDARDS COUNCIL, THE STATE OF GEORGIA PERFORMANCE STANDARDS FOR JUVENILE DEFENSE REPRESENTATION IN INDIGENT DELINQUENCY AND UNRULY CASES, Performance Standard 2.1, *available at* http://www.gpdsc.com/docs/cpdsystem-standards-juvenile_cases.pdf [hereinafter GEORGIA PERFORMANCE STANDARDS]; *see also* Ogletree, Jr. & Sapir, *supra* note 22, at 210; NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM: SPEED AND SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS 7 (2008), *available at* <http://www.michigancampaignforjustice.org/docs/Michigan%20NLADA%20report.pdf> [hereinafter A RACE TO THE BOTTOM] at 34 (stating “Kids deserve attorneys specially trained in these matters”).

²²⁴ *See* TEN CORE PRINCIPLES, *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf, at Principle 7.

²²⁵ *See* TEN CORE PRINCIPLES, *supra*, at Principle 7.

²²⁶ Levick & Desai, *supra* note 13, at 182 (noting that “juveniles need lawyers precisely because they are juveniles”); *see, e.g.*, GEORGIA PERFORMANCE STANDARDS, *supra* (directing counsel to be knowledgeable about, and seek ongoing training in, areas as diverse as child and adolescent development; brain development and the effect of trauma on brain development; mental health issues; special education laws; substance abuse issues; cultural diversity; working with and interviewing children; immigration laws; and school related issues); TEN CORE PRINCIPLES, *supra*; VIRGINIA INDIGENT DEFENSE COMM'N, VIRGINIA STANDARDS OF PRACTICE FOR JUVENILE DEFENSE COUNSEL, Standard 2.2 (2006), *available at* <http://www.indigentdefense.virginia.gov/PDF%20documents/Standards%20of%20Practice.pdf> [hereinafter VIRGINIA PERFORMANCE STANDARDS]; NEVADA INDIGENT DEFENSE STANDARDS OF PERFORMANCE: JUVENILE DELINQUENCY CASES, Standard 2, *available at* <http://clearinghouse.wustl.edu/detail.php?id=10603> (as an attachment to NEVADA INDIGENT DEFENSE COMMISSION REPORT, *supra* note 80) [hereinafter NEVADA DEFENSE STANDARDS].

²²⁷ *See* Roper v. Simmons, 543 U.S. 551, 569-72 (2005); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST. 1009, 1011-1014 (2003).

²²⁸ *See e.g.*, Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 271-272, 321 (2005) (“To achieve the delicate balance between advice and client autonomy, the [juvenile defense] lawyer must understand how developmental factors may affect the attorney-client relationship and develop concrete methods to improve interviewing, counseling, and decisionmaking with young clients”); Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woolard, *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 181, 193 (2003) (“Attorneys must be made aware of youths’ potential [developmental] deficits as defendants, be given guidance on how to be effective counselors for juveniles in the increasingly adversarial arena of juvenile justice, and be afforded the time necessary to develop a mutually beneficial attorney-client relationship”).

²²⁹ NCJFCJ Guidelines at 151.

²³⁰ *Id.*

²³¹ *See generally id.* at 3; Steinberg and Scott, *supra* note 107, at 1010; Elizabeth S. Scott and Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 19-20 (2008), *available at* http://www.futureofchildren.org/futureofchildren/publications/docs/18_02_02.pdf (“Research in developmental psychology supports the view that several characteristics of adolescence distinguish young offenders from adults in ways that mitigate culpability. These adolescent traits include deficiencies in decision-making ability, greater vulnerability to external coercion, and the relatively unformed nature of adolescent character”).

²³² *See* Elizabeth S. Scott and Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 19-20 (2008), *available at* http://www.futureofchildren.org/futureofchildren/publications/docs/18_02_02.pdf at 14; *see also* Task Force on Cmty. Prevention Servs., Ctr. for Disease Control & Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, 56 MORBIDITY & MORTALITY WKLY. REP. (RECOMMENDATIONS & REP.) 7-10 (2007), *available at* <http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf>.

²³³ *See* CAMPAIGN FOR YOUTH JUSTICE, CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 32 (2007), *available at* http://www.campaign4youthjustice.org/Downloads/NEWS/National_Report_consequences.pdf [hereinafter CONSEQUENCES AREN'T MINOR].

²³⁴ Neb. Rev. St. §43-247(3)(b)

²³⁵ Neb. Rev. St. §43-248(5)

²³⁶ Neb. Rev. St. §43-250(3)(a)

²³⁷ Nebraska Minority and Justice Task Force, Final Report, January 2003, *available at* http://ppc.nebraska.edu/userfiles/file/Documents/projects/MinorityandJusticeTaskForce/mjtf_final_report.pdf.

²³⁸ Nebraska Minority and Justice Task Force, Final Report (January 2003), p. 55, *available at* http://ppc.nebraska.edu/userfiles/file/Documents/projects/MinorityandJusticeTaskForce/mjtf_final_report.pdf.

²³⁹ Omaha World Herald, Racial Profiling Reporting Ends, January 28, 2006, *available at* http://ppc.nebraska.edu/whats_new/in_the_news/Documents/RacialProfiling.pdf.

²⁴⁰ The Nebraska Lawyer, “Minority & Justice Task Force Final Report,” March 2003, pp. 27-28, *available at* <http://casemaker.nebar.com/pdfs/nelawyer/2003/200303g.pdf>.

²⁴¹ Appointed by the Supreme Court, the Interpreter Advisory Committee was charged with evaluating, updating and recommending statewide policies, rules and regulations of court and probation interpreter services throughout the state. *See* Dr. Elizabeth Neeley, “Nebraska Efforts to Improve Access to Justice,” The Nebraska Lawyer, 16-17 (May 2006).

²⁴² Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, *available at* <http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf>.

²⁴³ The Indigent Defense System in Nebraska: An Update, A Report of the Nebraska Minority and Justice Task Force/ Implementation Committee at 13-19 (2004).

²⁴⁴ www.lincoln.ne.gov/cnty/pdefen/history3.htm (last visited November 17, 2009)

APPENDICIES

1 The State Treasurer shall transfer two hundred fifty
2 thousand dollars from the Commission on Public Advocacy Operations
3 Cash Fund to the University Cash Fund within fifteen days after
4 May 1, 2008. Such funds shall be used for a study of the
5 juvenile legal defense and guardian ad litem systems utilizing
6 the University of Nebraska Public Policy Center to create,
7 administer, and review a Request for Proposals to select from
8 a national search a research consultant that is qualified to
9 provide a methodologically sound and objective assessment of
10 Nebraska's juvenile justice system. The assessment shall include:
11 (1) Gathering of general data and information about the structure
12 and funding mechanisms for juvenile legal defense and guardian ad
13 litem representation; (2) a review of caseloads; (3) examining
14 issues related to the timing of appointment of counsel and
15 guardians ad litem; (4) supervision of attorneys; (5) charging
16 and trying juveniles as adults; (6) frequency with which juveniles
17 waive their right to counsel and under what conditions they do
18 so; (7) allocation of resources; (8) adequacy of juvenile court
19 facilities; (9) compensation of attorneys; (10) supervising and
20 training of attorneys; (11) access to investigators, experts,
21 social workers, and support staff; (12) access to educational
22 officers, teachers, educational staff, and truancy officers; (13)
23 the relationship between a guardian ad litem, a juvenile's legal
24 counsel, and the judicial system with identified educational
25 staff regarding a juvenile's educational status; (14) examining

1 issues related to truancy and the relationship between the school
2 districts and the juvenile court system; (15) recidivism; (16) time
3 to permanency and time in court, especially when a guardian ad
4 litem is appointed; and (17) coordination of representation for
5 those juveniles that may have been appointed an attorney in a
6 juvenile delinquency matter and a guardian ad litem because of
7 abuse or neglect. The assessment shall also highlight promising
8 approaches and innovative practices within the state and offer
9 recommendations to improve weak areas.

10 Sec. 3. Section 54-857, Reissue Revised Statutes of
11 Nebraska, is amended to read:

12 54-857 All money received pursuant to the Commercial Feed
13 Act shall be remitted by the director to the State Treasurer for
14 credit to the Commercial Feed Administration Cash Fund which is
15 hereby created. Such fund shall be used by the department to aid
16 in defraying the expenses of administering the act. Any money in
17 the fund available for investment shall be invested by the state
18 investment officer pursuant to the Nebraska Capital Expansion Act
19 and the Nebraska State Funds Investment Act.

20 On or before October 1, 2008, the State Treasurer shall
21 transfer two hundred fifty thousand dollars from the Commercial
22 Feed Administration Cash Fund to the Noxious Weed and Invasive
23 Plant Species Assistance Fund.

24 Sec. 4. Section 71-7608, Revised Statutes Supplement,
25 2007, is amended to read:

Institute of Judicial Administration
American Bar Association
Juvenile Justice Standards
Standards Relating to Counsel for Private Parties

PART I. GENERAL STANDARDS

Standard 1.1. Counsel in Juvenile Proceedings, Generally. The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.

Standard 1.2. Standards in Juvenile Proceedings, Generally.

- (a) As a member of the bar, a lawyer involved in juvenile court matters is bound to know and is subject to standards of professional conduct set forth in statutes, rules, decisions of courts, and codes, canons or other standards of professional conduct. Counsel has no duty to exercise any directive of the client that is inconsistent with law or these standards. Counsel may, however, challenge standards that he or she believes limit unconstitutionally or otherwise improperly representation of clients subject to juvenile court proceedings.
- (b) As used in these standards, the term "unprofessional conduct" denotes conduct which is now or should be subject to disciplinary sanction. Where other terms are used, the standard is intended as a guide to honorable and competent professional conduct or as a model for institutional organization.

Standard 1.3. Misrepresentation of Factual Propositions or Legal Authority. It is unprofessional conduct for counsel intentionally to misrepresent factual propositions or legal authority to the court or to opposing counsel and probation personnel in the course of discussions concerning entrance of a plea, early disposition or any other matter related to the juvenile court proceeding. Entrance of a plea concerning the client's responsibility in law for alleged misconduct or concerning the existence in law of an alleged status offense is a statement of the party's posture with respect to the proceeding and is not a representation of fact or of legal authority.

Standard 1.4. Relations with Probation and Social Work Personnel. A lawyer engaged in juvenile court practice typically deals with social work and probation department personnel throughout the course of handling a case. In general, the lawyer should cooperate with these agencies and should instruct the client to do so, except to the extent such cooperation is or will likely become inconsistent with protection of the client's legitimate interests in the proceeding or of any other rights of the client under the law.

Standard 1.5. Punctuality. A lawyer should be prompt in all dealings with the court, including attendance, submissions of motions, briefs and other papers, and in dealings with clients and other interested persons. It is unprofessional conduct for counsel intentionally to use procedural devices for which there is no legitimate basis, to misrepresent facts to the court or to accept conflicting responsibilities for the purpose of delaying court proceedings. The lawyer should also emphasize the importance of punctuality in attendance in court to the client and to witnesses to be called, and, to the extent feasible, facilitate their prompt attendance.

Standard 1.6. Public Statements.

- (a) The lawyer representing a client before the juvenile court should avoid personal publicity connected with the case, both during trial and thereafter.
- (b) Counsel should comply with statutory and court rules governing dissemination of information concerning juvenile and family court matters and, to the extent consistent with those rules, with the ABA Standards Relating to Fair Trial and Free Press.

Standard 1.7. Improvement in The Juvenile Justice System. In each jurisdiction, lawyers practicing before the juvenile court should actively seek improvement in the administration of juvenile justice and the provision of resources for the treatment of persons subject to the jurisdiction of the juvenile court.

PART II. PROVISIONS AND ORGANIZATION OF LEGAL SERVICES

Standard 2.1. General Principles.

(a) Responsibility for provision of legal services. Provision of satisfactory legal representation in juvenile and family court cases is the proper concern of all segments of the legal community. It is, accordingly, the responsibility of courts, defender agencies, legal professional groups, individual practitioners and educational institutions to ensure that competent counsel and adequate supporting services are available for representation of all persons with business before juvenile and family courts.

- (i) Lawyers active in practice should be encouraged to qualify themselves for participation in juvenile and family court cases through formal training, association with experienced juvenile counsel or by other means. To this end, law firms should encourage members to represent parties involved in such matters.
- (ii) Suitable undergraduate and postgraduate educational curricula concerning legal and nonlegal subjects relevant to representation in juvenile and family courts should regularly be available.
- (iii) Careful and candid evaluation of representation in cases involving children should be undertaken by judicial and professional groups, including the organized bar, particularly but not solely where assigned counsel-whether public or private-appears.

(b) Compensation for services.

- (i) Lawyers participating in juvenile court matters, whether retained or appointed, are entitled to reasonable compensation for time and services performed according to prevailing professional standards. In determining fees for their services, lawyers should take into account the time and labor actually required, the skill required to perform the legal service properly, the likelihood that acceptance of the case will preclude other employment for the lawyer, the fee customarily charged in the locality for similar legal services, the possible consequences of the proceedings, and the experience, reputation and ability of the lawyer or lawyers performing the services. In setting fees lawyers should also consider the performance of services incident to full representation in cases involving juveniles, including counseling and activities related to locating or evaluating appropriate community services for a client or a client's family.

- (ii) Lawyers should also take into account in determining fees the capacity of a client to pay the fee. The resources of parents who agree to pay for representation of their children in juvenile court proceedings may be considered if there is no adversity of interest as defined in Standard 3.2, *infra*, and if the parents understand that a lawyer's entire loyalty is to the child and that the parents have no control over the case. Where adversity of interests or desires between parent and child becomes apparent during the course of representation, a lawyer should be ready to reconsider the fee taking into account the child's resources alone.
 - (iii) As in all other cases of representation, it is unprofessional conduct for a lawyer to overreach the client or the client's parents in setting a fee, to imply that compensation is for anything other than professional services rendered by the lawyer or by others for him or her, to divide the fee with a layman, or to undertake representation in cases where no financial award may result on the understanding that payment of the fee is contingent in any way on the outcome of the case.
 - (iv) Lawyers employed in a legal aid or public defender office should be compensated on a basis equivalent to that paid other government attorneys of similar qualification, experience and responsibility.
- (c) *Supporting services.* Competent representation cannot be assured unless adequate supporting services are available. Representation in cases involving juveniles typically requires investigatory, expert and other nonlegal services. These should be available to lawyers and to their clients at all stages of juvenile and family court proceedings.
- (i) Where lawyers are assigned, they should have regular access to all reasonably necessary supporting services.
 - (ii) Where a defender system is involved, adequate supporting services should be available within the organization itself.
- (d) *Independence.* Any plan for providing counsel to private parties in juvenile court proceedings must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship.

Standard 2.2. Organization of Services.

- (a) *In general.* Counsel should be provided in a systematic manner and in accordance with a widely publicized plan. Where possible, a coordinated plan for

representation which combines defender and assigned counsel systems should be adopted.

(b) Defender systems.

- (i) Application of general defender standards. A defender system responsible for representation in some or all juvenile court proceedings generally should apply to staff and offices engaged in juvenile court matters its usual standards for selection, supervision, assignment and tenure of lawyers, restrictions on private practice, provision of facilities and other organizational procedures.
- (ii) Facilities. If local circumstances require, the defender system should maintain a separate office for juvenile court legal and supporting staff, located in a place convenient to the courts and equipped with adequate library, interviewing and other facilities. A supervising attorney experienced in juvenile court representation should be assigned to and responsible for the operation of that office.
- (iii) Specialization. While rotation of defender staff from one duty to another is an appropriate training device, there should be opportunity for staff to specialize in juvenile court representation to the extent local circumstances permit.
- (iv) Caseload. It is the responsibility of every defender office to ensure that its personnel can offer prompt, full and effective counseling and representation to each client. A defender office should not accept more assignments than its staff can adequately discharge.

(c) Assigned counsel systems.

- (i) An assigned counsel plan should have available to it an adequate pool of competent attorneys experienced in juvenile court matters and an adequate plan for all necessary legal and supporting services.
- (ii) Appointments through an assigned counsel system should be made, as nearly as possible, according to some rational and systematic sequence. Where the nature of the action or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

Standard 2.3. Types of Proceedings.

(a) Delinquency and in need of supervision proceedings.

- (i) Counsel should be provided for any juvenile subject to delinquency or in need of supervision proceedings.
- (ii) Legal representation should also be provided the juvenile in all proceedings arising from or related to a delinquency or in need of supervision action, including mental competency, transfer, postdisposition, probation revocation, and classification, institutional transfer, disciplinary or other administrative proceedings related to the treatment process which may substantially affect the juvenile's custody, status or course of treatment. The nature of the forum and the formal classification of the proceeding is irrelevant for this purpose.

(b) Child protective, custody and adoption proceedings. Counsel should be available to the respondent parents, including the father of an illegitimate child, or other guardian or legal custodian in a neglect or dependency proceeding. Independent counsel should also be provided for the juvenile who is the subject of proceedings affecting his or her status or custody. Counsel should be available at all stages of such proceedings and in all proceedings collateral to neglect and dependency matters, except where temporary emergency action is involved and immediate participation of counsel is not practicable.

Standard 2.4. Stages Of Proceedings.

(a) Initial provision of counsel.

- (i) When a juvenile is taken into custody, placed in detention or made subject to an intake process, the authorities taking such action have the responsibility promptly to notify the juvenile's lawyer, if there is one, or advise the juvenile with respect to the availability of legal counsel.
- (ii) In administrative or judicial postdispositional proceedings which may affect the juvenile's custody, status or course of treatment, counsel should be available at the earliest stage of the decisional process, whether the respondent is present or not. Notification of counsel and, where necessary, provision of counsel in such proceedings is the responsibility of the judicial or administrative agency.

(b) Duration of representation and withdrawal of counsel.

- (i) Lawyers initially retained or appointed should continue their representation through all stages of the proceeding, unless

geographical or other compelling factors make continued participation impracticable.

- (ii) Once appointed or retained, counsel should not request leave to withdraw unless compelled by serious illness or other incapacity, or unless contemporaneous or announced future conduct of the client is such as seriously to compromise the lawyer's professional integrity. Counsel should not seek to withdraw on the belief that the contentions of the client lack merit, but should present for consideration such points as the client desires to be raised provided counsel can do so without violating standards of professional ethics.
- (iii) If leave to withdraw is granted, or if the client justifiably asks that counsel be replaced, successor counsel should be available.

PART III. THE LAWYER-CLIENT RELATIONSHIP

Standard 3.1. The Nature Of The Relationship.

(a) *Client's interests paramount.* However engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance.

(b) *Determination of client's interests.*

(i) Generally. In general, determination of the client's interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney.

(ii) Counsel for the juvenile.

[a] Counsel for the respondent in a delinquency or in need of supervision proceeding should ordinarily be bound by the client's definition of his or her interests with respect to admission or denial of the facts or conditions alleged. It is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings.

[b] Where counsel is appointed to represent a juvenile subject to child protective proceedings, and the juvenile is capable of considered judgment on his or her own behalf, determination of the client's interest in the proceeding should ultimately remain the client's responsibility, after full consultation with counsel.

[c] In delinquency and in need of supervision proceedings, where it is locally permissible to so adjudicate very young persons, and in child protective proceedings, the respondent may be incapable of considered judgment in his or her own behalf.

[1] Where a guardian *ad litem* has been appointed, primary responsibility for determination of the posture of the case rests with the guardian and the juvenile.

[2] Where a guardian *ad litem* has not been appointed, the attorney should ask that one be appointed.

[3] Where a guardian *ad litem* has not been appointed and, for some reason, it appears that independent advice to the juvenile will not otherwise be available, counsel should inquire thoroughly into all circumstances that a careful and competent person in the juvenile's

position should consider in determining the juvenile's interests with respect to the proceeding. After consultation with the juvenile, the parents (where their interests do not appear to conflict with the juvenile's), and any other family members or interested persons, the attorney may remain neutral concerning the proceeding, limiting participation to presentation and examination of material evidence or, if necessary, the attorney may adopt the position requiring the least intrusive intervention justified by the juvenile's circumstances.

- (iii) Counsel for the parent. It is appropriate and desirable for an attorney to consider all circumstances, including the apparent interests of the juvenile, when counseling and advising a parent who is charged in a child protective proceeding or who is seeking representation during a delinquency or in need of supervision proceeding. The posture to be adopted with respect to the facts and conditions alleged in the proceeding, however, remains ultimately the responsibility of the client.

Standard 3.2 Adversity of Interests.

(a) *Adversity of interests defined.* For purposes of these standards, adversity of interests exists when a lawyer or lawyers associated in practice:

- (i) Formally represent more than one client in a proceeding and have a duty to contend in behalf of one client that which their duty to another requires them to oppose.
- (ii) Formally represent more than one client and it is their duty to contend in behalf of one client that which may prejudice the other client's interests at any point in the proceeding.
- (iii) Formally represent one client but are required by some third person or institution, including their employer, to accommodate their representation of that client to factors unrelated to the client's legitimate interests.

(b) *Resolution of adversity.* At the earliest feasible opportunity, counsel should disclose to the client any interest in or connection with the case or any other matter that might be relevant to the client's selection of a lawyer. Counsel should at the same time seek to determine whether adversity of interests potentially exists and, if so, should immediately seek to withdraw from representation of the client who will be least prejudiced by such withdrawal.

Standard 3.3. Confidentiality.

(a) *Establishment of confidential relationship.* Counsel should seek from the outset to establish a relationship of trust and confidence with the client. The lawyer

should explain that full disclosure to counsel of all facts known to the client is necessary for effective representation, and at the same time explain that the lawyer's obligation of confidentiality makes privileged the client's disclosures relating to the case.

(b) Preservation of client's confidences and secrets.

- (i) Except as permitted by 3.3(d), below, an attorney should not knowingly reveal a confidence or secret of a client to another, including the parent of a juvenile client.
- (ii) Except as permitted by 3.3(d), below, an attorney should not knowingly use a confidence or secret of a client to the disadvantage of the client or, unless the attorney has secured the consent of the client after full disclosure, for the attorney's own advantage or that of a third person.

(c) Preservation of secrets of a juvenile client's parent or guardian. The attorney should not reveal information gained from or concerning the parent or guardian of a juvenile client in the course of representation with respect to a delinquency or in need of supervision proceeding against the client, where (1) the parent or guardian has requested the information be held inviolate, or (2) disclosure of the information would likely be embarrassing or detrimental to the parent or guardian and (3) preservation would not conflict with the attorney's primary responsibility to the interests of the client.

- (i) The attorney should not encourage secret communications when it is apparent that the parent or guardian believes those communications to be confidential or privileged and disclosure may become necessary to full and effective representation of the client.
- (ii) Except as permitted by 3.3(d), below, an attorney should not knowingly reveal the parent's secret communication to others or use a secret communication to the parent's disadvantage or to the advantage of the attorney or of a third person, unless (1) the parent competently consents to such revelation or use after full disclosure or (2) such disclosure or use is necessary to the discharge of the attorney's primary responsibility to the client.

Disclosure of confidential communications. In addition to circumstances specifically mentioned above, a lawyer may reveal:

- (i) Confidences or secrets with the informed and competent consent of the client or clients affected, but only after full disclosure of all relevant circumstances to them. If the client is a juvenile incapable

of considered judgment with respect to disclosure of a secret or confidence, a lawyer may reveal such communications if such disclosure (1) will not disadvantage the juvenile and (2) will further rendition of counseling, advice or other service to the client.

- (ii) Confidences or secrets when permitted under disciplinary rules of the ABA Code of Professional Responsibility or as required by law or court order.
- (iii) The intention of a client to commit a crime or an act which if done by an adult would constitute a crime, or acts that constitute neglect or abuse of a child, together with any information necessary to prevent such conduct. A lawyer must reveal such intention if the conduct would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes disclosure is necessary to prevent the harm. If feasible, the lawyer should first inform the client of the duty to make such revelation and seek to persuade the client to abandon the plan.
- (iv) Confidences or secrets material to an action to collect a fee or to defend himself or herself or any employees or associates against an accusation of wrongful conduct.

Standard 3.4. Advice and Service with Respect to Anticipated Unlawful Conduct. It is unprofessional conduct for a lawyer to assist a client to engage in conduct the lawyer believes to be illegal or fraudulent, except as part of a bona fide effort to determine the validity, scope, meaning or application of a law.

Standard 3.5. Duty to Keep Client Informed. The lawyer has a duty to keep the client informed of the developments in the case, and of the lawyer's efforts and progress with respect to all phases of representation. This duty may extend, in the case of a juvenile client, to a parent or guardian whose interests are not adverse to the juvenile's, subject to the requirements of confidentiality set forth in 3.3, above.

PART IV. INITIAL STAGES OF REPRESENTATION

Standard 4.1. Prompt Action to Protect the Client. Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. The lawyers should immediately inform clients of their rights and pursue any investigatory or procedural steps necessary to protection of their clients' interests.

Standard 4.2. Interviewing the Client.

- (a) The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.

- (b) In interviewing a client, it is proper for the lawyer to question the credibility of the client's statements or those of any other witness. The lawyer may not, however, suggest expressly or by implication that the client or any other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may the lawyer intimate that the client should be less than candid in revealing material facts to the attorney.

Standard 4.3. Investigation and Preparation.

- (a) It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts concerning responsibility for the acts or conditions alleged and social or legal dispositional alternatives. The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities. The duty to investigate exists regardless of the client's admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.
- (b) Where circumstances appear to warrant it, the lawyer should also investigate resources and services available in the community and, if appropriate, recommend them to the client and the client's family. The lawyer's responsibility in this regard is independent of the posture taken with respect to any proceeding in which the client is involved.
- (c) It is unprofessional conduct for a lawyer to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so.

Standard 4.4. Relations with Prospective Witnesses.

The ethical and legal rules concerning counsel's relations with lay and expert witnesses generally govern lawyers engaged in juvenile court representation.

PART V. ADVISING AND COUNSELING THE CLIENT

Standard 5.1. Advising the Client Concerning the Case.

- (a) After counsel is fully informed on the facts and the law, he or she should with complete candor advise the client involved in juvenile court proceedings concerning all aspects of the case, including counsel's frank estimate of the probable outcome. It is unprofessional conduct for a lawyer intentionally to understate or overstate the risks, hazards or prospects of the case in order unduly or improperly to influence the client's determination of his or her posture in the matter.

- (b) The lawyer should caution the client to avoid communication about the case with witnesses where such communication would constitute, apparently or in reality, improper activity. Where the right to jury trial exists and has been exercised, the lawyer should further caution the client with regard to communication with prospective or selected jurors.

Standard 5.2. Control and Direction of the Case.

- (a) Certain decisions relating to the conduct of the case are in most cases ultimately for the client and others are ultimately for the lawyer. The client, after full consultation with counsel, is ordinarily responsible for determining:
 - (i) the plea to be entered at adjudication;
 - (ii) whether to cooperate in consent judgment or early disposition plans;
 - (iii) whether to be tried as a juvenile or an adult, where the client has that choice;
 - (iv) whether to waive jury trial;
 - (v) whether to testify on his or her own behalf.
- (b) Decisions concerning what witnesses to call, whether and how to conduct cross-examination, what jurors to accept and strike, what trial motions should be made, and any other strategic and tactical decisions not inconsistent with determinations ultimately the responsibility of and made by the client, are the exclusive province of the lawyer after full consultation with the client.
- (c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, his or her advice and reasons, and the conclusion reached. This record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

Standard 5.3. Counseling. A lawyer engaged in juvenile court representation often has occasion to counsel the client and, in some cases, the client's family with respect to nonlegal matters. This responsibility is generally appropriate to the lawyer's role and should be discharged, as any other, to the best of the lawyer's training and ability.

PART VI. INTAKE, EARLY DISPOSITION AND DETENTION

Standard 6.1. Intake and Early Disposition Generally. Whenever the nature and circumstances of the case permit, counsel should explore the possibility of early diversion from the formal juvenile court process through subjudicial agencies and other community

resources. Participation in pre- or nonjudicial stages of the juvenile court process may be critical to such diversion, as well as to protection of the client's rights.

Standard 6.2. Intake Hearings.

- (a) In jurisdictions where intake hearings are held prior to reference of a juvenile court matter for judicial proceedings, the lawyer should be familiar with and explain to the client and, if the client is a minor, to the client's parents, the nature of the hearing, the procedures to be followed, the several dispositions available and their probable consequences. The lawyer should further advise the client of his or her rights at the intake hearing, including the privilege against self-incrimination where appropriate, and of the use that may be made of the client's statements.
- (b) The lawyer should be prepared to make to the intake hearing officer arguments concerning the jurisdictional sufficiency of the allegations made and to present facts and circumstances relating to the occurrence of and the client's responsibility for the acts or conditions charged or to the necessity for official treatment of the matter.

Standard 6.3. Early Disposition.

- (a) When the client admits the acts or conditions alleged in the juvenile court proceeding and, after investigation, the lawyer is satisfied that the admission is factually supported and that the court would have jurisdiction to act, the lawyer should, with the client's consent, consider developing or cooperating in the development of a plan for informal or voluntary adjustment of the case.
- (b) A lawyer should not participate in an admission of responsibility by the client for purposes of securing informal or early disposition when the client denies responsibility for the acts or conditions alleged.

Standard 6.4. Detention.

- (a) If the client is detained or the client's child is held in shelter care, the lawyer should immediately consider all steps that may in good faith be taken to secure the child's release from custody.
- (b) Where the intake department has initial responsibility for custodial decisions, the lawyer should promptly seek to discover the grounds for removal from the home and may present facts and arguments for release at the intake hearing or earlier. If a judicial detention hearing will be held, the attorney should be prepared, where circumstances warrant, to present facts and arguments relating to the jurisdictional sufficiency of the allegations, the appropriateness of the place of and criteria used for detention, and any noncompliance with procedures for referral to court or for

detention. The attorney should also be prepared to present evidence with regard to the necessity for detention and a plan for pretrial release of the juvenile.

- (c) The lawyer should not personally guarantee the attendance or behavior of the client or any other person, whether as surety on a bail bond or otherwise.

PART VII. ADJUDICATION

Standard 7.1. Adjudication without Trial.

- (a) Counsel may conclude, after full investigation and preparation, that under the evidence and the law the charges involving the client will probably be sustained. Counsel should so advise the client and, if negotiated pleas are allowed under prevailing law, may seek the client's consent to engage in plea discussions with the prosecuting agency. Where the client denies guilt, the lawyer cannot properly participate in submitting a plea of involvement when the prevailing law requires that such a plea be supported by an admission of responsibility in fact.
- (b) The lawyer should keep the client advised of all developments during plea discussions with the prosecuting agency and should communicate to the client all proposals made by the prosecuting agency. Where it appears that the client's participation in a psychiatric, medical, social or other diagnostic or treatment regime would be significant in obtaining a desired result, the lawyer should so advise the client and, when circumstances warrant, seek the client's consent to participation in such a program.

Standard 7.2. Formality, In General. While the traditional formality and procedure of criminal trials may not in every respect be necessary to the proper conduct of juvenile court proceedings, it is the lawyer's duty to make all motions, objections or requests necessary to protection of the client's rights in such form and at such time as will best serve the client's legitimate interests at trial or on appeal.

Standard 7.3. Discovery and Motion Practice.

(a) *Discovery.*

- (i) Counsel should promptly seek disclosure of any documents, exhibits or other information potentially material to representation of clients in juvenile court proceedings. If such disclosure is not readily available through informal processes, counsel should diligently pursue formal methods of discovery including, where appropriate, the filing of motions for bills of particulars, for discovery and inspection of exhibits, documents and photographs, for production of statements by and evidence favorable to the respondent, for production of a list of witnesses, and for the taking of depositions.

- (ii) In seeking discovery, the lawyer may find that rules specifically applicable to juvenile court proceedings do not exist in a particular jurisdiction or that they improperly or unconstitutionally limit disclosure. In order to make possible adequate representation of the client, counsel should in such cases investigate the appropriateness and feasibility of employing discovery techniques available in criminal or civil proceedings in the jurisdiction.
- (b) Other motions. Where the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client's rights, such as motions to dismiss the petition, to suppress evidence, for mental examination, or appointment of an investigator or expert witness, for severance, or to disqualify a judge. Such motions should ordinarily be made in writing when that would be required for similar motions in civil or criminal proceedings in the jurisdiction. If a hearing on the motion is required, it should be scheduled at some time prior to the adjudication hearing if there is any likelihood that consolidation will work to the client's disadvantage.

Standard 7.4. Compliance with Orders.

- (a) Control of proceedings is principally the responsibility of the court, and the lawyer should comply promptly with all rules, orders and decisions of the judge. Counsel has the right to make respectful requests for reconsideration of adverse rulings and has the duty to set forth on the record adverse rulings or judicial conduct which counsel considers prejudicial to the client's legitimate interests.
- (b) The lawyer should be prepared to object to the introduction of any evidence damaging to the client's interest if counsel has any legitimate doubt concerning its admissibility under constitutional or local rules of evidence.

Standard 7.5. Relations with Court and Participants.

- (a) The lawyer should at all times support the authority of the court by preserving professional decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors
 - (i) When court is in session, the lawyer should address the court and not the prosecutor directly on any matter relating to the case unless the person acting as prosecutor is giving evidence in the proceeding.
 - (ii) It is unprofessional conduct for a lawyer to engage in behavior or tactics purposely calculated to irritate or annoy the court, the prosecutor or probation department personnel.
- (b) When in the company of clients or clients' parents, the attorney should maintain a professional demeanor in all associations with opposing counsel and with court or probation personnel.

Standard 7.7. Presentation of Evidence.

It is unprofessional conduct for a lawyer knowingly to offer false evidence or to bring inadmissible evidence to the attention of the trier of fact, to ask questions or display demonstrative evidence known to be improper or inadmissible, or intentionally to make impermissible comments or arguments in the presence of the trier of fact. When a jury is empaneled, if the lawyer has substantial doubt concerning the admissibility of evidence, he or she should tender it by an offer of proof and obtain a ruling on its admissibility prior to presentation.

Standard 7.8. Examination of Witnesses.

- (a) The lawyer in juvenile court proceedings should be prepared to examine fully any witness whose testimony is damaging to the client's interests. It is unprofessional conduct for counsel knowingly to forego or limit examination of a witness when it is obvious that failure to examine fully will prejudice the client's legitimate interests.
- (b) The lawyer's knowledge that a witness is telling the truth does not preclude cross-examination in all circumstances, but may affect the method and scope of cross-examination. Counsel should not misuse the power of cross-examination or impeachment by employing it to discredit the honesty or general character of a witness known to be testifying truthfully.
- (c) The examination of all witnesses should be conducted fairly and with due regard for the dignity and, to the extent allowed by the circumstances of the case, the privacy of the witness. In general, and particularly when a youthful witness is testifying, the lawyer should avoid unnecessary intimidation or humiliation of the witness.
- (d) A lawyer should not knowingly call as a witness one who will claim a valid privilege not to testify for the sole purpose of impressing that claim on the fact-finder. In some instances, as defined in the ABA Code of Professional Responsibility, doing so will constitute unprofessional conduct.
- (e) It is unprofessional conduct to ask a question that implies the existence of a factual predicate which the examiner knows cannot be supported by evidence.

Standard 7.9. Testimony by the Respondent.

- (a) It is the lawyer's duty to protect the client's privilege against self- incrimination in juvenile court proceedings. When the client has elected not to testify, the lawyer should be alert to invoke the privilege and should insist on its recognition unless the client competently decides that invocation should not be continued.
- (b) If the respondent has admitted to counsel facts which establish his or her responsibility for the acts or conditions alleged and if the lawyer, after independent investigation, is satisfied that those admissions are true, and the respondent insists on exercising the right to testify at the adjudication hearing, the lawyer must advise the client against taking the stand to testify falsely and, if necessary, take appropriate steps to avoid lending aid to perjury.
 - (i) If, before adjudication, the respondent insists on taking the stand to testify falsely, the lawyer must withdraw from the case if that is feasible and should seek the leave of the court to do so if necessary.
 - (ii) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during adjudication without notice, it is unprofessional conduct for the lawyer to lend aid to perjury or to use the perjured testimony. Before the respondent takes the stand in these circumstances the lawyer should, if possible, make a record of the fact that respondent is taking the stand against the advice of counsel without revealing that fact to the court. Counsel's examination should be confined to identifying the witness as the respondent and permitting the witness to make his or her statement to the trier of fact. Counsel may not engage in direct examination of the respondent in the conventional manner and may not recite or rely on the false testimony in argument.

Standard 7.10. Argument. The lawyer in juvenile court representation should comply with the rules generally governing argument in civil and criminal proceedings.

PART VIII. TRANSFER PROCEEDINGS

Standard 8.1. In General. A proceeding to transfer a respondent from the jurisdiction of the juvenile court to a criminal court is a critical stage in both juvenile and criminal justice processes. Competent representation by counsel is essential to the protection of the juvenile's rights in such a proceeding.

Standard 8.2. Investigation and Preparation.

- (a) In any case where transfer is likely, counsel should seek to discover at the earliest opportunity whether transfer will be sought and, if so, the procedure and criteria according to which that determination will be made.

- (b) The lawyer should promptly investigate all circumstances of the case bearing on the appropriateness of transfer and should seek disclosure of any reports or other evidence that will be submitted to or may be considered by the court in the course of transfer proceedings. Where circumstances warrant, counsel should promptly move for appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protection of the client's rights.

Standard 8.3. Advising and Counseling the Client Concerning Transfer. Upon learning that transfer will be sought or may be elected, counsel should fully explain the nature of the proceeding and the consequences of transfer to the client and the client's parents. In so doing, counsel may further advise the client concerning participation in diagnostic and treatment programs which may provide information material to the transfer decision.

Standard 8.4. Transfer Hearings. If a transfer hearing is held, the rules set forth in Part VII of these standards shall generally apply to counsel's conduct of that hearing.

Standard 8.5. Post-Hearing Remedies. If transfer for criminal prosecution is ordered, the lawyer should act promptly to preserve an appeal from that order and should be prepared to make any appropriate motions for post-transfer relief.

PART IX. DISPOSITION

Standard 9.1. In General. The active participation of counsel at disposition is often essential to protection of clients' rights and to furtherance of their legitimate interests. In many cases the lawyer's most valuable service to clients will be rendered at this stage of the proceeding.

Standard 9.2. Investigation and Preparation.

- (a) Counsel should be familiar with the dispositional alternatives available to the court, with its procedures and practices at the disposition stage, and with community services that might be useful in the formation of a dispositional plan appropriate to the client's circumstances.
- (b) The lawyer should promptly investigate all sources of evidence including any reports or other information that will be brought to the court's attention and interview all witnesses material to the disposition decision.
- (c) If access to social investigation, psychological, psychiatric or other reports or information is not provided voluntarily or promptly, counsel should be prepared to seek their disclosure and time to study them through formal measures.
- (d) Whether or not social and other reports are readily available, the lawyer has a duty independently to investigate the client's circumstances, including such

factors as previous history, family relations, economic condition and any other information relevant to disposition.

- (e) The lawyer should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation or testimony with respect to formation of a dispositional plan.

Standard 9.3. Counseling Prior to Disposition.

- (a) The lawyer should explain to the client the nature of the disposition hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan. Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.
- (b) When psychological or psychiatric evaluations are ordered by the court or arranged by counsel prior to disposition, the lawyer should explain the nature of the procedure to the client and encourage the client's cooperation with the person or persons administering the diagnostic procedure.
- (c) The lawyer must exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical and social reports, tests or evaluations bearing on the client's history or condition or, if the client is a juvenile, the history or condition of the client's parents. In general, the lawyer should not disclose data or conclusions contained in such reports to the extent that, in the lawyer's judgment based on knowledge of the client and the client's family, revelation would be likely to affect adversely the client's well-being or relationships within the family and disclosure is not necessary to protect the client's interests in the proceeding.

Standard 9.4. Disposition Hearing.

- (a) It is the lawyer's duty to insist that proper procedure be followed throughout the disposition stage and that orders entered be based on adequate reliable evidence.
- (b) Where the dispositional hearing is not separate from adjudication or where the court does not have before it all evidence required by statute, rules of court or the circumstances of the case, the lawyer should seek a continuance until such evidence can be presented if to do so would serve the client's interests.
- (c) The lawyer at disposition should be free to examine fully and to impeach any witness whose evidence is damaging to the client's interests and to challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court. The lawyer should not knowingly limit or forego

examination or contradiction by proof of any witness, including a social worker or probation department officer, when failure to examine fully will prejudice the client's interests. Counsel may seek to compel the presence of witnesses whose statements of fact or opinion are before the court or the production of other evidence on which conclusions of fact presented at disposition are based.

- (d) The lawyer may, during disposition, ask that the client be excused during presentation of evidence when, in counsel's judgment, exposure to a particular item of evidence would adversely affect the well-being of the client or the client's relationship with his or her family, and the client's presence is not necessary to protecting his or her interests in the proceeding.

Standard 9.5. Counseling After Disposition.

When a dispositional decision has been reached, it is the lawyer's duty to explain the nature, obligations and consequences of the disposition to the client and his or her family and to urge upon the client the need for accepting and cooperating with the dispositional order. If appeal from either the adjudicative or dispositional decree is contemplated, the client should be advised of that possibility, but the attorney must counsel compliance with the court's decision during the interim.

PART X. REPRESENTATION AFTER DISPOSITION

Standard 10.1. Relations with the Client After Disposition.

- (a) The lawyer's responsibility to the client does not necessarily end with dismissal of the charges or entry of a final dispositional order. The attorney should be prepared to counsel and render or assist in securing appropriate legal services for the client in matters arising from the original proceeding.
- (b) If the client has been found to be within the juvenile court's jurisdiction, the lawyer should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan.
- (c) Whether or not the charges against the client have been dismissed, where the lawyer is aware that the client or the client's family needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.
- (d) The decision to pursue an available claim for postdispositional relief from judicial and correctional or other administrative determinations related to juvenile court proceedings, including appeal, habeas corpus or an action to protect the client's right to treatment, is ordinarily the client's responsibility after full consultation with counsel.

Standard 10.2. Post-Dispositional Hearings Before the Juvenile Court.

- (a) The lawyer who represents a client during initial juvenile court proceedings should ordinarily be prepared to represent the client with respect to proceedings to review or modify adjudicative or dispositional orders made during earlier hearings or to pursue any affirmative remedies that may be available to the client under local juvenile court law.
- (b) The lawyer should advise the client of the pendency or availability of a postdispositional hearing or proceeding and of its nature, issues and potential consequences. Counsel should urge and, if necessary, seek to facilitate the prompt attendance at any such hearing of the client and of any material witnesses who may be called.

Standard 10.3. Counsel on Appeal.

- (a) Trial counsel, whether retained or appointed by the court, should conduct the appeal unless new counsel is substituted by the client or by the appropriate court. Where there exists an adequate pool of competent counsel available for assignment to appeals from juvenile court orders and substitution will not work substantial disadvantage to the client's interests, new counsel may be appointed in place of trial counsel.
- (b) Whether or not trial counsel expects to conduct the appeal, he or she should promptly inform the client, and where the client is a minor and the parents' interests are not adverse, the client's parents of the right to appeal and take all steps necessary to protect that right until appellate counsel is substituted or the client decides not to exercise this privilege.
- (c) Counsel on appeal, after reviewing the record below and undertaking any other appropriate investigation, should candidly inform the client as to whether there are meritorious grounds for appeal and the probable results of any such appeal, and should further explain the potential advantages and disadvantages associated with appeal. However, appellate counsel should not seek to withdraw from a case solely because his or her own analysis indicates that the appeal lacks merit.

Standard 10.4. Conduct of the Appeal.

The rules generally governing conduct of appeals in criminal and civil cases govern conduct of appeals in juvenile court matters.

Standard 10.5. Post-Dispositional Remedies: Protection of the Client's Right to Treatment.

- (a) A lawyer who has represented a client through trial and/or appellate proceedings should be prepared to continue representation when post-dispositional action,

whether affirmative or defensive, is sought, unless new counsel is appointed at the request of the client or continued representation would, because of geographical considerations or other factors, work unreasonable hardship.

- (b) Counsel representing a client in post-dispositional matters should promptly undertake any factual or legal investigation in order to determine whether grounds exist for relief from juvenile court or administrative action. If there is reasonable prospect of a favorable result, the lawyer should advise the client and, if their interests are not adverse, the client's parents of the nature, consequences, probable outcome and advantages or disadvantages associated with such proceedings.
- (c) The lawyer engaged in post-dispositional representation should conduct those proceedings according to the principles generally governing representation in juvenile court matters.

Standard 10.6. Probation Revocation; Parole Revocation.

- (a) Trial counsel should be prepared to continue representation if revocation of the client's probation or parole is sought, unless new counsel is appointed or continued representation would, because of geographical or other factors, work unreasonable hardship.
- (b) Where proceedings to revoke conditional liberty are conducted in substantially the same manner as original petitions alleging delinquency or need for supervision, the standards governing representation in juvenile court generally apply. Where special procedures are used in such matters, counsel should advise the client concerning those procedures and be prepared to participate in the revocation proceedings at the earliest stage.

Standard 10.7. Challenges to the Effectiveness of Counsel.

- (a) A lawyer appointed or retained to represent a client previously represented by other counsel has a good faith duty to examine prior counsel's actions and strategy. If, after investigation, the new attorney is satisfied that prior counsel did not provide effective assistance, the client should be so advised and any appropriate relief for the client on that ground should be vigorously pursued.
- (b) A lawyer whose conduct of a juvenile court case is drawn into question may testify in judicial, administrative or investigatory proceedings concerning the matters charged, even though in so doing the lawyer must reveal information which was given by the client in confidence.

IJA-ABA Juvenile Justice Standards Relating to Transfer Between Courts

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PREFACE

The standards and commentary in this volume are part of a series designed to cover the spectrum of problems pertaining to the laws affecting children. They examine the juvenile justice system and its relationship to the rights and responsibilities of juveniles. The series was prepared under the supervision of a Joint Commission on Juvenile Justice Standards appointed by the Institute of Judicial Administration and the American Bar Association. Seventeen volumes in the series were approved by the House of Delegates of the American Bar Association on February 12, 1979.

The standards are intended to serve as guidelines for action by legislators, judges, administrators, public and private agencies, local civic groups, and others responsible for or concerned with the treatment of youths at local, state, and federal levels. The twenty-three volumes issued by the joint commission cover the entire field of juvenile justice administration, including the jurisdiction and organization of trial and appellate courts hearing matters concerning juveniles; the transfer of jurisdiction to adult criminal courts; and the functions performed by law enforcement officers and court intake, probation, and corrections personnel. Standards for attorneys representing the state, for juveniles and their families, and for the procedures to be followed at the preadjudication, adjudication, disposition, and postdisposition stages are included. One volume in this series sets forth standards for the statutory classification of delinquent acts and the rules governing the sanctions to be imposed. Other volumes deal with problems affecting nondelinquent youth, including recommendations concerning the permissible range of intervention by the state in cases of abuse or neglect, status offenses (such as truancy and running away), and contractual, medical, educational, and employment rights of minors.

The history of the Juvenile Justice Standards Project illustrates the breadth and scope of its task. In 1971, the Institute of Judicial Administration, a private, nonprofit research and educational organization located at New York University School of Law, began planning the Juvenile Justice Standards Project. At that time, the Project on Standards for Criminal Justice of the ABA, initiated by IJA seven years earlier, was completing the last of twelve volumes of recommendations for the adult criminal justice system. However, those standards were not designed to address the issues confronted by the separate courts handling juvenile matters. The Juvenile Justice Standards Project was created to consider those issues.

A planning committee chaired by then Judge and now Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit met in October 1971. That winter, reporters who would be responsible for drafting the volumes met with six planning subcommittees to identify and analyze the important issues in the juvenile justice field. Based on material developed by them, the planning committee charted the areas to be covered.

In February 1973, the ABA became a co-sponsor of the project. IJA continued to serve as the secretariat of the project. The IJA-ABA Joint Commission on Juvenile Justice Standards was then created to serve as the project's governing body. The joint commission, chaired by Chief Judge Kaufman, consists of twenty-nine members, approximately half of whom are lawyers and judges, the balance representing nonlegal disciplines such as psychology and sociology. The chairpersons of the four drafting committees also

serve on the joint commission. The perspective of minority groups was introduced by a Minority Group Advisory Committee established in 1973, members of which subsequently joined the commission and the drafting committees. David Gilman has been the director of the project since July 1976

The task of writing standards and accompanying commentary was undertaken by more than thirty scholars, each of whom was assigned a topic within the jurisdiction of one of the four advisory drafting committees: Committee I, Intervention in the Lives of Children; Committee II, Court Roles and Procedures; Committee III, Treatment and Correction; and Committee IV, Administration. The committees were composed of more than 100 members chosen for their background and experience not only in legal issues affecting youth, but also in related fields such as psychiatry, psychology, sociology, social work, education, corrections, and police work. The standards and commentary produced by the reporters and drafting committees were presented to the IJA-ABA Joint Commission on Juvenile Justice Standards for consideration. The deliberations of the joint commission led to revisions in the standards and commentary presented to them, culminating in the published tentative drafts.

The published tentative drafts were distributed widely to members of the legal community, juvenile justice specialists, and organizations directly concerned with the juvenile justice system for study and comment. The ABA assigned the task of reviewing individual volumes to ABA sections whose members are expert in the specific areas covered by those volumes. Especially helpful during this review period were the comments, observations, and guidance provided by Professor Livingston Hall, Chairperson, Committee on Juvenile Justice of the Section of Criminal Justice, and Marjorie M. Childs, Chairperson of the Juvenile Justice Standards Review Committee of the Section of Family Law of the ABA. The recommendations submitted to the project by the professional groups, attorneys, judges, and ABA sections were presented to an executive committee of the joint commission, to whom the responsibility of responding had been delegated by the full commission. The executive committee consisted of the following members of the joint commission:

Chief Judge Irving R. Kaufman, Chairman
Hon. William S. Fort, Vice Chairman
Prof. Charles Z. Smith, Vice Chairman
Dr. Eli Bower
Allen Breed
William T. Gossett, Esq.
Robert W. Meserve, Esq.
Milton G. Rector
Daniel L. Skoler, Esq.
Hon. William S. White
Hon. Patricia M. Wald, Special Consultant

The executive committee met in 1977 and 1978 to discuss the proposed changes in the published standards and commentary. Minutes issued after the meetings reflecting the decisions by the executive committee were circulated to the members of the joint commission and the ABA House of Delegates, as well as to those who had transmitted comments to the project.

On February 12, 1979, the ABA House of Delegates approved seventeen of the twenty-three published volumes. It was understood that the approved volumes would be revised to conform to the changes described in the minutes of the 1977 and 1978 executive committee meetings. The Schools and Education volume was not presented to the House and the five remaining volumes-Abuse and Neglect, Court Organization and Administration, Juvenile Delinquency and Sanctions, Juvenile Probation Function, and

Noncriminal Misbehavior-were held over for final consideration at the 1980 mid-winter meeting of the House.

Among the agreed-upon changes in the standards was the decision to bracket all numbers limiting time periods and sizes of facilities in order to distinguish precatory from mandatory standards and thereby allow for variations imposed by differences among jurisdictions. In some cases, numerical limitations concerning a juvenile's age also are bracketed.

The tentative drafts of the seventeen volumes approved by the ABA House of Delegates in February 1979, revised as agreed, are now ready for consideration and implementation by the components of the juvenile justice system in the various states and localities.

Much time has elapsed from the start of the project to the present date and significant changes have taken place both in the law and the social climate affecting juvenile justice in this country. Some of the changes are directly traceable to these standards and the intense national interest surrounding their promulgation. Other major changes are the indirect result of the standards; still others derive from independent local influences, such as increases in reported crime rates.

The volumes could not be revised to reflect legal and social developments subsequent to the drafting and release of the tentative drafts in 1975 and 1976 without distorting the context in which they were written and adopted. Therefore, changes in the standards or commentary dictated by the decisions of the executive committee subsequent to the publication of the tentative drafts are indicated in a special notation at the front of each volume.

In addition, the series will be brought up to date in the revised version of the summary volume, *Standards for Juvenile Justice: A Summary and Analysis*, which will describe current history, major trends, and the observable impact of the proposed standards on the juvenile justice system from their earliest dissemination. Far from being outdated, the published standards have become guideposts to the future of juvenile law.

The planning phase of the project was supported by a grant from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration. The National Institute also supported the drafting phase of the project, with additional support from grants from the American Bar Endowment, and the Andrew Mellon, Vincent Astor, and Herman Goldman foundations. Both the National Institute and the American Bar Endowment funded the final revision phase of the project.

An account of the history and accomplishments of the project would not be complete without acknowledging the work of some of the people who, although no longer with the project, contributed immeasurably to its achievements. Orison Marden, a former president of the ABA, was co-chairman of the commission from 1974 until his death in August 1975. Paul Nejelski was director of the project during its planning phase from 1971 to 1973. Lawrence Schultz, who was research director from the inception of the project, was director from 1973 until 1974. From 1974 to 1975, Delmar Karlen served as vice-chairman of the commission and as chairman of its executive committee, and Wayne Mucci was director of the project. Barbara Flicker was director of the project from 1975 to 1976. Justice Tom C. Clark was chairman for ABA liaison from 1975 to 1977.

Legal editors included Jo Rena Adams, Paula Ryan, and Ken Taymor. Other valued staff members were Fred Cohen, Pat Pickrell, Peter Garlock, and Oscar Garcia-Rivera. Mary Anne O'Dea and Susan

J. Sandler also served as editors. Amy Berlin and Kathy Kolar were research associates. Jennifer K. Schweickart and Ramelle Cochrane Pulitzer were editorial assistants.

It should be noted that the positions adopted by the joint commission and stated in these volumes do not represent the official policies or views of the organizations with which the members of the joint commission and the drafting committees are associated.

This volume is part of a series of standards and commentary prepared under the supervision of Drafting Committee II, which also includes the following volumes:

COURT ORGANIZATION AND ADMINISTRATION

COUNSEL FOR PRIVATE PARTIES

PROSECUTION

THE JUVENILE PROBATION FUNCTION: INTAKE AND PREDISPOSITION
INVESTIGATIVE SERVICES

PRETRIAL COURT PROCEEDINGS

ADJUDICATION

APPEALS AND COLLATERAL REVIEW

ADDENDUM OF REVISIONS IN THE 1977 TENTATIVE DRAFT

As discussed in the Preface, the published tentative drafts were distributed to the appropriate ABA sections and other interested individuals and organizations. Comments and suggestions concerning the volumes were solicited by the executive committee of the IJA-ABA Joint Commission. The executive committee then reviewed the standards and commentary within the context of the recommendations received and adopted certain modifications. The specific changes affecting this volume are set forth below. Corrections in form, spelling, or punctuation are not included in this enumeration.

1. Standards 1.1 B. and 1.1 C. were amended by reducing the minimum age for criminal court jurisdiction from over fifteen to over fourteen years of age at the time the offense is alleged to have occurred.

The commentaries to Standards 1.1. B. and 1.1 C. also were revised to include fifteen-year-old juveniles among those under eighteen who could be subject to waiver of juvenile court jurisdiction.

2. Standard 1.2 A. was amended by bracketing thirty-six months to comply with the policy adopted by the executive committee of making recommended time limitations permissive rather than mandatory.

The commentary to Standard 1.2 A. also was revised to place brackets around three years, the recommended maximum duration for juvenile court dispositions.

3. The commentary to Standard 1.2 B. was revised to add two sentences at the end of the last paragraph to expand the cross-reference to the provisions in the Dispositions volume that modify a disposition by applying Dispositions Standard 5.4 to revocation of probation.
4. Standards 2.1 A. through 2.1 E. were amended to bracket all numbers representing time limits, adding class two juvenile offenses to the category of charges for which waiver of juvenile court jurisdiction would be possible, and reducing to fifteen the age at which the alleged juvenile offense must have been committed for waiver to be possible.

The commentaries to Standards 2.1 A. through 2.1 E. were revised to reflect the above changes.

5. Standard 2.2 A. 1. was amended to add class two offenses to the provision requiring a finding of probable cause as a prerequisite to waiver.

The commentary also was revised to add class two offenses.

6. Standard 2.2 C. was amended by adding class two offenses to the provisions on necessary findings for waiver, by requiring a finding of a prior record of adjudication for class two offenses only, and by adding a cross-reference to Standard 2.1 E. providing that the court's finding that the juvenile is not a proper person for juvenile court handling must be in writing.

The commentary to Standard 2.2 C. was revised accordingly.

7. Standard 2.2 D. was amended to include class two offenses in the provision on the substitution of a finding of probable cause in subsequent juvenile court proceedings but not in any subsequent criminal proceeding.
8. Standards 2.3 A. and B. were amended to bracket five court days for notice of the waiver hearing.
9. Standard 2.3 C. was amended to add to the provision that the court pay expert witness fees and expenses a clause making payment subject to the court finding the expert testimony necessary.

The commentary was revised to include the same caveat.

10. Standard 2.3 E. was amended to add class two offenses to the provision placing the burden of proof of probable cause and of the juvenile's unfitness for juvenile court handling on the prosecutor.

Commentary to Standard 2.3 E. was revised to add to the discussion of the juvenile's right to challenge prosecution evidence a cross-reference to the right to compulsory process in Dispositional Procedures Standard 6.2, Juvenile Records and Information Systems Standard 5.7 B., and Pretrial Court Proceedings Standard 1.5 F.

11. Standard 2.3 I. was amended to delete "criminal," thereby extending the inadmissibility of admissions by the juvenile during the waiver hearing to both juvenile and criminal proceedings, and to add an exception for perjury proceedings.
12. Standard 2.4 was amended to bracket the seven days for filing appeals.

Commentary to Standard 2.4 was revised to add a cross-reference to Appeals and Collateral Review Standard 2.2, which authorizes appeal of the waiver decision by either party.

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INTRODUCTION

Drawing lines is difficult and necessarily arbitrary. The line between “adult” and “child” is important in every context, but nowhere more than in the application of the criminal law. The “adult” faces the processes and sanctions of the criminal court. The “child” experiences the juvenile court, its treatment programs, and limited penalties.

This volume is about waiver, the process by which the juvenile court releases certain juveniles from its jurisdiction and transfers them to the criminal courts.

Juvenile courts exist because Americans admit to a fundamental difference between children and adults. We are, perhaps, more sympathetic to troublesome children than to criminal adults. Because they are immature and not held to the same degree of responsibility for their acts, or because they are more malleable and susceptible to rehabilitation, children are brought within the jurisdiction of a juvenile court whose rhetoric, and sometimes whose practice, is kinder, more hopeful, and less vindictive than that of the criminal court.

The juvenile court is often described as a child-saving institution, principally rehabilitative. By contrast, the criminal court acknowledges its multiple purposes of retribution, deterrence, containment, and, when it can be reconciled with the others, rehabilitation. Public opinion appears to tolerate, even endorse, the propositions that juvenile courts should be different from criminal courts and that children should be treated more benevolently than adults. The juvenile court’s clients are usually referred to in this volume asexually and unemotionally as “juveniles” or “persons.” In these few paragraphs, however, we use the terms “children” and “child” advisedly. A “child” is not an adult, and the line between them must be drawn somewhere.

Many American jurisdictions have determined in recent years that an eighteen-year-old is an adult for purposes of voting, conscription, marriage, and alcohol consumption. An adult for some purposes, the argument goes, should be an adult for all. Eighteen years of age will suffice to draw the line for crime as for alcohol or the ballot.

There is nothing inherently right or just about a line drawn at eighteen. Other ages would do as well, and have. Professor Egon Bittner has convincingly argued that the concept of adolescence is a recent Western invention. “Policing Juveniles-The Social Bases of Common Practice,” in *Pursuing Justice for the Child* (Rosenheim ed. 1976). See also J.R. Gillis, *Youth and History: Tradition and Change in European Age Relations, 1770-Present* (1975). Without adolescence, the child-adult line might be at fourteen, or thirteen, or younger.

No matter what the age, difficult cases will remain. There always will be individuals who are victims of arbitrary lines. Innocent and immature adults of eighteen years will be processed by the criminal courts. “Young person” or “young adult” programs may be available which will mean exposure to lesser sanctions than face other adults, but they will be in the criminal courts just the same. A compassionate prosecutor or judge may exercise discretion in favor of a particular defendant, but that will be fortuitous. Beneficence will be good fortune, not a theoretical right. Whatever the qualities of children which argue for special treatment, an eighteen-year-old, by irrefutable legal presumption, is not a child. Neither the laws of any state nor this volume propose any method by which the presumption of adulthood can be overcome. [FN1]

The converse problem ought to be equally easy. A tough-minded view of majority might have as a logical corollary a soft-hearted view of minority. If an adult is outside the juvenile court’s jurisdiction

because the alleged act occurred a day past his or her eighteenth birthday, a child should be within the juvenile court if the act occurs a day before the crucial birthday.

It doesn't work that way. The presumption of childhood can be rebutted in almost every state. Under certain circumstances, children of certain ages who have allegedly committed certain acts can be transferred to the criminal court. This volume offers specific guides to making transfer decisions. It discusses who decides, under whose initiatives these decisions are made, what procedures and information are involved, age range, and the nature of the decisionmaking mechanisms.

The stakes are high. The adult accused of murder, rape, or armed robbery can be punished with life imprisonment in most jurisdictions, in some with death. In most cases the child faces punishments of lesser duration and severity.

If something about children compels the existence of juvenile courts, the lack of symmetry between the irrebuttable presumption of majority and the rebuttable presumption of minority should be disturbing. But, disturbing or not, the possibility of waiver is unavoidable. Some acts are so offensive to the community that the arbitrary line drawn at eighteen cannot acceptably be used to protect the alleged wrongdoer. The serious offender should not be permitted to escape the criminal justice system simply because he or she is a day or a year short of eighteen. As age eighteen approaches, credible argument can be made that the juvenile court's always inadequate resources should not be devoted to those youthful wrongdoers whose offenses are so serious or who appear to be so incorrigible as to be unworthy of or beyond help.

Finally, all court proceedings are prospective. They deal with past acts but also with future remedies, sanctions, and programs. If the conduct alleged is sufficiently serious, some mechanism should exist to permit retention of authority over some juveniles beyond the eighteenth birthday. A waiver decision will determine which court will have jurisdiction. If the precipitating acts are serious enough, the criminal court's capacity to maintain control over the juvenile for long periods of time may be more appropriate and socially reassuring than the maximum three-year period of juvenile court control proposed in these standards.

The standards that follow express a preference for retention by the juvenile court of jurisdiction over most persons under eighteen. An implicit presumption should be made explicit; every person under eighteen years of age at the time he or she commits an act that would constitute a criminal offense should remain subject to the juvenile court's jurisdiction unless every one of many conditions is present. Every procedural and substantive standard that follows grows out of the presumption.

The presumption in favor of juvenile court jurisdiction need not adopt any particular theoretical rationale for the juvenile court and the concept of separate treatment for juveniles. One rationale, the first principle of the juvenile court, is that children are qualitatively different from adults. Possibly they are most innocent and in some moral sense less responsible for their acts and more deserving of compassion than are adults. Possibly they are victims of criminogenic environments from which they should be given every opportunity to escape. Possibly children are more malleable than adults and more likely to benefit from gentler handling. For these reasons and others, it can be argued that, whenever possible, children should be accorded a humane, compassionate response to their disturbing acts.

A second rationale for the juvenile court derives from the view recently summarized as radical nonintervention. This view, in broadest outline (it takes many forms) is that many young people engage in seriously antisocial acts, but most simply outgrow them. Arguing in part from labeling theories, this view urges that the children who are least likely to mature out of antisocial acts are those who are identified as delinquent and treated as such by the state (and necessarily the community at large). Most juvenile acts by

this view ought to be disregarded. Moreover, the juvenile and criminal justice systems disproportionately enforce laws against the poor and dispossessed who are accordingly labeled “delinquent” and eventually, by self-fulfilling prophecy, become adult criminal statistics. While some violent, threatening, or repetitive acts cannot conscientiously be ignored, radical nonintervention argues for the minimum possible intervention in children’s lives. The juvenile court often has lesser consequences (if only because the duration and severity of its sanctions are more limited, and because its records are, ostensibly, confidential) than the criminal court and should therefore be preferred.

A third rationale is that the juvenile court is peculiarly capable of rehabilitating disruptive or disturbed children. Recent research urges skepticism about the efficacy of existing rehabilitative methods. Stanton Wheeler in 1966 summarized juvenile rehabilitative programs and concluded:

But do we know enough about delinquency to specify the ways in which even a moderate reduction could be brought about? In terms of verified knowledge, the answer must be an unqualified no.... Indeed, as of now, there are no demonstrable and proven methods for reducing the incidence of serious delinquent acts through preventive or rehabilitative procedures. Either the descriptive knowledge has not been translated into feasible action programs, or the programs have not been successfully implemented; or if implemented, they have lacked evaluation; or if evaluated, the results usually have been negative; and in the few cases of reported positive results, replications have been lacking. Wheeler et al., “Juvenile Delinquency-Its Prevention and Control,” in President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 410 (1967).

In 1973, LaMar Empey canvassed the major experiments in rehabilitation of delinquent children and concluded:

[S]pecial treatment institutions for juveniles have been built, but ironically, they seem to have perpetuated many of the same difficulties [as adult institutions]. Except for the protection of society in the most extreme cases, there is little evidence to support the notion that juvenile institutions are successful. “Diversion, Due Process and Deinstitutionalization,” in *Prisoners in America* 35 (Ohlin ed. 1973).

Paul Lerman’s 1974 reanalysis of the evaluation data of two of the most acclaimed juvenile rehabilitative programs concluded: “There is an array of evidence that current correctional ‘packages,’ regardless of their contents, are relatively ineffective in changing youth behavior,” *Community Treatment and Social Control-A Critical Analysis of Juvenile Policy* 96 (1974). “It is ... evident that an effective juvenile control/treatment strategy has yet to be scientifically demonstrated.” *Id.* at 206.

Probably the most that can be said presently is that lavishly funded experimental programs with a high level of staff commitment, low staff-client ratios, and empathetic long-term aftercare facilities have some likelihood of improving the life chances of the children who experience them. We can hope that rehabilitative programs will be successful. We do not know that we can improve life chances, but we need not yet be convinced that we cannot. The possibility that juveniles are more susceptible of rehabilitation is not to be dismissed or belittled. Many of those involved in the creation of the juvenile court and in its present administration have believed in its promise. To the extent that the juvenile court is successful with some children and changes some lives for the better, the rehabilitative argument for the juvenile court has great moral force.

Each of the first three rationales is vulnerable to serious objections. To the first, it can be argued, as Justice Fortas did in *In re Gault*, 387 U.S. 1 (1967), that we have failed to deliver to the child as we

promised and that nonadult characteristics do not justify the juvenile court's reduced protections and the juvenile's vulnerability to unstructured judicial and social worker discretion. That view has been widely adopted. Witness the many recent calls for limitation of the juvenile court's criminal jurisdiction to acts that would be criminal if committed by an adult and for adoption by the juvenile court of most of the procedural protections of the criminal court for juvenile offenders. Other volumes in these standards support that position.

The second rationale is convincing only to those (who are increasing in number but still a minority) who accept most of the tenets of radical nonintervention and who further accept the proposition that a criminal court intervention will cause more harm than a juvenile court intervention.

The rehabilitative rationale by itself is persuasive only to the optimistic at heart and to that dwindling number of informed people who believe that the technology of rehabilitation has achieved a reliability that justifies taking special power over others to change them.

A fourth rationale for the juvenile court remains and it may be the most compelling of all. Assume that children are not, or morally should not be viewed as, materially different from adults. Assume that innate difference is not a compelling justification for the separate juvenile court. Assume that the criminal court's social consequences are no more severe than those of the juvenile court. Assume further a negative or agnostic view of the technology of rehabilitation.

The fourth rationale is that the criminal justice system is so inhumane, so poorly financed and staffed, and so generally destructive that the juvenile court cannot do worse. Perhaps it can do better. This type of cynical analysis, often called a theory of less harm, has appeared in many contexts in recent years. Plans for new prisons have been justified on the basis that they will cause less harm to their inmates than do existing megaprisons. The influential *Beyond the Best Interests of the Child* (Goldstein, Freud, and Solnit [1973]) calls for employment of a "least detrimental alternative" concept in child placement decisions in all contexts.

President Johnson's crime commission nine years ago presented its most powerful argument for retention of a separate juvenile court in terms of an argument of less harm:

The Commission does not conclude from its study of the juvenile court that the time has come to jettison the experiment and remand the disposition of children charged with crime to the criminal courts of the country. As trying as are the problems of the juvenile court, the problems of the criminal courts, particularly those of the lower courts that would fall heir to much of the juvenile court jurisdiction, are even graver. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 81 (1967).

The following standards and the commentary in support do not attempt to offer theoretical or ideological explanations. Nor do we necessarily adopt any one or more of the rationales offered here to the exclusion of the others. Sound social policies require a presumption that all persons under the juvenile court's maximum age jurisdiction should remain subject to the juvenile court's jurisdiction. Only extraordinary juveniles in extraordinary factual situations should be transferred to the criminal court and then only in accordance with procedures designed to accord maximum procedural protections to juvenile and in compliance with precise and exacting behavioral standards.

FN1. The unusual process of reverse certification-see Ark. Stat. § 45-241 (1964) and Vt. Stat. Ann. tit. 33, § 635(b) (Supp. 9, 1974)-by which juveniles first appear in criminal court and the criminal court judge determines whether juvenile court jurisdiction is appropriate, may be an exception.

STANDARDS

Part I: Jurisdiction

STANDARD 1.1 AGE LIMITS

- A. The juvenile court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than seventeen years of age.
- B. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than fourteen years of age.
- C. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was fifteen, sixteen, or seventeen years of age, unless the juvenile court has waived its jurisdiction over that person.

STANDARD 1.2 OTHER LIMITS

- A. No juvenile court disposition, however modified, resulting from a single transaction or episode, should exceed [thirty-six] months.
- B. The juvenile court should retain jurisdiction to administer or modify its disposition of any person. The juvenile court should not have jurisdiction to adjudicate subsequent conduct of any person subject to such continuing jurisdiction if at the time the subsequent criminal offense is alleged to have occurred such person was more than seventeen years of age.

STANDARD 1.3 LIMITATIONS PERIOD

No juvenile court adjudication or waiver decision should be based on an offense alleged to have occurred more than three years prior to the filing of a petition alleging such offense, unless such offense would not be subject to a statute of limitations if committed by an adult. If the statute of limitations applicable to adult criminal proceedings for such offense is less than three years, such shorter period should apply to juvenile court criminal proceedings.

Part II. Waiver

STANDARD 2.1 TIME REQUIREMENTS

- A. Within [two] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of age when the alleged offense occurred, the clerk of the juvenile court should give the prosecuting attorney written notice of the possibility of waiver.
 - B. Within [three] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of
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age when the alleged offense occurred, the prosecuting attorney should give such person written notice, multilingual if appropriate, of the possibility of waiver.

- C. Within [seven] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of age when the alleged offense occurred, the prosecuting attorney may request by written motion that the juvenile court waive its jurisdiction over the juvenile. The prosecuting attorney should deliver a signed, acknowledged copy of the waiver motion to the juvenile and counsel for the juvenile within [twenty-four] hours after the filing of such motion in the juvenile court.
- D. The juvenile court should initiate a hearing on waiver within [ten] court days of the filing of the waiver motion or, if the juvenile seeks to suspend this requirement, within a reasonable time thereafter.
- E. The juvenile court should issue a written decision setting forth its findings and the reasons therefor, including a statement of the evidence relied on in reaching the decision, within [ten] court days after conclusion of the waiver hearing.
- F. No waiver notice should be given, no waiver motion should be accepted for filing, no waiver hearing should be initiated, and no waiver decision should be issued relating to any juvenile court petition after commencement of any adjudicatory hearing relating to any transaction or episode alleged in that petition.

STANDARD 2.2 NECESSARY FINDINGS

- A. The juvenile court should waive its jurisdiction only upon finding:
 - 1. that probable cause exists to believe that the juvenile has committed the class one or class two juvenile offense alleged in the petition; and
 - 2. that by clear and convincing evidence the juvenile is not a proper person to be handled by the juvenile court.
- B. A finding of probable cause to believe that a juvenile has committed a class one or class two juvenile offense should be based solely on evidence admissible in an adjudicatory hearing of the juvenile court.
- C. A finding that a juvenile is not a proper person to be handled by the juvenile court must include determinations, by clear and convincing evidence; of:
 - 1. the seriousness of the alleged class one or class two juvenile offense;
 - 2. a prior record of adjudicated delinquency involving the infliction or threat of significant bodily injury, if the juvenile is alleged to have committed a class two juvenile offense;
 - 3. the likely inefficacy of the dispositions available to the juvenile court as demonstrated by previous dispositions of the juvenile; and
 - 4. the appropriateness of the services and dispositional alternatives available in the criminal justice system for dealing with the juvenile's problems, and whether they are, in fact, available.

Expert opinion should be considered in assessing the likely efficacy of the dispositions available to the juvenile court. A finding that a juvenile is not a proper person to be handled by the juvenile court should be based solely on evidence admissible in a disposition hearing of the juvenile court, and should be in writing, as provided in Standard 2.1 E.

- D. A finding of probable cause to believe that a juvenile has committed a class one or class two juvenile offense may be substituted for a probable cause determination relating to that offense (or a lesser included offense) required in any subsequent juvenile court proceeding. Such a finding should not be substituted for any finding of probable cause required in any subsequent criminal proceeding.

STANDARD 2.3 THE HEARING

- A. The juvenile should be represented by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this requirement at least [five] court days before commencement of the waiver hearing.
- B. The juvenile court should appoint counsel to represent any juvenile unable to afford representation by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this right at least [five] court days before commencement of the waiver hearing.
- C. The juvenile court should pay the reasonable fees and expenses of an expert witness for the juvenile if the juvenile desires, but is unable to afford, the services of such an expert witness at the waiver hearing, unless the presiding officer determines that the expert witness is not necessary.
- D. The juvenile should have access to all evidence available to the juvenile court which could be used either to support or contest the waiver motion.
- E. The prosecuting attorney should bear the burden of proving that probable cause exists to believe that the juvenile has committed a class one or class two juvenile offense and that the juvenile is not a proper person to be handled by the juvenile court.
- F. The juvenile may contest the waiver motion by challenging, or producing evidence tending to challenge, the evidence of the prosecuting attorney.
- G. The juvenile may examine any person who prepared any report concerning the juvenile which is presented at the waiver hearing.
- H. All evidence presented at the waiver hearing should be under oath and subject to cross-examination.
- I. The juvenile may remain silent at the waiver hearing. No admission by the juvenile during the waiver hearing should be admissible to establish guilt or to impeach testimony in any subsequent proceeding, except a perjury proceeding. J. The juvenile may disqualify the presiding officer at the waiver hearing from presiding at any subsequent criminal trial or juvenile court adjudicatory hearing relating to any transaction or episode alleged in the petition initiating juvenile court proceedings.

STANDARD 2.4 APPEAL

- A. The juvenile or the prosecuting attorney may file an appeal of the waiver decision with the court authorized to hear appeals from final judgments of the juvenile court within [seven] court days of the decision of the juvenile court.

- B. The appellate court should render its decision expeditiously, according the findings of the juvenile court the same weight given the findings of the highest court of general trial jurisdiction.
- C. No criminal court should have jurisdiction in any proceeding relating to any transaction or episode alleged in the juvenile court petition as to which a waiver motion was made, against any person over whom the juvenile court has waived jurisdiction, until the time for filing an appeal from that determination has passed or, if such an appeal has been filed, until the final decision of the appellate court has been issued.

STANDARDS WITH COMMENTARY

Part I: Jurisdiction

STANDARD 1.1 AGE LIMITS

- 1.1 A. The juvenile court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than seventeen years of age.**

Commentary

This standard addresses two major issues: the maximum age of juvenile court jurisdiction and the point at which the juvenile's age is relevant.

Standard 1.1 A. proposes that all accused persons seventeen and younger should be subject to juvenile court jurisdiction. The eighteenth birthday should define an adult for the purposes of court jurisdiction. The jurisdictional statutes of thirty-seven states agree. Nine states end juvenile court jurisdiction at the seventeenth birthday; four at the sixteenth. The eighteenth birthday signals the achievement of majority for many legal purposes. The twenty-sixth amendment to the United States Constitution establishes a constitutional right to vote in federal elections at that age. This near consensus among the states and the federal government argues compellingly that juvenile court jurisdiction should end at age eighteen.

Standard 1.1 A. bases jurisdiction on age at the time an act allegedly occurred that would constitute an offense on which a juvenile court adjudication could be based. One alternative is to look to age at the time that the juvenile court petition or the criminal court complaint, information, or indictment is filed. A majority of states base jurisdiction on a person's age at the time of the alleged conduct giving rise to juvenile court jurisdiction. See Iowa Code Ann. § 232.62 (1941); La. Rev. Stat. § 13.1569(3) (Supp. 1974); and W. Va. Code Ann. § 49-5-3 (Supp. 49, 1974). In some states the controlling factor is age when juvenile court proceedings are initiated. See Ky. Rev. Stat. Ann. § 208.020 (1969) and Mich. Comp. Laws Ann. § 712A.2 (Supp. 37, 1974).

The existence of a juvenile court reflects a social policy decision that the acts of juveniles ordinarily should not place them within the jurisdiction of the criminal court. To base juvenile court jurisdiction on any age other than that at the time of the alleged wrongful conduct would conflict with the fundamental concept that the acts of juveniles should receive different judicial treatment from those of adults.

A second argument for the time-of-conduct jurisdictional rule is the possibility that otherwise prosecutorial caprice could determine jurisdiction. Conduct that could be the basis for a juvenile court delinquency adjudication can usually also support a criminal prosecution. In a state where jurisdiction is based on age at the time of filing, a prosecutor can deny juvenile court jurisdiction simply by delaying the initiation of proceedings. Texas prosecutors have become notorious for this practice. See Note, "Trial of Juveniles as Adults," 21 *Baylor L. Rev.* 333 (1969) and Note, "Juvenile Due Process Texas-Style: Fruit of the Poisonous Tree Resweetened," 24 *Baylor L. Rev.* 71 (1972).

Standard 1.1 A.'s time-of-conduct age jurisdiction rule avoids a troublesome jurisdictional problem encountered in states (and the District of Columbia) that employ a two-part age jurisdiction standard; the individual must have been under a specified age at the time of the alleged conduct and must be under a second age at the time of adjudication. The gap between the time-of-conduct and time-of-adjudication limits is usually at least three years. Representative statutes include: Ga. Code Ann. § 24A-401(c)(2) (Supp. 9A, 1973); N.H. Rev. Stat. Ann. § 169:1 (Supp. 2, 1973); and Utah Code Ann. § 55-10-77 (1973).

The two-part age test produces anomalies. The customary situation involves an individual who meets the time-of-conduct age requirements but not the time-of-adjudication age. The juvenile can properly argue that the juvenile court lacks jurisdiction either to adjudicate the alleged conduct or to waive its jurisdiction. If the criminal court can have jurisdiction over the juvenile only after waiver, the juvenile can assert that no court has jurisdiction over the conduct alleged. Such an argument was accepted with little discussion in *Wilson v. Reagan*, 354 F.2d 45 (9th Cir. 1965).

Appellate courts strain to avoid the Reagan result. In *Kent v. United States*, 383 U.S. 541 (1965), the Supreme Court refused dismissal, recommending that the criminal court attempt to reconstruct the waiver hearing. The commentary following Standards 2.4 A. and B. suggests some defects of such a hearing.

Reagan and Kent concerned challenges to prior waiver hearings; acceptance of those challenges and rejection of outright release made reconstruction of the waiver hearings necessary. That outcome could be avoided by rejecting the challenge to the prior hearing, as occurred in *Mordecai v. United States*, 421 F.2d 1133 (D.C. Cir. 1969), and *Brown v. Cox*, 481 F.2d 622 (4th Cir. 1973). Standard 1.1 A. avoids this problem by basing age jurisdiction solely on time-of-conduct.

Assuming a successful appeal and a remand to the juvenile court, an extended appeal from a waiver hearing can result in juvenile court jurisdiction over persons beyond the court's customary age range. Standard 2.4 attempts to lessen that possibility by requiring prompt filing of appeals from waiver decisions and prompt resolution of those appeals.

Jurisdiction based on time-of-conduct has the possible disadvantage that delay in apprehension could produce a "juvenile" who is beyond the customary age range of the juvenile court. Without further limitations on jurisdiction a thirty-year-old could be the subject of a juvenile court adjudication. Standard 1.3 addresses that problem by establishing a three-year limitations period for the acts of juveniles.

1.1 B. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than fourteen years of age.

Commentary

The juvenile court should have exclusive jurisdiction over persons who were fourteen or younger at the time of the alleged criminal conduct. Standard 1.1 C. authorizes waiver of juvenile court jurisdiction over persons who were fifteen, sixteen, or seventeen at the time of the alleged conduct. This standard recognizes that any line between adult and juvenile is necessarily arbitrary. Practical and political pressures will sometimes require that persons otherwise subject to juvenile court jurisdiction be referred to the criminal court. Standards 1.1 A. and 1.1 C. create a rebuttable presumption that fifteen-, sixteen-, and seventeen-year-olds should be treated as juveniles. This standard reflects a determination that fourteen-year-olds are, or at least should irrebuttably be presumed to be, juveniles for purposes of court jurisdiction.

Minimum ages at which juveniles can appear in criminal courts vary widely. The minima result both from laws determining criminal responsibility and laws defining juvenile and criminal court jurisdiction. Prosecution of a mere infant is theoretically possible in Arizona. *Ariz. Rev. Stat. Ann. § 13-135* (1956) presumes lack of criminal responsibility in children thirteen or under, but the prosecution can rebut the presumption with a showing that “at the time of committing the act charged against them they knew its wrongfulness.” Under *Ariz. R. Juv. P. 12*, the juvenile court may waive its jurisdiction over any child subject to criminal prosecution. In Idaho and the District of Columbia, an alleged offender is subject to criminal prosecution only if he or she is eighteen or older at the time of trial. *Idaho Code § 16-1806(1)(b)* (Supp. 3, 1973) and *D.C. Code Ann. § 16-2307(a)(3)* (1973).

In thirteen states the lower limit of criminal jurisdiction is the sixteenth birthday: California, Hawaii, Idaho, Kansas, Montana, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, Vermont, and Wisconsin. In nine and in twenty-five jurisdictions the minimum ages are fifteen and fourteen, respectively. The minimum is thirteen years of age in Illinois and twelve in Arkansas and Washington. Thus Standard 1.1 B. establishes a rule that presently exists only in a minority of the jurisdictions that allow waiver.

The realism of the minority rule adopted here is suggested by existing research on the incidence of waiver. Regardless of the permissible scope for waiver, its occurrence rarely extends beyond the last two years of juvenile court jurisdiction. Few fifteen-year-olds are waived to the criminal court. A recent study indicates that the juvenile courts in Nashville during a two-year period waived jurisdiction only over persons who were seventeen and thus in their last year of juvenile court eligibility. See Note, “Problem of Age and Jurisdiction in the Juvenile Court,” 19 *Vand. L. Rev.* 833, 854 (1966). Similarly, a Houston survey of juveniles whose waiver was sought during a period in 1970 found that most were in the last two years. See Hays and Solway, “The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults,” 9 *Houston L. Rev.* 709, 710 (1972).

A minimum age jurisdiction of fifteen years for the criminal court may enhance the juvenile court’s public image. Exclusive jurisdiction over persons under fifteen evidences commitment to the proposition that juveniles are qualitatively different from adults and should be treated differently.

Standard 1.1 B. assumes that the criminal court does not hear appeals from the juvenile court. In jurisdictions in which that is not the case, Standard 1.1 B. should be modified to read “No criminal court should have original jurisdiction in any proceeding....”

1.1 C. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was fifteen, sixteen, or seventeen years of age, unless the juvenile court has waived its jurisdiction over that person.

Commentary

Waiver by the juvenile court of its jurisdiction over certain persons is one mechanism by which persons otherwise subject to the juvenile court can be referred to the criminal court. There are other mechanisms. By “reverse certification,” criminal courts can refer criminal defendants to the juvenile court for handling. The matter also can be settled by excluding from the juvenile court’s jurisdiction persons accused of particular offenses regardless of age. The prosecutor then decides what court will have jurisdiction by deciding what criminal charge to allege.

This volume adopts a waiver approach in which the juvenile court judge, upon motion by the prosecutor, decides whether waiver of juvenile court jurisdiction is appropriate in the particular case.

Standard 1.1 C. prohibits criminal court jurisdiction over any person who was fifteen, sixteen, or seventeen at the time an act allegedly occurred that would constitute an offense on which a juvenile court adjudication could be based unless the juvenile court has waived its jurisdiction over such person.

The standard recognizes that the eighteenth birthday is an arbitrary point at which to draw the line between juveniles and adults. Standard 1.1 C. allows a wide two-year age range in which waiver is possible. At the same time, a fundamental premise of this volume is that the vast majority of juveniles should be handled by the juvenile court. Later standards in this volume establish a rigorous test that must be met before any person otherwise within the juvenile court’s jurisdiction can properly be waived to the criminal court.

The standards recognize that arguments will be made as to why certain individuals are not proper persons to be handled by the juvenile court. Among those arguments will be: the seriousness of the alleged offense; public demands for harsher treatment of juvenile offenders; the age or prior criminal record of the individual; or the demonstrated inefficacy of juvenile court programs. By allowing a liberal age range but a strict test for waiver’s appropriateness, this volume offers the view that the clearly dangerous juvenile should be waived, even if only fifteen, but no one else.

Only New York bars waiver, N.Y. Family Ct. Act § 713 (McKinney 1962) grants “exclusive original jurisdiction” to the state’s juvenile courts. New York law provides no mechanism to relieve the juvenile court of the task of handling persons within the court’s age jurisdiction. This seemingly brave experiment commits the state to attempt to treat as juveniles all those statutorily defined as juveniles.

A lack of flexibility appears to be the major flaw in New York’s Family Court Act. The New York legislature lowered the maximum age for court jurisdiction to fifteen-see N.Y. Family Ct. Act § 712(a) (McKinney Supp. 29A, 1973)-and the sixteen- or seventeen-year-old is therefore never eligible for juvenile court treatment.

Standard 1.1 C. manifests an intention to define juvenile court jurisdiction broadly. The juvenile court can subsequently waive those juveniles for whom juvenile court jurisdiction is found

inappropriate. Without some ability to select, the juvenile court must misallocate its efforts and limited resources on juveniles who appear unlikely to benefit from juvenile court programs. Failure to deal constructively with the most troublesome juveniles might produce legislative pressure, as in New York, to lower the maximum age for juvenile court jurisdiction. Contraction of jurisdiction would force many persons into the criminal courts who might benefit from the special handling of the juvenile court. A flexible case-by-case waiver scheme is far preferable to the New York approach.

Standard 1.1 C. provides that the juvenile court, rather than a criminal court, should be the setting for the waiver decision. The criminal court may assert jurisdiction only after the juvenile court waives. This approach follows the example of the Model Penal Code § 4.10(1) (Proposed Official Draft 1962).

The alternative to juvenile court decision-making power is reverse certification, in which the juvenile first appears before a criminal court. The criminal court judge decides whether to retain jurisdiction or to certify the case to the juvenile court. California had such a system until the California legislature amended Cal. Welf. & Inst'ns Code § 604 in 1971. Only Arkansas and Vermont currently employ reverse certification exclusively. See Ark. Stat. § 45-241 (1964), and Vt. Stat. Ann. tit. 33, § 635(b) (Supp. 9, 1974).

A principal argument against reverse certification is that the juvenile court ought to, and has special competence to, interpret the laws regulating its own jurisdiction. Granting the criminal primary responsibility for the decision invites abuse. The juvenile court judge is more aware of the juvenile court's capacities and limitations, and he or she should make the waiver decision.

Reverse certification is also incompatible with the juvenile court's conceptual underpinnings. The court's very existence is premised on the view that the special characteristics of juveniles require that they receive different judicial treatment than adults. Any waiver mechanism consistent with that view must institutionalize a presumption in favor of juvenile court jurisdiction. Reverse certification institutionalizes the opposite presumption: that juveniles are subject to the criminal court's jurisdiction unless special steps are taken.

Standard 1.1 C. assumes that the criminal court does not hear appeals from the juvenile court. In jurisdictions in which that assumption is unfounded, Standard 1.1 C. should be modified to read "No criminal court should have original jurisdiction in any proceeding...."

STANDARD 1.2 OTHER LIMITS

1.2 A. No juvenile court disposition, however modified, resulting from a single transaction or episode, should exceed [thirty-six] months.

Commentary

Standard 1.2 A. places a maximum [three-year] limit on any juvenile court disposition resulting from a single episode or transaction.

One of the fundamental modern criticisms of the juvenile court has been that it subjects juveniles to longer and harsher interventions in their lives than are experienced by adults accused of the same unlawful acts. Gerald Gault, the principal of *In Re Gault*, 387 U.S. 1 (1967), was found to have violated an Arizona statute prohibiting "vulgar, abusive or obscene language ... in the presence or

hearing of any woman or child..." Ariz. Rev. Stat. Ann. § 13-377 (1956). An adult convicted of that offense could be imprisoned for no more than sixty days. Gerald Gault was committed to the State Industrial School until he reached majority at age twenty-one, unless sooner discharged.

Juvenile courts in Kansas and Rhode Island may retain dispositional jurisdiction over juveniles until the twenty-first birthday, even if the juvenile was only twelve or thirteen when the disposition was ordered. See Kan. Stat. Ann. § 38-806(b) (Supp. 3, 1973) and R.I. Gen. Laws Ann. § 14-1-6 (1956). In forty-six states and the District of Columbia, juvenile courts retain authority over persons previously adjudicated after the maximum age for initial jurisdiction has passed. The court customarily retains jurisdiction to administer its dispositions until the juvenile's twenty-first birthday. See Mont. Rev. Codes Ann. § 10-1206(1) (Supp. vol. 1, pt. 2, 1974) and Okla. Stat. Ann. ch. 10, § 1102 (Supp. 10, 1974).

Hawaii, Massachusetts, South Dakota, Vermont, and West Virginia do not permit retained jurisdiction to administer dispositions beyond the maximum adjudicatory age jurisdiction of the juvenile court. Those states initially deny the court power to adjudicate or to supervise a disposition of any person over seventeen. See Hawaii Rev. Stat. § § 571-11(1), 571-13 (Supp. 7, 1973); Mass. Gen. Laws Ann. ch. 119, § 68 (Supp. 18, 1974); S.D. Compiled Laws Ann. §§ 26-8-1(3), 26-8-48, 26-1-1 (Supp. 9, 1974); Vt. Stat. Ann. tit. 33, §§ 633(a), 632(a)(1), 634, tit. 1, § 173 (Supp. 1, 1974); and W. Va. Code Ann. § § 49-5-2, 49-2-2 (Supp. 14, 1974). Those statutory provisions reflect a view that a person who is not a juvenile for adjudicatory purposes should not be a juvenile for dispositional purposes.

There are circumstances in which the court should have authority over persons beyond the maximum age for initial adjudication. Apprehension may occur shortly before the eighteenth birthday. If dispositional authority beyond the eighteenth birthday is lacking, powerful incentive either to waive juvenile court jurisdiction or not to invoke the juvenile court process at all will result.

Denial of dispositional jurisdiction beyond the court's maximum adjudicatory age limit would result in several anomalies. For instance, a juvenile could allegedly commit a criminal act on his or her seventeenth birthday. If a rigorous test for the propriety of waiver exists in the jurisdiction, as this volume recommends, the juvenile might not be waivable and in one month would be beyond the authority of any court. Similarly, the concept of a statute of limitations such as that suggested in Standard 1.3 is compatible only with extended dispositional jurisdiction. A three-year limitations period in a state having an eighteenth birthday maximum age jurisdiction would actually be the lesser of three years or the period of time remaining before the eighteenth birthday.

Abolition of retained jurisdiction would create pressure to transfer for criminal prosecution any older juvenile accused of serious criminal conduct. Waiver would be attractive because the juvenile court could enforce its disposition only for a short period, while the criminal court would have greater dispositional authority. A fundamental premise of this volume is that the vast majority of persons within the juvenile court's age jurisdiction who are alleged to have committed criminal acts should be handled by the juvenile court. To deny juvenile court handling because there is not sufficient time to provide it is inconsistent with that premise.

When waiver is not possible because the alleged conduct occurred before the juvenile's fifteenth birthday or, as in New York, waiver is simply not authorized, the argument for extending jurisdiction is different. Without retained dispositional jurisdiction there would be a strong inducement to release a juvenile apprehended at seventeen for a crime committed at fourteen. The limited duration of juvenile court jurisdiction could make adjudication and short-term disposition of the juvenile a misallocation of the court's limited resources.

Most states permit retained dispositional jurisdiction. The most common approach allows the juvenile court to impose its disposition until the juvenile reaches a certain age, usually from one to four years beyond the maximum age for adjudication. This is the system that Gerald Gault experienced and subjects younger juveniles to dispositional jurisdiction for very long periods.

A few states, including Connecticut, New York, and Pennsylvania, allow retention of dispositional jurisdiction for a specified period of years following adjudication. Jurisdiction to impose a disposition lasts two years in Connecticut and the juvenile court may renew the jurisdiction for another two-year period. See Conn. Gen. Stat. Ann. § 17-69 (Supp. 10, 1974). New York authorizes dispositional jurisdiction for three years after adjudication. See N.Y. Family Ct. Act § 758 (McKinney Supp. 29A, 1973). Pennsylvania law also authorizes a three-year dispositional period and, as in Connecticut, grants the juvenile court power to renew the period. See Pa. Stat. Ann. tit. 11, § 50-323 (Supp. 11, 1974). However, the court may retain dispositional jurisdiction past the maximum age for adjudication only if the juvenile was apprehended after reaching a specified age: thirteen in New York; twelve in Connecticut and Pennsylvania. This fixed term of years approach is preferable to its more popular alternative. Fixed duration dispositional authority also lessens the disparity between the maximum periods of court control faced by juveniles and adults alleged to have committed certain offenses.

1.2 B. The juvenile court should retain jurisdiction to administer or modify its disposition of any person. The juvenile court should not have jurisdiction to adjudicate subsequent conduct of any person subject to such continuing jurisdiction if at the time the subsequent criminal offense is alleged to have occurred such person was more than seventeen years of age.

Commentary

Standard 1.2 B. bars adjudications based on conduct occurring during the extended period of dispositional jurisdiction of persons not otherwise within the court's age jurisdiction. Standard 1.1 A. implicitly achieves the same result. However, an unequivocal declaration was considered appropriate. Such a provision contradicts statutes like Mich. Comp. Laws Ann. § 712A.22 (Supp. 37, 1974) that permit adjudication of previously adjudicated and disposed seventeen- and eighteen-year-olds even though the maximum age for initial juvenile court jurisdiction is sixteen. Michigan limits such permissible subsequent adjudications to allegations of noncriminal conduct. Thus, section 712A.22 subjects an eighteen-year-old whom the juvenile court has adjudicated and disposed to a further adjudication if the juvenile repeatedly disobeys the commands of his or her parents.

The prohibition on new adjudications should not bar modifications of disposition during the period of extended jurisdiction. Such a bar would unduly restrict the juvenile court's dispositional options. A juvenile's conduct while subject to a juvenile court disposition is material to decisions to modify that disposition. There will be occasions when distinguishing between a proper modification of a disposition and an improper imposition of what is in substance an additional disposition without an additional adjudication will be difficult. The bases for modifying dispositional decisions are discussed in the Dispositions volume. Dispositions Standard 5.4 provides that when a juvenile fails to comply with a dispositional order and a warning is insufficient to induce compliance, the court may modify conditions or impose the next most severe disposition, but may not extend its duration. Thus probation (community supervision) could be revoked and a custodial disposition in a nonsecure residence substituted for the remainder of the dispositional term if a warning or changed conditions of probation would be ineffective.

STANDARD 1.3 LIMITATIONS PERIOD

No juvenile court adjudication or waiver decision should be based on an offense alleged to have occurred more than three years prior to the filing of a petition alleging such offense, unless such offense would not be subject to a statute of limitations if committed by an adult. If the statute of limitations applicable to adult criminal proceedings for such offense is less than three years, such shorter period should apply to juvenile court criminal proceedings.

Commentary

Standard 1.3 establishes a three-year statute of limitations for juvenile court adjudications in most cases. Standard 1.3 rejects the two most common existing limitations approaches in juvenile courts: incorporation of statutes limiting criminal prosecutions, and application of equitable principles of limitation. This standard incorporates adult statutes of limitations only to the extent that they establish limitation periods shorter than three years or provide no limitations period for specified serious criminal offenses.

Standards 1.1 A., 1.2 A., and 1.3 combine to authorize the juvenile court to maintain jurisdiction over a juvenile until age twenty-four. Standard 1.1 A. gives the court jurisdiction over persons under eighteen at the time-of-conduct. Standard 1.3 creates a three-year limitations period for most offenses. The juvenile a day short of age eighteen at the time-of-conduct could be two days short of twenty-one when the petition is filed. Disregarding the time required for adjudication, the three-year maximum disposition authorized by Standard 1.2 A. would permit the court to retain jurisdiction over that individual until almost his or her twenty-fourth birthday.

New Jersey's juvenile courts have been among the leaders in applying criminal statutes of limitations to juvenile court proceedings. In *State in the Interest of B.H.*, 270 A.2d 72 (N.J. 1970), a juvenile and domestic relations court held that the one-year limit on prosecutions under the Disorderly Persons Act restricted the filing of juvenile petitions as well:

The lapse of the statutory period for prosecution is not a procedural defense; it is substantive and jurisdictional.... It would indeed be anomalous to award juveniles an ever-expanding shield of procedural protection, but deny them the right to plead a substantive defense. *Id.* at 74.

Dictum in *State in the Interest of K. V.N.*, 271 A.2d 921 (N.J. 1970), endorses this view, as does Standard 1.3.

Periods of limitation frequently vary by offense. New Jersey employs a one-year limit for disorderly conduct but five years for armed robbery or rape.

A three-year limitations period has the advantages of certainty and predictability. The certainty of the three-year limit is preferable to the frequently arbitrary differences between limitations periods for different offenses.

The view of delinquency summarized in E. Schur's *Radical Nonintervention-Rethinking the Delinquency Problem* (1973) holds that most juveniles will outgrow propensities for antisocial acts if left alone. The 1973 Report of the National Advisory Commission on Criminal Justice Standards and Goals largely supported that view. See *National Advisory Commission on Criminal Justice Standards and Goals, A National Strategy to Reduce Crime* 109 (1973). For those offenses subject to the three-year limit, Standard 1.3 embodies the view that acts that occurred more than three years before the

filing of a petition are not valid indicators of a juvenile's social adjustment, notwithstanding that the adult limitations period exceeds three years.

The juvenile should, however, receive the benefit of any adult limitations period shorter than three years. Being a juvenile should not justify intervention that adults who have engaged in similar criminal conduct do not experience. The argument in support of incorporation by reference of shorter adult limitations periods is similar to that in support of the maximum three-year dispositional jurisdiction of Standard 1.2 A.

Some juvenile courts have applied equitable concepts to limitations problems. The Oklahoma Court of Criminal Appeals in *Sorrels v. Steele*, 506 P.2d 942 (Okla. 1973), voided a delinquency finding, in part for staleness reasons:

It should be apparent that one isolated incident removed in point of time by some thirty-one months is far too remote to have any possible bearing on the current conduct of a fourteen-year-old girl, much less to be considered as part of a basis for adjudicating her a delinquent. *Id.* at 944.

Standard 1.3 permits the flexibility of the equitable limitations approach, and implements the "least intrusive alternative" policy of these standards.

Standard 1.3 omits from the statute of limitations the customary list of circumstances that suspend the limitation period. Flight from the jurisdiction or concealment of criminal conduct will not toll the statute. Such exceptions have no place in a juvenile court statute of limitations. The arguments in support of a three-year limitations period for most juvenile offenses apply equally even if the alleged criminal conduct has been concealed or the juvenile has been outside the jurisdiction.

Standard 1.3 incorporates by reference the provisions of criminal law statutes of limitations that except certain offenses, usually murder, rape, and other serious criminal acts. The seriousness of those particular criminal acts, which gives rise to the criminal court provisions, applies equally in the juvenile court. The juvenile accused of an excepted offense regarding which the general limitations period has run out will not necessarily be subject to waiver. If the alleged conduct occurred before the juvenile's fifteenth birthday, waiver will not be possible in any event. If the alleged conduct occurred while the juvenile was fifteen, sixteen, or seventeen, the general standards for waiver will apply.

Part II: Waiver

STANDARD 2.1 TIME REQUIREMENTS

2.1 A. Within [two] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of age when the alleged offense occurred, the clerk of the juvenile court should give the prosecuting attorney written notice of the possibility of waiver.

Commentary

Standard 2.1 A. requires the clerk of the juvenile court to give prompt written notice to the prosecuting attorney of the filing of petitions against fifteen-, sixteen-, and seventeen-year-olds with class one or class two juvenile offenses. The recommended time requirement has been bracketed to indicate that it is not mandatory, since calendar backlogs, resources, and other circumstances may

vary significantly among jurisdictions. This is consistent with the policy adopted throughout the revised versions of the standards to bracket all such numerical limitations (see Preface).

Standards 2.1 B. through 2.1 E. similarly require prompt consideration and resolution of waiver motions. Delay can have an adverse impact on the juvenile regardless of the outcome of the juvenile court proceeding. If the petition is dismissed, for whatever reason, intervention in the juvenile's life should be as short and unobtrusive as possible. If the petition results in a delinquency adjudication, the juvenile should be spared unnecessary delay in the imposition of a disposition. The disposition should begin promptly. The adverse effects of juvenile court processing should be minimized.

The problems of delay are multiplied during the waiver process. The subject of an unresolved waiver proceeding is in limbo. Neither the juvenile court nor the criminal court can act upon the criminal charges until the waiver motion is decided.

Notice to the prosecuting attorney of the possibility of waiver is necessary only when the petition alleges conduct which would constitute a class one or class two juvenile offense. Standard 2.2 A. prohibits waiver unless the juvenile court finds probable cause to believe that the juvenile committed a class one or class two juvenile offense. The term "class one juvenile offense" is defined in the Juvenile Delinquency and Sanctions volume as those criminal offenses for which the maximum sentence for adults would be death or imprisonment for life or a term in excess of twenty years. A "class two juvenile offense" is one for which an adult could be imprisoned for a term in excess of five but not more than twenty years.

2.1 B. Within [three] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of age when the alleged offense occurred, the prosecuting attorney should give such person written notice, multilingual if appropriate, of the possibility of waiver.

Commentary

Standard 2.1 B. requires the prosecuting attorney to give prompt consideration to the possibility of waiver proceedings against fifteen-, sixteen-, and seventeen-year-olds accused of class one or class two juvenile offenses. For reasons discussed in the commentary following Standard 2.1 C., the prosecuting attorney should have exclusive authority to initiate waiver proceedings.

The notice must be given within [three] court days of the filing of the petition alleging conduct that would constitute a class one or class two juvenile offense. Failure to give timely notice would be a fatal defect to any waiver proceeding.

The prosecuting attorney will be compelled to determine within [three] court days whether waiver is appropriate in each case. If timely notice is not given, the juvenile court can proceed to consider the petition on the merits. If the notice is given, the juvenile will be informed early that he or she may be waived to the criminal court.

Some prosecutorial offices might respond to Standard 2.1 B. by giving notice in every case in which waiver is possible. Although such a procedure would partially frustrate the objectives of the notice requirement, the juvenile would be put on notice of the possibility of waiver in the case. Other prosecutorial offices might comply with the spirit of 2.1 B. and signal their intention not to seek waiver by not giving notice. In those offices which establish a standard notice procedure, Standard 2.1

C., which requires filing of the waiver motion within [seven] court days of the filing of the juvenile court petition, minimizes the uncertainty which the juvenile faces.

Multilingual notices should be given when the language primarily spoken by the juvenile is not English.

2.1 C. Within [seven] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of age when the alleged offense occurred, the prosecuting attorney may request by written motion that the juvenile court waive its jurisdiction over the juvenile. The prosecuting attorney should deliver a signed, acknowledged copy of the waiver motion to the juvenile and counsel for the juvenile within [twenty-four] hours after the filing of such motion in the juvenile court.

Commentary

Standard 2.1 C. gives the prosecuting attorney sole authority to determine which juveniles will not be the subjects of waiver motions. A decision not to seek waiver can be indicated definitively by not filing a waiver motion within [seven] court days of the filing of the juvenile court petition. The prosecuting attorney may initiate, but not decide, waiver proceedings.

Prosecutorial authority to initiate, but not decide, waiver diverges from present practice in most states. See Minn. Stat. Ann. § 260.125(1) (1971) for one of the few exceptions.

Prosecuting attorneys customarily possess authority to waive juvenile jurisdiction in either of two ways. Some juvenile courts have concurrent jurisdiction with the criminal courts. See, e.g., Wyo. Stat. Ann. § 14-115.4(c) (Supp. 5, 1973), and *Fugate v. Ponin*, 91 N.W.2d 240 (Neb. 1958). Prosecuting attorneys in those jurisdictions determine court jurisdiction by deciding whether to file a petition in juvenile court or a complaint in criminal court.

Prosecuting attorneys in some jurisdictions can determine court jurisdiction by alleging certain criminal acts. Some juvenile courts lack jurisdiction over certain crimes. Ten states and the District of Columbia have such provisions. See, e.g., Colo. Rev. Stat. Ann. § 22-1-3(17) (1963), Del. Code Ann. tit. 10, § 957 (1953), Ind. Code § 31-5-7-4(1) (1973), and D.C. Code Ann. § 16-2301(3) (1973). Such laws permit the prosecuting attorney to select a forum by selecting a charge. District of Columbia criminal courts may retain jurisdiction to try the juvenile for a lesser included offense even if the alleged lesser included offense by itself would not have warranted criminal court jurisdiction. Prosecuting attorneys can abuse such a system by charging a juvenile with conduct over which the juvenile court lacks jurisdiction. After juvenile court jurisdiction has been avoided, the charge can be reduced to a crime more susceptible of proof. Such license to charge capriciously grants the prosecutor unfettered discretion to determine court jurisdiction over juveniles.

Mr. Justice Douglas, dissenting from denial of a petition for certiorari in *United States v. Bland*, 412 U.S. 909 (1973), presented a forceful argument against prosecutorial authority to determine juvenile court jurisdiction. Bland, a sixteen-year-old District of Columbia resident, was charged with armed robbery. The District of Columbia juvenile courts lack jurisdiction over armed robbery. The district court upheld Bland's constitutional objections to unreviewable prosecutorial discretion to charge Bland with an offense triable only in the criminal courts. 330 F. Supp. 34 (D.C.D.C. 1970). The court of appeals reversed. 472 F.2d 1329 (D.C. Cir. 1972). Bland's petition for certiorari to the United States Supreme Court was denied.

Justice Douglas argued against prosecutorial discretion to determine court jurisdiction over juveniles:

A juvenile or “child” is placed in a more protected position than an adult.... In that category he is theoretically subject to rehabilitative treatment. Can he, on the whim or caprice of a prosecutor, be put in the class of run-of-the-mill criminal defendants, without any hearing, without any chance to be heard, without an opportunity to rebut the evidence against him, without a chance of showing that he is being given an invidiously different treatment from others in his group? 412 U.S. 909 at 911.

This potential for arbitrary and unequal treatment of juveniles is aggravated by the absence of review of prosecutorial decisions. This is the “barricade behind which the prosecutor operates.” *Id.*

Justice Douglas’ policy argument in *Bland* is persuasive whatever its present constitutional force. The very existence of juvenile courts should evidence a policy decision that juveniles should be subject to juvenile court jurisdiction unless a considered decision is made that criminal court jurisdiction is appropriate in the given case. This volume has adopted a strong presumption in favor of juvenile court jurisdiction. The presumption can properly be overcome only in a trial-type, due process proceeding in which the decision-making process is visible, based on identifiable and credible information and subject to review. The power of the prosecutor to make unreviewable waiver decisions at a low level of visibility invites capricious decisions.

Standard 2.1 C. strikes a balance between unlimited prosecutorial authority to waive juvenile court jurisdiction and no authority at all. Standard 2.1 C. grants the prosecuting attorney discretion to bar waiver; the juvenile court may consider waiver only upon the prosecutor’s motion. The prosecuting attorney, often an elected official, may weigh political considerations in deciding whether to seek waiver and thereby express public outrage at a particularly serious offense. As the official who can properly take public sentiments into account, the prosecutor can partially insulate the juvenile court judge, who cannot properly consider such matters, from public pressure. The juvenile court judge must base the waiver decision on the findings required by Standard 2.2 A., thus providing judicial review of the prosecutor’s actions.

It could be argued that Standard 2.1 C. grants too much authority to the prosecuting attorney; the juvenile court should be able to consider waiver on its own motion and should not be bound by the prosecutor’s decision not to seek waiver. Several state legislatures have accepted this reasoning. Virginia amended its waiver statute in 1973 to replace prosecutorial discretion to waive with a hearing procedure that may be initiated by either the prosecuting attorney or the juvenile court judge. Va. Code Ann. § 16.1-176 (Supp. 4, 1974).

Virginia’s procedure compromises the integrity of the court. The court should assume a passive stance, deciding in an impartial fashion only those questions necessary for resolution of the case before it. Raising issues *sua sponte* is undesirable for it shifts the court from a passive to an active role. The impartiality of the court’s resolution of an issue raised on its own motion is inherently suspect. The court must be concerned with both the fact and the appearance of fairness and impartiality. The court’s behavior will appear less than evenhanded to the juvenile whose treatment as a juvenile is first questioned by the juvenile court judge. Juvenile court judges should rule on waiver but their judicial status should prevent their initiating the subject.

A third approach to deciding jurisdiction over juveniles is to prohibit waiver and thereby deny discretion to both the juvenile court judge and the prosecuting attorney, as in New York. Some objections to that approach are discussed in the commentary following Standard 1.2 C.

2.1 D. The juvenile court should initiate a hearing on waiver within [ten] court days of the filing of the waiver motion or, if the juvenile seeks to suspend this requirement, within a reasonable time thereafter.

Commentary

Standard 2.1 D. requires the juvenile court to begin a waiver hearing within [ten] court days after the waiver motion is filed. Waiver of jurisdiction must be premised on the findings required by Standard 2.2 A. based on evidence presented at an adversary hearing.

The United States Supreme Court approved a similar hearing requirement for the District of Columbia in *Kent v. United States*, 383 U.S. 541 (1966). Kent confessed to involvement in the robbery and rape of a District of Columbia resident. The juvenile court waived jurisdiction over him without a hearing and without published reasons. After extensive but unsuccessful efforts to appeal the waiver decision, Kent was convicted of robbery, but not rape. The judgment was affirmed by the District of Columbia Court of Appeals. 343 F.2d 247 (D.C. Cir. 1964).

The Supreme Court disapproved waiver without a hearing:

[C]onsidering particularly that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, ... and to a statement of reasons for the juvenile court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel. 383 U.S. 541 at 557.

The sentence last quoted has plagued attempts to assess Kent's significance. Is a waiver hearing necessary because of "constitutional principles" or because of the particular District of Columbia statute? Does procedural due process require that a hearing precede resolution?

The importance of the constitutional question should not be over-emphasized. Even if Kent concerned only statutory construction, the arguments for a hearing on the waiver issue would remain strong, given the potential prejudice to the juvenile in denying juvenile court jurisdiction without a hearing and opportunity to object. Disposition by a court of a critically important motion without hearing arguments or receiving evidence lacks fundamental fairness.

An adversary hearing is the best method for judicial resolution of the waiver issue. An overwhelming majority of state legislatures agree. For the minority view see, e.g., Ala. Code tit. 13, § 364 (1959) and Miss. Code Ann. § 43-21-31 (1972). Faced with similar statutory provisions (most of which have now been redrafted), a number of state courts have found waiver hearings to be required constitutionally.

The Supreme Court of Indiana held "in accordance with *Kent*" that the appellant had a right to a full juvenile court hearing prior to waiver. *Summers v. State*, 230 N.E.2d 320, 325 (Ind. 1967). Oregon's highest court found "that the intent of the United States Supreme Court ... is that the due process clause of the Constitution of the United States requires states to accord a hearing before a juvenile can be remanded to the adult criminal process." *Bouge v. Reed*, 459 P.2d 869, 870 (Ore. 1969). See also *In re Harris*, 434 P.2d 615 (Cal. 1967); *Smith v. Commonwealth*, 412 S.W.2d 256 (Ky. 1967); and *Jefferson v. State*, 442 S.W.2d 6 (Mo. 1969).

Some courts have disagreed. The Supreme Court of Appeals of Virginia did so in *Cradle v. Peyton*, 156 S.E.2d 874 (Va. 1967). However, most state courts have emphasized the constitutional foundations of *Kent*. “Although our decision turned upon the language of the statute, we emphasized the necessity that ‘the basic requirements of due process and fairness’ be satisfied in such proceedings.” *In re Gault*, 387 U.S. 1, 12 (1967).

One commentator has remarked that “[a]fter a careful reading of *Kent* and *Gault*, a question as to the constitutional status of the holdings in the former case would seem pure rhetoric.” Schornhorst, “The Waiver of Juvenile Court Jurisdiction: *Kent* Revisited,” 43 *Ind. L.J.* 583, 585 (1968). This opinion is based on the significance of the waiver decision and the consequent need for procedural safeguards, steps in analysis which “bristle with constitutional indicia.” *Id.* at 586.

Standard 2.1 D. conforms to prevailing constitutional opinion regarding waiver hearings. If that view is subsequently rejected as a matter of constitutional law, the policy reasons in support of a hearing requirement remain strong.

2.1 E. The juvenile court should issue a written decision setting forth its findings and the reasons therefor, including a statement of the evidence relied on in reaching the decision, within [ten] court days after conclusion of the waiver hearing.

Commentary

Standard 2.1 E. requires the juvenile court to issue a written decision on the waiver motion setting forth its findings and the reasons therefor within [ten] court days after conclusion of the waiver hearing.

Kent requires not only a hearing but also that the juvenile court state the reasons for its decision. *Kent v. United States*, 383 U.S. 541, 557 (1966). Indiana’s highest court explicitly accorded both of these holdings full constitutional authority in *Summers v. State*, 230 N.E.2d 320 (Ind. 1967).

Kent’s statement of reasons requirement has been adopted in a number of jurisdictions. The state courts, exercising their powers to promulgate rules of court, have been the prime movers. See, e.g., Ohio R. Juv. P. 30(E), Wash. Juv. Ct. R. 6.4, and Fla. Juv. R. 8.100(c).

The importance of written decisions cannot be overstated. Written decisions discourage slipshod decision making in the particular case and in the juvenile process generally. More care may be exercised if the juvenile court judge realizes that decisions can be scrutinized. Statements of findings and reasoning in particular cases may benefit other judges in similar proceedings. Written decisions will narrow the range of questions on which reasonable judges may disagree and focus attention on those questions. Reasoned elaboration of the law will be promoted.

The argument for written decisions would remain strong even if the intellectual rigor of waiver decisions was guaranteed and every reasonably disputable question was removed from the waiver statute. The appearance of accountability created by explained decisions is beneficial to the juvenile court. A decision unsupported by reasons or based on reasons unsupported by evidence appears arbitrary, regardless of its actual character.

2.1 F. No waiver notice should be given, no waiver motion should be accepted for filing, no waiver hearing should be initiated, and no waiver decision should be issued relating to any juvenile court petition after commencement of any adjudicatory hearing relating to any transaction or episode alleged in that petition.

Commentary

Standard 2.1 F. prohibits consideration of waiver after adjudicatory proceedings have begun. Any other approach would be incompatible with *Breed v. Jones*, 421 U.S. 519 (1975), which held that jeopardy attaches for purposes of double jeopardy when the juvenile court, as the trier of fact, begins to hear evidence.

A juvenile court petition was filed against Gary Steven Jones, then seventeen, alleging that he had committed acts which if committed by an adult would constitute robbery. The juvenile court, after taking evidence from two prosecution witnesses and the juvenile, found that the allegations were true. Three weeks later the juvenile court determined that Jones was unsuitable for treatment as a juvenile and waived jurisdiction. Jones was subsequently convicted in criminal court of armed robbery in the first degree.

After a number of unsuccessful appeals from the waiver decision on double jeopardy grounds, Jones persuaded the Circuit Court of Appeals for the Ninth Circuit that the double jeopardy clause of the fifth amendment to the United States Constitution “is fully applicable to juvenile court proceedings.” 497 F.2d 1160, 1165 (9th Cir. 1974). The Supreme Court granted certiorari to resolve the conflict on that question among federal courts of appeals and state supreme courts.

With the exception of *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), which held that jury trials are not required in juvenile court adjudicatory proceedings, the trend of recent Supreme Court decisions on juvenile court issues has been to apply criminal court procedural protections to juvenile court proceedings. *Breed v. Jones* is in line with that policy. On the applicability to juvenile court proceedings of the double jeopardy clause, the Supreme Court concluded:

We believe it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he had committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. *Breed v. Jones*, 421 U.S. at 529.

Breed v. Jones laid to rest any remaining doubts as to the applicability of the double jeopardy clause to juvenile court proceedings. It would appear that the *Gault* decision, when read in conjunction with the Court’s subsequent decision in *Benton v. Maryland*, 395 U.S. 784 (1969), which applied the double jeopardy clause of the fifth amendment to state criminal proceedings, made *Breed v. Jones* inevitable.

Moquin v. State, 140 A.2d 914 (Md. 1958), epitomizes state court opinions concerning double jeopardy claims raised by juveniles before *Gault*, *Benton*, and *Breed v. Jones*:

... [T]he rule of double jeopardy is applicable only when the first prosecution involves a trial before a criminal court or at least a court empowered to impose punishment by way of fine, imprisonment or otherwise as a deterrent to the commission of crime. The question to be decided is whether the hearing before the

Juvenile Court of Montgomery County subjected the defendant to the risk of these penalties. We answer this question in the negative. 140 A.2d at 916.

The Maryland Court of Appeals focused on a rehabilitative rationale for the juvenile court, rather than on the impact of an adjudication on the juvenile:

The juvenile act does not contemplate the punishment of children where they are found to be delinquent. The act contemplates an attempt to correct and rehabilitate.... [W]hile the act recognizes that there will be cases where hospital care or commitment to a juvenile training school or other institution may be necessary, this is all directed to the rehabilitation of the child concerned rather than punishment for any delinquent conduct. Id. at 916-17.

The pre-Breed state legislatures were only slightly more willing to extend protection against double jeopardy to juveniles than were the state courts. New Mexico's provision, N.M. Stat. Ann. § 13-14-25(I) (Supp. 3, 1973), which explicitly bars all other proceedings after an adjudication has begun, is unique. Other states have not been quick to follow New Mexico's lead.

The Supreme Court of California anticipated *Breed v. Jones* by explicitly recognizing the combined effect of *Benton* and *Gault* in *M. v. Superior Court*, 482 P.2d 664 (Cal. 1971). Without dissent that court held that the constitutional guarantee against double jeopardy prohibited multiple threats of judgment in juvenile court proceedings. Id. at 668.

The United States Court of Appeals for the Fifth Circuit, in a decision quoted by the Supreme Court in *Breed v. Jones*, also anticipated *Breed*. In *Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973), Fain, arrested for rape in Florida, was indicted in criminal court after a juvenile court had adjudicated him delinquent on the basis of the alleged rape. Before criminal trial, Fain sought and obtained a writ of habeas corpus in federal court, claiming that the indictment placed him twice in jeopardy. The state appealed.

Judge Morgan, speaking for the majority, rejected the notion that there is no jeopardy in a court seeking to rehabilitate:

Fain's commitment ... resulted from his having been found delinquent. And his being found delinquent resulted from his having violated a criminal law.... Thus a violation of the criminal law many directly result in incarceration. This is a classic example of jeopardy. Id. at 225.

Standard 2.1 F. accepts the reasoning of *Breed v. Jones*. The threat of a juvenile court adjudication constitutes jeopardy. The juvenile court judge should not consider waiver of jurisdiction after an adjudicatory hearing has begun.

STANDARD 2.2 NECESSARY FINDINGS

2.2 A. The juvenile court should waive its jurisdiction only upon finding:

- 1. that probable cause exists to believe that the juvenile has committed the class one or class two juvenile offense alleged in the petition; and**
- 2. that by clear and convincing evidence the juvenile is not a proper person to be handled by the juvenile court.**

Commentary

Standard 2.2 A. establishes a two-part test for waiver of juveniles to the criminal court. The juvenile court must find that probable cause exists to believe that the juvenile committed a class one or class two juvenile offense and, by clear and convincing evidence, that the juvenile is not a proper person for juvenile court handling. The required findings are discussed in the commentary following Standards 2.2 B. and 2.2 C.

2.2 B. A finding of probable cause to believe that a juvenile has committed a class one or class two juvenile offense should be based solely on evidence admissible in an adjudicatory hearing of the juvenile court.

Commentary

Standard 2.2 A. requires a probable cause finding as a necessary precondition of waiver. Probable cause is a condition for waiver in eighteen of the thirty-six jurisdictions which have waiver statutes. See, e.g., Me. Rev. Stat. Ann. tit. 15, § 2611(3) (1964), N.C. Gen. Stat. § 7A-280 (1969), and Tex. Family Code § 54.02(f) (1973). The presumption in favor of juvenile court jurisdiction should be overcome only in extreme cases. A juvenile against whom probable cause cannot be found should not be considered an extreme case. A probable cause finding should be a necessary, but not the sole, condition for waiver.

The juvenile court could assume the prosecutor's factual allegations, leaving open only the question of whether a juvenile is a proper person for juvenile court handling. Such a procedure would lead to wasted effort. Inquiry into whether a juvenile is a proper person for juvenile court handling must be careful and thorough to be meaningful. That inquiry is useless if lack of probable cause will bar any subsequent proceeding, whether criminal or juvenile. Judicial economy is an important objective. Probable cause is likely to be a factor in waiver proceedings in all juvenile court, regardless of the applicable statutory provisions.

Requiring a probable cause finding at the waiver hearing encourages reliable factual allegations by the prosecutor. A prosecutorial tactic for overreaching the juvenile in plea bargaining is to threaten treatment as an adult. That threat can be particularly effective when the prosecutor can inflate the potential criminal charge without jeopardizing the case for waiver. Forcing the juvenile to bargain under such circumstances is unfair.

The juvenile court must find probable cause to believe that the juvenile's alleged conduct constitutes a class one or class two juvenile offense. The term "class one juvenile offense" is defined in the Juvenile Delinquency and Sanctions volume as those criminal offenses for which the maximum sentence for adults would be death or imprisonment for life or a term in excess of twenty years. A "class two juvenile offense" would be punishable for adults by imprisonment for more than five but no more than twenty years. Fourteen of the states which permit waiver bar surrender of jurisdiction

over conduct amounting only to misdemeanor. See, e.g., Fla. Stat. Ann. § 39.02(6)(a) (Supp. 1A, 1973), N.H. Rev. Stat. Ann. § 169:21-a (Supp. 2, 1973), Ohio Rev. Code § 2151.26(A) (Supp. 21, 1973), and Utah Code Ann. § 55-10-86 (1973).

Juveniles should be waived to the criminal court only when serious felonies are alleged. Offenses which the legislature had elected to punish with the severe penalties attached to class one or class two juvenile offenses should include such serious felonies. Allegations of lesser criminal acts should be insufficient to overcome the presumption in favor of juvenile court jurisdiction. The class one or class two juvenile offense requirement limits the prosecutor's ability to inflate a misdemeanor or minor felony into a major felony to support a waiver motion. In such a situation, the court could find probable cause to believe that the juvenile committed the conduct alleged but that such conduct did not constitute a class one or class two juvenile offense. The juvenile court could thereby limit prosecutorial manipulation of its jurisdiction.

The probable cause determination must be based on evidence admissible in juvenile court adjudicatory hearings. Evidence which could not be the basis for an adjudication should not be the basis for waiver. Concern for judicial economy compels that requirement. Probable cause determinations based on evidence not otherwise admissible in juvenile court adjudicatory proceedings (or in the criminal court where evidence standards will be at least as strict) will inevitably result in wasted effort. Standard 2.2 D. permits use of probable cause determinations in waiver proceedings in other juvenile court proceedings. The possibility of multiple use of the waiver probable cause finding necessarily requires that the finding be based on evidence that the juvenile court can otherwise properly consider.

2.2 C. A finding that a juvenile is not a proper person to be handled by the juvenile court must include determinations, by clear and convincing evidence; of:

- 1. the seriousness of the alleged class one or class two juvenile offense;**
- 2. a prior record of adjudicated delinquency involving the infliction or threat of significant bodily injury, if the juvenile is alleged to have committed a class two juvenile offense;**
- 3. the likely inefficacy of the dispositions available to the juvenile court as demonstrated by previous dispositions of the juvenile; and**
- 4. the appropriateness of the services and dispositional alternatives available in the criminal justice system for dealing with the juvenile's problems, and whether they are, in fact, available.**

Expert opinion should be considered in assessing the likely efficacy of the dispositions available to the juvenile court. A finding that a juvenile is not a proper person to be handled by the juvenile court should be based solely on evidence admissible in a disposition hearing of the juvenile court, and should be in writing, as provided in Standard 2.1 E.

Commentary

The juvenile court should waive jurisdiction only over extraordinary juveniles in extraordinary factual circumstances. Standard 2.2 C. defines those circumstances. Waiver is appropriate only when the juvenile is accused of a serious class one or class two juvenile offense, has demonstrated a propensity for violent acts against other persons and, on the basis of personal background, appears unlikely to benefit from any disposition available to the juvenile court. The court's finding that the juvenile is not a proper person to be handled by the juvenile court should be set forth in a written

decision stating the reasons for that conclusion, including the evidence on which it relied, as required in Standard 2.1 E.

Although certain rehabilitative functions are appropriate to the juvenile justice system, existing research suggests a skeptical view of the system's ability to rehabilitate troubled and troublesome juveniles. From the perspective that coercive state intervention in children's lives should be infrequent and limited, the juvenile court has one unarguable advantage; a person subject to the juvenile court is not, unless waived, subject to the harsher penalties of criminal court.

The presumption of Standard 2.2 C., that juveniles should be handled by the juvenile court, accords both with a noninterventionist philosophy and with the conviction that the juvenile court plays a constructive role in the lives of all or some of the juveniles who come within its jurisdiction. The requirements of Standard 2.2 C. must be met before that presumption can be overcome.

Standards 2.2 A. and 2.2 C. speak of juveniles who are not "proper persons to be handled by the juvenile court." A more frequently used concept, premised on a rehabilitative juvenile court rationale, is the juvenile who is not "amenable to treatment." The findings required by Standard 2.2 C. are appropriate regardless of whether or not a rehabilitative view is taken of the juvenile courts.

Twenty-four of the thirty-six jurisdictions that have waiver statutes require a waiver finding that the juvenile is not amenable to treatment. However, nonamenability is not the most widely adopted statutory justification for waiver of juvenile court jurisdiction. Twenty-seven states' statutes establish the "public interest" as a basis for waiver.

Standard 2.2 C. rejects the public interest as a justification for waiver. The presumption in favor of juvenile court jurisdiction requires that the juvenile "deserve" waiver. Waiver must be justified on the basis of the juvenile and his or her actions and personal history. A "public interest" basis for waiver looks to something external to the juvenile. To the extent that the public interest means political considerations, these standards reject such considerations as a proper element in the decision to waive jurisdiction over a specific juvenile. Such factors may be proper considerations for the prosecuting attorney to weigh in deciding whether to seek waiver. They are inappropriate to the waiver decision itself.

Some statutes authorize consideration of general deterrence in waiver proceedings. Montana permits waiver when "the seriousness of the offense and the protection of the community requires treatment of the youth beyond that afforded by juvenile facilities." Mont. Rev. Codes Ann. § 10-2229(d) (Supp. 1 Part 2, 1974). Several states combine considerations of general deterrence with the child's interest. Utah approves waiver when "it would be contrary to the best interests of the child or of the public to retain jurisdiction." Utah Code Ann. § 55-10-86 (1973).

A waiver system premised solely on general deterrence would probably be unconstitutional. The state does not possess authority to use individuals as symbols without regard to individual responsibility. A waiver scheme premised solely on general deterrence would refer some individuals to the criminal court arbitrarily without concern for the facts of specific cases and would probably constitute a denial of due process and equal protection. No state is likely to establish such a scheme, but the arguments against consideration of general deterrence in juvenile court, even as only one element of the waiver decision, are equally applicable. The court's mission is the successful maturation, and in some cases reintegration into the community, of troubled juveniles. Considerations of general deterrence are inappropriate to waiver proceedings.

Some waiver tests are premised on specific deterrence and community security. Some public interest provisions focus on deterrence of the particular individual before the juvenile court. In Connecticut, waiver is possible if “the safety of the community requires that the child continue under restraint for a period extending beyond his majority.” Conn. Gen. Stat. Ann. § 17-60a (Supp. 10, 1974). Ohio allows waiver when “[t]he safety of the community may require that he be placed under legal restraint ... for the period extending beyond his majority.” Ohio Rev. Code Ann. § 2151.26(A)(3)(b) (Supp. 1973) (emphasis added).

Considerations of specific deterrence and community security are implicit in Standard 2.2 C. The “not a proper person” test is designed to identify juveniles who are genuine threats to community safety as evidenced by the seriousness of the present criminal charge, their past violent acts, and their unsuccessful past experience with the juvenile justice system. Standard 2.2 C. will not authorize waiver over all persons as to whom a persuasive specific deterrence argument could be made. That is a cost that Standard 2.2 C. (and the existence of the juvenile court) evidences willingness to accept.

A judgment that treatment as a juvenile is improper is necessarily subjective. Any subjective decision creates an opportunity for abuse. Juvenile court judges might waive jurisdiction while speaking in terms of nonamenability or not a proper person but thinking of the public interest, general deterrence, or some other inappropriate justification. Limited research on waiver suggests this potential for abuse. Surveys in Wisconsin and Ohio show that a desire to consolidate the trials of juvenile and adult co-offenders often leads to waiver. See Note, “Waiver of Jurisdiction in Wisconsin Juvenile Courts,” 1968 Wis. L. Rev. 551, 553 (1968); Note, “Waiver of Jurisdiction in Juvenile Courts,” 30 Ohio St. L. J. 132, 137 (1969). The United States Children’s Bureau’s Survey of Juvenile Courts and Probation Services (1966) corroborates this finding. Administrative convenience is not an acceptable justification for waiver. That juvenile court judges occasionally accept it demonstrates the opportunities for abuse in waiver decisions.

Subsections 1., 2., and 3. of Standard 2.2 C. contain the specific determinations on which a finding that a juvenile is not a proper person for juvenile court handling must be based. Specific required determinations lessen the likelihood that a juvenile will be waived for public interest, general deterrence, or other inappropriate reasons. Subsection 1. requires that the juvenile be charged with a “serious” class one or class two juvenile offense. In most cases, the probable cause finding required by Standard 2.2 B. will also suffice for 2.2 C. 1. Class one and class two juvenile offenses are defined by the maximum sanctions that may be imposed. Most offenses likely to fall within the categories, such as murder, rape, and armed robbery, will be “serious.” Occasionally anomalies will exist. The juvenile court judge should have power to assess the seriousness of the criminal act alleged. If possession of a small quantity of cannabis, or simple theft, is punishable within a jurisdiction by a possible life sentence, the judge should have authority to decide for purposes of waiver that the criminal act alleged is not “serious.”

Subsection C.2. requires that the juvenile have been previously adjudicated on charges of threatening or inflicting serious bodily injury if the juvenile is alleged to have committed a class two juvenile offense. The presumption in favor of juvenile court jurisdiction is strong. Only juveniles who pose genuine threats to community safety should be waived and exposed to the greater sanctions of the criminal court. A prior record of violent acts is evidence of that threat. Prior records of property offenses, minor violent offenses, or alleged but unproven serious violent offenses do not evidence that threat. However, it should be noted that an adjudication involving a serious violent offense by itself does not warrant waiver. As originally drafted, the standards permitted waiver only if the juvenile was alleged to have committed a class one juvenile offense. When revised to include class two offenses, the requirement of a finding of a prior record was eliminated for class one offenses.

The requirements of subsection 2. probably conform to most present practices. Inconclusive but revealing studies of the Metropolitan Nashville Juvenile Court and Houston's juvenile courts suggest as much. In the Nashville sample, every juvenile remanded to criminal court over a seventeen-month period had appeared in juvenile court at least once before; forty-three of forty-nine had previously been committed. See Note, "Problem of Age and Jurisdiction in the Juvenile Court," 19 Vand. L. Rev. 833, 854 (1966). In Houston the juvenile courts considered the waiver of eighteen juveniles over a six-month period. Distributed among those eighteen were twenty-one charges: ten of murder and assault to murder, three of rape, and eight of robbery by firearms. Hays and Solway, "The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults," 9 Houston L. Rev. 709, 710 (1972).

Subsection C. 3. requires the juvenile court judge to consider every available dispositional alternative and the likelihood that the juvenile will not benefit from each. This analysis should include detailed consideration of the juvenile's previous exposure to juvenile justice programs.

In *Hazel v. United States*, 404 F.2d 1275 (D.C. Cir. 1968), a United States Court of Appeals considered the validity of an order, supported by a bare finding of nonamenability, that waived juvenile court jurisdiction. The case was decided on the juvenile court judge's failure to obtain an adequate release by the juvenile of his right to a waiver hearing. The court of appeals nevertheless devoted considerable attention to the sufficiency of the waiver findings. Chief Judge Bazelon wrote:

The Juvenile Court did not indicate what strategy might offer hope to rehabilitate the appellant, nor what facilities would be necessary to pursue such a strategy nor what efforts had been made to explore the availability of such facilities. The unelaborated conclusion that "facilities currently available to the Juvenile Court" offered no promise of rehabilitation thus telescoped together the several distinct stages of this critical inquiry. *Id.* at 1280.

Faced with a suspicious waiver order, the juvenile court was warned not to "abandon its statutory duty to help the young offender." *Id.* at 1282. The court of appeals required that an examination of all dispositional alternatives precede any finding of nonamenability. "[I]t is only after all rehabilitative possibilities have been canvassed that a decision to waive jurisdiction to the District Court is ever proper." *Id.*

The Haziel requirements ensure a thorough, particularized study of the juvenile's situation and discourage cursory consideration of dispositional alternatives. Subsection C. 3. seeks to achieve the same ends. Recurrent examination of dispositional alternatives may focus attention on the juvenile court's facilities and contribute to their improvement. "Perhaps it is only by searching for what we need but do not have that future improvements in knowledge and resources can be hoped for." *Id.* at 1280.

Standard 2.2 C. encourages consideration of expert opinion in assessing the likely efficacy of the dispositions available to the juvenile court.

The court may find that a juvenile is not a proper person for juvenile court handling only on the basis of clear and convincing evidence. This provision is a compromise between the widely used standard of proof of the justification for waiver by a preponderance of the evidence and the beyond-a-reasonable-doubt standard required in juvenile adjudications.

Use of the standard constitutionally required in juvenile court adjudicatory hearings would unduly restrict the juvenile court's power to waive jurisdiction. Determinations that a juvenile is not a "proper person" are exercises in judgment of the sort never entirely free from reasonable doubt. A lesser standard, which nonetheless requires a thorough demonstration of the need for waiver-which a mere preponderance test does not-is appropriate. For this reason, the standard of proof by clear and convincing evidence has been chosen.

The findings required by Standard 2.2 C. must be based on evidence admissible in a juvenile court dispositional hearing. Evidence that cannot properly be considered by the juvenile court at a dispositional hearing following an adjudication is no more credible or worthy of consideration in the context of waiver.

A finding that a juvenile is not a proper person for juvenile court handling must include all four determinations required by Standard 2.2 C. Only extraordinary juveniles in extraordinary circumstances should be waived. If any of the required determinations cannot be made on the basis of clear and convincing evidence, the juvenile should not be waived. Standard 2.2 C. permits but does not require waiver. The juvenile need not be waived even if the juvenile court judge decides that all four determinations have been demonstrated by clear and convincing evidence.

2.2 D. A finding of probable cause to believe that a juvenile has committed a class one or class two juvenile offense may be substituted for a probable cause determination relating to that offense (or a lesser included offense) required in any subsequent juvenile court proceeding. Such a finding should not be substituted for any finding of probable cause required in any subsequent criminal proceeding.

Commentary

Standard 2.2 D. bars substitution of the waiver hearing's finding of probable cause for any similar finding required in any subsequent criminal proceeding. The bar does not apply to subsequent juvenile court proceedings.

Many jurisdictions have limited provisions for discovery in criminal proceedings. In the words of Judge Weinstein, a preliminary hearing constitutes "the most valuable discovery technique available" to the criminal defendant. *United States ex rel. Wheeler v. Flood*, 269 F. Supp. 194, 198 (E.D.N.Y. 1967). Depriving the person waived from juvenile court jurisdiction of this opportunity to learn the nature of the evidence gathered is unfair and possibly unconstitutional. The juvenile will often have stipulated the existence of probable cause at the waiver hearing and focused on the issue of being a proper person for juvenile court handling.

The juvenile court situation is different. Principles of economy favor consolidation of judicial function. The court, the juvenile, the prosecuting attorney, and the issues are the same in probable cause determinations in the context of waiver and in other juvenile court contexts. Neither the juvenile court nor the juvenile should be required to go through the same motions a second time. *Breed v. Jones*, 421 U.S. 519 (1975), does not require otherwise.

STANDARD 2.3 THE HEARING

2.3 A. The juvenile should be represented by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this requirement at least [five] court days before commencement of the waiver hearing.

Commentary

Standard 2.3 A. requires that the juvenile be represented by counsel. Written notice of the requirement, multilingual if appropriate, must be given to the juvenile at least [five] court days before the waiver hearing begins.

Kent v. United States, 383 U.S. 541 (1966), acknowledges the constitutional significance of the right to counsel in waiver proceedings: “The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.” *Id.* at 561. This right has been widely acknowledged. See, e.g., *Alaska R. Juv. P. 3(c) and 15(a)*; *Steinhauser v. State*, 206 S.2d 25 (Fla. 1967); and *N.D. Cent. Code § 27-20-26* (1974).

This standard rejects, for the juvenile court, the Supreme Court’s decision in *Faretta v. California*, 422 U.S. 806 (1975). *Faretta* affirms the constitutional right of an adult criminal defendant to represent him- or herself without benefit of counsel.

Some, perhaps all, juveniles may be legally incapable of a knowing and intelligent waiver of the right to counsel. The thirteen-year-old is unlikely to have sufficient maturity and perspective. The seventeen-year-old may. Any method of determining which juveniles are capable of an intelligent and knowing waiver of the right to counsel will inevitably err on occasion. Rather than accept the inevitable error, Standard 2.3 A. imposes counsel on the hypothetical juvenile who rejects the right to counsel.

A fundamental premise of this volume is that juveniles are different from adults in material respects. Being a juvenile should seldom justify reduced procedural protections. That state does justify the imposition of a protection which should in most cases benefit the juvenile.

2.3 B. The juvenile court should appoint counsel to represent any juvenile unable to afford representation by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this right at least [five] court days before commencement of the waiver hearing.

Commentary

Standard 2.3 B. requires appointment of counsel to represent juveniles unable to afford representation at the waiver hearing.

Since *In re Gault*, 387 U.S. 1 (1967), juveniles unarguably have a constitutional right to counsel, including appointed counsel when necessary, in any juvenile court adjudicatory hearing.

A similar constitutional right to counsel must exist for waiver hearings. An adverse decision results in denial of juvenile court handling and its limited sanctions, and in prosecution, conviction, and punishment as an adult. The need for procedural protection in waiver proceedings was recognized before *Kent v. United States*, 383 U.S. 541 (1966), and the *Gault* opinions were issued. In *Black*

v. United States, the United States Court of Appeals for the District of Columbia observed that the need for the assistance of counsel, while substantial in delinquency hearings, “is even greater in the adjudication of waiver since it contemplates the imposition of criminal sanctions.” 355 F.2d 104, 106 (D.C. Cir. 1965). Also see *Kempen v. Maryland*, 428 F.2d 169, 173-75 (4th Cir. 1970).

The propriety of notification of the right to counsel is indisputable. *Gault* requires such notice in juvenile adjudications, 387 U.S. at 41, and *Kempen* explicitly extended the requirements to waiver hearings. 428 F.2d at 175.

2.3 C. The juvenile court should pay the reasonable fees and expenses of an expert witness for the juvenile if the juvenile desires, but is unable to afford, the services of such an expert witness at the waiver hearing, unless the presiding officer determines that the expert witness is not necessary.

Commentary

Standard 2.3 C. requires the juvenile court to pay the reasonable costs and expenses of an expert witness for the juvenile in cases of indigency, unless the court exercises its discretion to rule that no need appears for such testimony.

Standard 2.2 C. 3. requires the waiver judge to consider the likely efficacy of available juvenile court dispositions in deciding whether a juvenile is a proper person for juvenile court handling. Standard 2.2 C. also requires the juvenile court judge to consider expert opinion in considering the 2.2 C. 3. finding. The juvenile should receive benefit of the testimony of experts chosen by the defense, even when the juvenile cannot afford the expert’s fees and expenses.

Wealth should not determine the quality of a juvenile’s opposition to waiver. Justice Black eloquently affirmed the necessity of “providing equal justice for poor and rich ... alike” in the majority opinion in *Griffin v. Illinois*, 351 U.S. 12 (1956). *Griffin* involved indigent criminal defendant who were denied free transcripts for use in appellate proceedings:

Surely no one could contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color. *Id.* at 16-17.

In *Jacobs v. United States*, 320 F.2d 571 (4th Cir. 1965), citing *Griffin*, the fourth circuit extended this guarantee to include court appointment of a psychiatrist to testify on defendant’s competency to stand trial. In 1969 the seventh circuit extended *Griffin* to juvenile adjudications. *Reed v. Duter*, 416 F.2d 744 (7th Cir. 1969). Given *Jacobs* and *Reed*, the requirement that the state pay the costs of an expert witness in waiver proceedings is consistent with current constitutional precepts.

2.3 D. The juvenile should have access to all evidence available to the juvenile court which could be used either to support or contest the waiver motion.

Commentary

Standard 2.3 D. grants the juvenile access to all evidence available to the juvenile court that could be used to support or contest the waiver motion.

Justice Fortas in *Kent v. United States*, 383 U.S. 541 (1966), asserted a District of Columbia juvenile's right to access through his attorney to all information in the hands of the juvenile court:

With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the juvenile court in making its decision to waive, they must be made available to the child's counsel. 383 U.S. at 562.

An eminent scholar soon responded, criticizing this holding as a "shortcoming." Paulsen, "Kent v. United States: The Constitutional Context of Juvenile Cases," 1966 Sup. Ct. Rev. 167, 179-81. Paulsen argued that the Supreme Court underestimated the importance of juvenile court confidentiality, fearing that full disclosure of social records would "touch off an uproar among social workers." He noted:

There is a footnote referring to the fact that Kent's lawyer had, in fact, seen the confidential material at a stage in the proceedings after the waiver decision. In that footnote, Mr. Justice Fortas quipped: "Perhaps the point of it is that it again illustrates the maxim that while nondisclosure may contribute to the comfort of the staff, disclosure does not cause the heavens to fall." To which many experienced probation officers would respond: "Not right away perhaps." *Id.* at 179-80.

Paulsen feared that the disclosure requirement would dry up one of the juvenile court's principal sources of information:

To get information, especially of an intimate sort, the social investigator must be able to give firm assurances of confidentiality; if people generally learn that supplying information will bring them to court or plunge them into a neighborhood feud, they will no longer share their knowledge and impressions; information destructive of the youngster's chances at rehabilitation may leak back to him. *Id.* at 180.

The decade since *Kent* has seen no revolt by juvenile court personnel in the District of Columbia or nationwide. Social workers have adjusted well to Kent's imposition on the confidentiality of their reports. Paulsen underestimated the ability of juvenile court personnel to adjust to full disclosure in the waiver setting. That demonstrated ability is a persuasive argument for Kent's disclosure requirements.

2.3 E. The prosecuting attorney should bear the burden of proving that probable cause exists to believe that the juvenile has committed a class one or class two juvenile offense and that the juvenile is not a proper person to be handled by the juvenile court.

2.3 F. The juvenile may contest the waiver motion by challenging, or producing evidence tending to challenge, the evidence of the prosecuting attorney.

2.3 G. The juvenile may examine any person who prepared any report concerning the juvenile which is presented at the waiver hearing.

2.3 H. All evidence presented at the waiver hearing should be under oath and subject to cross-examination.

Commentary

Standard 2.3 E. through H. establishes requirements for the conduct of the waiver hearing. The waiver hearing will determine whether a juvenile is denied juvenile court handling or is exposed to the practices and punishments of the criminal court. A decision of that magnitude should be considered on the basis of a fully adversary hearing in which the state must establish the propriety of the result that it urges. The prosecutor should bear the burden of proof and the risk of nonpersuasion. The juvenile should be able to contest prosecution evidence; cross-examine prosecution witnesses, including persons who prepare reports which the prosecution introduces in support of waiver; and present original evidence in opposition to waiver. On the right to compulsory process, see Dispositional Procedures Standard 6.2, Juvenile Records and Information Systems Standard 5.7 B., and Pretrial Court Proceedings Standard 1.5 F.

2.3 I. The juvenile may remain silent at the waiver hearing. No admission by the juvenile during the waiver hearing should be admissible to establish guilt or to impeach testimony in any subsequent proceeding, except a perjury proceeding.

Commentary

Standard 2.3 I. establishes a right to silence in waiver hearings. The juvenile's right to silence at the waiver hearing should be axiomatic. The Supreme Court recognized this right in juvenile adjudications in *In re Gault*, 387 U.S. 1 (1967), and in criminal prosecutions in *Malloy v. Hogan*, 378 U.S. 1 (1964). The protection against self-incrimination available in the juvenile and criminal courts should apply to the hearing which serves as the bridge between them.

Standard 2.3 I. also gives the juvenile power to bar the introduction in any subsequent criminal trial or other proceeding, except for perjury, of admissions made during the waiver hearing.

Twenty states offer similar evidentiary protection to juveniles opposing waiver. These statutes fall into three general categories. Some, like Va. Code Ann. § 16.1-176(b) (Supp. 4, 1974) and Wyo. Stat. Ann. § 14-115.38 (Supp. 5, 1973), appear as part of the statute authorizing waiver and apply solely to that process. Others, like Ala. Code tit. 13, § 377 (1959) and Ore. Rev. Stat. § 419.567(3) (1974), apply to all juvenile court proceedings, including waiver hearings. Still others seem to pertain to waiver, but ambiguous drafting (resulting, perhaps, from a preoccupation with admissions at other juvenile court hearings) clouds the issue. See, e.g., Mass. Ann. Laws ch. 119, § 60 (Supp. 18, 1974) and Mich. Comp. Laws Ann. § 712A.23 (1969). A statute specifically applicable to admission at the waiver hearing is preferable.

Such statutes encourage candor at the waiver hearing. A better-informed waiver decision should result. The juvenile need not fear that an admission of misconduct-contrition evidencing that the juvenile is a proper person for juvenile court handling-will lead to a criminal conviction if the juvenile court elects to waive jurisdiction.

Justice Harlan offered similar reasoning in an analogous situation in *Simmons v. United States*, 390 U.S. 377 (1968). One co-defendant admitted ownership of a suitcase in order to establish standing to suppress evidence found in the suitcase; at trial this admission was used against him. The defendant claimed that such use had a chilling effect on his right to challenge the introduction of evidence unconstitutionally seized.

The Supreme Court agreed:

[T]here will be a deterrent effect in those ... cases in which it cannot be estimated with confidence whether the motion will succeed. Since search-and-seizure claims depend heavily upon their individual facts, and since the law of search and seizure is in a state of flux, the incidence of such marginal cases cannot be said to be negligible. *Id.* at 393.

The *Simmons* opinion observes that, in marginal suppression cases “a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government’s proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.” *Id.* at 393. Most waiver cases are marginal. The juvenile with an argument against waiver based in part on inferences from an admission of misconduct might accept a criminal trial after token opposition to waiver rather than risk use of such an admission at a criminal trial. Standard 2.3 E. avoids this dilemma for the juvenile. Use of admissions during the waiver process in subsequent criminal proceedings is prohibited.

The 2.3 I. restriction does not apply to subsequent juvenile proceedings. Similarly, Standard 2.2 D. permits subsequent use in the juvenile court of the waiver hearing’s probable cause determination.

The primary reason for permitting later juvenile court use of admissions at the waiver hearing is judicial economy. Otherwise, a juvenile could admit (or the court could find probable cause to believe) occurrence of a class one juvenile offense but assert innocence at a juvenile court probable cause or adjudicatory hearing. The court, the juvenile, the prosecutor, and defense counsel would have to consider probable cause de novo or try a question that all believe has previously been resolved.

Standard 2.3 I.’s evidentiary bar is broad. Admissions made during the waiver hearing may not be used either to establish guilt or to impeach testimony.

Standard 2.3 I. rejects the distinction in *Harris v. New York*, 401 U.S. 222 (1971), between inadmissible use of the defendant’s statements to establish guilt (because obtained without proper *Miranda* warnings) and admissible use to attack the credibility of the defendant’s testimony in his or her own behalf.

2.3 J. The juvenile may disqualify the presiding officer at the waiver hearing from presiding at any subsequent criminal trial or juvenile court adjudicatory hearing relating to any transaction or episode alleged in the petition initiating juvenile court proceedings.

Commentary

Standard 2.3 J. permits the juvenile to disqualify the judge who presided at the waiver hearing from presiding at a subsequent juvenile court adjudication or criminal trial.

The waiver judge hears evidence that would be inadmissible in an adjudicatory hearing or a trial. The likelihood that the juvenile will perceive impropriety is great. Standard 2.3 J. permits any juvenile who senses such a disadvantage to demand a different judge at the adjudicatory proceeding.

Similar provisions appear at § 31 (i) of the “Legislative Guide for Drafting Family and Juvenile Court Acts” prepared by the United States Children’s Bureau and at § 34(E) of the Uniform Juvenile Court Act. The notes of the National Conference of Commissioners on Uniform Laws appended to subsection (E) offer this rationale:

On a hearing to transfer, the judge of necessity must hear and consider matters relating adversely to the child which would be inadmissible in a hearing on the merits of the petition. Hence, the need for avoiding their prejudicial effect by requiring over objection that another judge hear the charges made in the petition or in the criminal court if the case is transferred.

The commissioners emphasize the danger of actual prejudice to the juvenile. This danger is less persuasive an argument for disqualification than is the certainty of apparent prejudice. No matter how fair the waiver judge may be in subsequent proceedings, an impression of unfairness will exist.

STANDARD 2.4 APPEAL

2.4 A. The juvenile or the prosecuting attorney may file an appeal of the waiver decision with the court authorized to hear appeals from final judgments of the juvenile court within [seven] court days of the decision of the juvenile court.

Commentary

The right to appeal provided by Standard 2.4 A. must be exercised within [seven] court days after the waiver decision. The alternative-review only after entry of a final order in either criminal or juvenile court-appears to be the majority rule. Few statutes address the issue. State courts have disagreed sharply. Appeals and Collateral Review Standard 2.2 C. 2. e. expressly authorizes appeal of the waiver decision.

The leading exponent of the majority rule is *People v. Jiles*, 251 N.E.2d 529 (Ill. 1969). The Supreme Court of Illinois refused a petition for immediate review of waiver, citing standard arguments against interlocutory appeals:

To permit interlocutory review of such an order would obviously delay the prosecution of any proceeding in either the juvenile or the criminal division, with the result that the prospect of a just disposition would be jeopardized. In either proceeding the primary issue is the ascertainment of the innocence or guilt of the person charged. To permit interlocutory review would subordinate that primary issue and defer its consideration....*Id.* at 531.

Similar decisions include *Brekke v. People*, 233 Cal.App. 2d 196, 43 Cal. Rptr. 553 (1965), and *In re T.J.H.*, 479 S.W.2d 433 (Mo. 1972).

The supreme courts of Oregon, Tennessee, and Hawaii have approved interlocutory appeal from waiver decisions. *State v. Little*, 407 P.2d 627(Ore. 1965); *In re Houston*, 428 S.W.2d 303 (Tenn. 1968); and *In re Doe I*, 444 P.2d 459 (Hawaii 1968).

The principal advantage of immediate appeal is avoidance of the reconstructed waiver hearing, the proceeding necessary when an appellate court finds a defect in the original waiver hearing after the person waived is, because of the time consumed by the criminal trial, beyond the age jurisdiction of the juvenile court. The appellate court which upholds a waiver appeal must either free the improperly waived individual—because neither juvenile nor criminal court has jurisdiction—or reconstruct the waiver process to determine if a hearing free from error would have resulted in waiver. The reconstructed hearing must attempt to imagine the juvenile as he or she was at the time of the original hearing.

The experience of Morris Kent illustrates the problems that arise when interlocutory appeal from waiver decision is not possible. Kent was apprehended at age sixteen on September 5, 1961. Waived to criminal court seven days later, he sought immediate appellate review. He appealed to the municipal court of appeals, then the highest local court in the District of Columbia. He sought a writ of habeas corpus in United States District Court. The district court dismissed the application for the writ on September 19, 1961, and rejected the appeal on April 13, 1962. In *re Kent*, 179 A.2d 727 (1962). On January 22, 1963, the court of appeals for the District of Columbia held that a motion to dismiss Kent's criminal indictment was the proper vehicle for challenging the waiver decision and that denial of such a motion was reviewable only after conviction. *Kent v. Reid*, 316 F.2d 331 (D.C. Cir. 1963). Morris Kent was still within the age jurisdiction of the juvenile court.

The district court denied Kent's motion to dismiss the indictment on February 8, 1963. Kent was convicted of robbery. He appealed to the court of appeals, which finally heard his attack on the juvenile court's waiver of jurisdiction on December 17, 1963—twenty-seven months after the fact.

That court affirmed Kent's conviction in 1964 and denied rehearing en banc in early 1965. *Kent v. United States*, 343 F.2d 247 (D.C. Cir. 1965). The Supreme Court granted certiorari in 1965. The landmark decision was issued on March 21, 1966. Justice Fortas recognized the difficulty of providing appropriate relief to Kent, by then over twenty-one:

In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In the circumstances of this case ..., we do not consider it appropriate to grant this drastic relief. Accordingly, we vacate the order of the Court of Appeals and the judgment of the District Court and remand the case to the District Court for a hearing de novo on waiver, consistent with this opinion. 383 U.S. 541, 564-65 (1966).

The Supreme Court thereby sanctioned the reconstructed waiver hearing.

The case reports do not indicate the precise date on which the district court attempted to transform itself into a juvenile court sitting in September 1961. The reconstructed hearing probably occurred in the latter half of 1966. Removed almost five years from his previous circumstances, Kent agreed that juvenile treatment would have been inappropriate in 1961 but argued that civil commitment, not waiver into criminal court, would have been the best disposition.

The district court in 1967 rejected this contention, finding waiver reasonable in the circumstances. The court of appeals reversed the lower court on July 30, 1968. *Kent v. United States*, 401 F.2d 408 (D.C. Cir. 1968). Kent thus first obtained substantive appellate review of a procedurally adequate waiver decision more than eighty-two months after the juvenile court had waived its jurisdiction.

The delay caused by deferring appeal of waiver aggravates the impossibility at any reconstructed hearing of ignoring present conditions. Reconstructed waiver hearings ask judges to do what may be impossible and what certainly is unwise.

Congress alleviated the need for such hearings by establishing for the District of Columbia a right of immediate appeal of waiver decisions. Had a provision analogous to D.C. Code Ann. § 16-2327 (1973) been in force at the time, the court in *Kent v. Reid* could have ruled on the sufficiency of Kent's waiver. Had the appeals court found a defect, the juvenile court could have asserted jurisdiction and redetermined waiver. There would have been no reconstructed waiver hearing. Standard 2.4 A. attempts to avoid the *Kent* problem and assure a similar result in all jurisdictions.

Standard 2.4 A. also provides that the court that normally reviews final judgments of the juvenile court should hear appeals regarding waiver of juvenile court jurisdiction. A few states involve the criminal courts in the appellate process, thereby tempting those judges covetous of juvenile court jurisdiction. Such temptation should be avoided.

Waiver of juvenile court jurisdiction in Alaska is first reviewable in the criminal court that will try the juvenile's case. Alaska R. Juv. P. 3(h). In Virginia the prosecutor can appeal a decision not to waive to the court that would have tried the case if the juvenile judge had waived jurisdiction. Va. Code Ann. § 16.1-176(e) (Supp. 4, 1974). Either of these provisions requires the criminal court to determine whether its treatment of the juvenile will be preferable to that of the juvenile court. The natural tendency of the criminal court judge is to suppose that criminal court can do the better job.

A more evenhanded view of the jurisdictional claims of criminal and juvenile courts should apply if the court that hears other juvenile court appeals reviews the waiver decision. Such courts of appeal usually review criminal convictions as well as juvenile adjudications. Their deliberations should be relatively unbiased. As appellate courts they are experienced in statutory interpretation and constitutional adjudication.

2.4 B. The appellate court should render its decision expeditiously, according the findings of the juvenile court the same weight given the findings of the highest court of general trial jurisdiction.

Commentary

Standard 2.4 B. requires the appellate court to apply the standard of review customarily applied to the decisions of other courts of original jurisdiction. This provision assures that waiver appeals will be treated no differently from other cases on the appellate court's docket. The probable cause and impropriety determinations of the juvenile court are neither particularly vulnerable nor particularly invulnerable to appellate review.

2.4 C. No criminal court should have jurisdiction in any proceeding relating to any transaction or episode alleged in the juvenile court petition as to which a waiver motion was made, against any person over whom the juvenile court has waived jurisdiction, until the time for filing an appeal from that determination has passed or, if such an appeal has been filed, until the final decision of the appellate court has been issued.

Commentary

Standard 2.4 C. seeks to protect the juvenile from multiple threats of judgment. Appeal of the waiver decision suspends further criminal or juvenile proceedings. Thus there can be no possibility that the appellate court might overturn waiver of juvenile court jurisdiction after criminal jeopardy has attached. D.C. Code Ann. § 16-2327 (1973) has a similar provision.

C

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

Supreme Court of Florida.
In re **AMENDMENT TO FLORIDA RULE
OF JUVENILE PROCEDURE 8. 165(a).**
No. SC07-1162.

May 1, 2008.

Robert W. Mason, Chair, **Juvenile** Court **Rules** Committee, Public Defender's Office, Fourth Judicial Circuit, Jacksonville, FL; John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, FL, for Petitioner.

Carlos J. Martinez, Vice President, Florida Public Defender Association, Miami, FL, Responding with comments.

PER CURIAM.

This matter is before the Court for consideration of proposed **amendments** to the Florida **Rules** of **Juvenile** Procedure. We have jurisdiction. *See* [art. V, § 2\(a\), Fla. Const.](#)

In 2004, the **Juvenile** Court **Rules** Committee (Committee) filed its regular-cycle report proposing **amendments** to the Florida **Rules** of **Juvenile** Procedure. Among the proposed **amendments** were several **amendments** to **rule 8. 165**, Providing Counsel to Parties, applicable in **juvenile** delinquency proceedings. Specifically, the Committee proposed amending subdivision (a), Duty of the Court,

to require that a child be given a meaningful opportunity to confer with counsel before waiving his or her right to counsel and that all such waivers be in writing. The Committee also proposed new subdivision (b)(3) requiring that when a child enters a plea or is being tried for a delinquent act, the written waiver of counsel be submitted "in the presence of a parent, legal custodian, responsible adult relative, or attorney assigned by the court to assist the child, who shall verify on the written waiver that the child's decision to waive counsel has been discussed with the child and appears to be knowing and voluntary." *See* [Fla. R. Juv. P. 8.165\(b\)\(3\)](#). These proposals were unanimously recommended to the Committee by The Florida Bar's Commission on the Legal Needs of Children (Commission), an interdisciplinary statewide commission whose mission is to study the legal needs of children in Florida and recommend ways to help children appearing in Florida courts. The Commission's 2002 report addressed the legal needs of children according to five priority areas: (1) representation; (2) treatment and services; (3) confidentiality; (4) education and the role of The Florida Bar; and (5) technology and the court. With regard to representation, the Commission adopted the Representation Subcommittee's Report, which made a number of recommendations to improve the representation of children in Florida courts. The Commission noted that a disturbing number of children waive their right to counsel in delinquency proceedings*464 and drafted the proposed amendments to [rule 8.165\(a\)](#) to provide standards to be used be-

fore a child in delinquency proceedings may waive his or her right to counsel. *Final Report of The Florida Bar Commission on the Legal Needs of Children* 5, 12-13, appendix A (2002).^{FN1} Additionally, both the Steering Committee on Families and Children in the Court (Steering Committee) and the Florida Public Defender Association (FPDA) supported the proposals. After considering the Committee's report and hearing oral argument, the Court adopted the **amendment** to [rule 8.165\(a\)](#) requiring all waivers of counsel to be in writing, as well as new subdivision (b)(3). However, the Court ultimately deferred consideration of the proposed **amendment** requiring prewaiver consultation with an attorney, stating:

[FN1](#). The proposals submitted to the Court by the **Juvenile Court Rules** Committee were almost identical to the proposed **amendments** drafted by the Commission.

Although we believe that consultation with an attorney prior to waiving counsel is an important additional safeguard designed to protect a **juvenile's** constitutional right to counsel, we are also mindful of the potential financial impact of this requirement. We note that one of the recommendations of the representation subcommittee that was adopted by the full Commission on the Legal Needs of Children was to encourage efforts seeking legislative changes that would "create" a right to a prewaiver consultation and authorize the public defender to provide the required consultation. In fact, in its June 2002 Final Report, the Commission specifically recommended:

5. Florida law should specifically create a right for children to consult counsel, short of outright appointment for the duration of the case, in the following instances:

a. Regarding waiver of counsel or other right or legal interest in a delinquency proceeding, prior to the appointment of the Public Defender by a judge, or at any time thereafter where waiver is sought;

....

6. Florida law should specifically authorize the Public Defender to provide the consultation services outlined in # 5 above. This recommendation would necessitate the legislature appropriating additional funds for the Public Defender to adequately provide consultation services.

These two recommended changes in the law could be made by amending [sections 985.203\(1\)](#) and [27.51, Florida Statutes](#) (2004).

Because of the potential financial impact of the amendment to [rule 8.165\(a\)](#) regarding consultation with attorneys and our desire to work cooperatively with the Legislature, we urge the Legislature to consider the Commission's recommendations. We also strongly urge that the voluntary practice that exists in many jurisdictions in which consultation with an attorney takes place be continued and, where possible, expanded in the interim.

We thus decline to adopt at this time the portion of [rule 8.165\(a\)](#) regarding consul-

tation with an attorney prior to a waiver. We emphasize that we are not rejecting this proposed amendment to [rule 8.165\(a\)](#), but are merely deferring its consideration. We intend to readdress the adoption of the amendment to [rule 8.165\(a\)](#) at a future time following the conclusion of the legislative session. We further take this opportunity to reinforce that it is critical for delinquency judges to ensure that any waiver of counsel by a child is knowingly and voluntarily*465 given, especially prior to accepting a plea of guilty or nolo contendere.

[Amendments to Fla. Rules of Juv. Pro., 894 So.2d 875, 880-81 \(Fla.2005\).](#)

Subsequently, given the Court's concerns regarding the potential financial impact on the public defenders of requiring a prewaiver consultation with counsel, the Court directed the Committee to seek input from the FPDA concerning this issue. Further, in 2005, the National Juvenile Defender Center (NJDC) conducted an assessment of children's access to counsel in delinquency proceedings in Florida and issued a report. This report made some sobering observations. The NJDC reported that (1) even very young children in Florida's courts routinely waive counsel, sometimes with subtle encouragement from judges; (2) that this is done without counsel being present or any meaningful discussion of the potential long term disadvantages; (3) that the rule requiring a written waiver is generally followed, but seems to be regarded as a substitute for a meaningful inquiry into the child's understanding; (4) that the rule requiring consultation with an adult about the waiver decision is "routinely flouted," and (5) that consultation with a parent may also

be an inadequate safeguard, given the other subtle disincentives for exercising the right to counsel, such as indigence and application fees, surcharges, complex application forms, and inadequate oversight of indigence determinations by judges. Patricia Puritz & Cathryn Crawford, National Juvenile Defender Center, *Florida: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 3 (2006), available at <http://www.njdc.info/pdf/Florida%20Assessment.pdf>. The NJDC's report also made the following specific recommendation:

Further restrictions on waiver of counsel must be established consistent with national standards. Youth should not be permitted to waive counsel without prior consultation with such counsel. Counsel should assist the client in making an informed, knowing and voluntary choice and stand-by counsel should be available in the event of waiver. It is imperative that youth understand the long-term consequences of a juvenile adjudication.

Id. at 4.

Accordingly, on June 22, 2007, the Committee resubmitted the proposed amendment to [rule 8.165\(a\)](#) to the Court. The Committee's report states that the FPDA continues to support the proposed amendment and believes there would be only minimal fiscal impact as a result of public defenders providing a prewaiver consultation in juvenile dependency proceedings. Additionally, the Committee notes that several bills in accordance with the Commission's recommendations were introduced in subsequent legisla-

tive sessions,^{FN2} and although these bills ultimately failed to pass, the staff analyses for several of them, relying upon representations of the FPDA, noted minimal fiscal impact.^{FN3} The *466 proposed rule amendment at issue passed the Committee by a vote of fourteen to five, and was approved by the Executive Committee of The Florida Bar Board of Governors by a unanimous vote of ten to zero.

[FN2.](#) See Fla. SB 88 (2007) (died in Juvenile Justice Committee); Fla. HB 53 (2007) (withdrawn prior to introduction); Fla. HB 7 (2007) (died in Juvenile Justice Committee); Fla. SB 526 (2006) (passed by Senate but died in House Judiciary Committee); Fla. CS for SB 1218 (2005) (died in Senate Judiciary Committee).

[FN3.](#) See Fla. S. Comm. on Judiciary, SB 88 (2007) Staff Analysis 3-4 (Mar. 7, 2007) (on file with comm.); Fla. S. Comm. on Crim. Just., SB 88 (2007) Staff Analysis 3-4 (Feb. 1, 2007) (on file with comm.); Fla. S. Comm. on Crim. Just., SB 526 (2006) Staff Analysis 2-3 (Jan. 6, 2006) (on file with comm.); Fla. S. Comm. on Crim. Just., CS for SB 1218 (2005) Staff Analysis 2-3 (Apr. 7, 2005) (on file with comm.). Of course, as acknowledged in these staff analyses, the potential fiscal impact that cannot be determined is that which may occur if more children decide not to waive their right to counsel as a result of the prewaiver consultation. The staff analyses noted that according to the FDPDA, in large circuits like the

Fourth (Jacksonville), the Eleventh (Miami), and the Thirteenth (Tampa) there would be no impact because the common practice is to appoint a public defender to almost all indigent children. Other circuits that do not have this practice could realize a significant increase in caseloads.

After submission to the Court, the proposed amendment was published for comment in the July 15, 2007, edition of *The Florida Bar News*. One comment was received from the FPDA in favor of the proposed amendment. In its comment, the FPDA expressly agreed to provide the consultation services required by the proposed amendment. The FPDA also represented that it believes the fiscal impact of requiring a prewaiver consultation will be minimal, and the resulting increase in caseloads that may occur in some circuits if more children decide not to waive their right to counsel will not be unduly burdensome. The FPDA states that “[m]ost [public defender] offices will be able to absorb the increases within current staffing levels or with the addition of a minimal number of positions.” Finally, the FPDA requests that the Court balance any potential financial impact against the likelihood that, if the **amendment** to the **rule** is adopted, there will be fewer reversals on appeal in cases in which a child has not received legal counsel.

After considering the Committee's report and the FPDA's comments, we adopt the **amendment** to [rule 8.165\(a\)](#) as proposed by the Committee. We adopt the **amendment** because we agree with the Committee, the Commission, the Steering Committee, the FPDA, and the NJDC that consultation with

an attorney prior to waiving counsel is an important and necessary procedural safeguard designed to protect a **juvenile's** constitutional right to counsel.

The substantive right to counsel for children in **juvenile** delinquency proceedings is firmly established under the United States Constitution and Florida Statutes. *In re Gault*, 387 U.S. 1, 36, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); § 985.033(1), Fla. Stat. (2007) (stating that a child is entitled to representation by legal counsel at all stages of any delinquency proceeding). Florida courts have a duty to protect that right. [Florida Rule of Juvenile Procedure 8.165](#) governs the appointment and waiver of counsel in juvenile delinquency proceedings. This rule “contains specific guidelines to ensure that the substantive right of a juvenile to counsel is protected.” *K.E.N. v. State*, 892 So.2d 1176, 1179 (Fla. 5th DCA 2005). Part of protecting and effectuating a child's right to counsel in juvenile delinquency proceedings is ensuring that a waiver of that right by the child is knowing and voluntary. This Court has noted that “[i]t is extremely doubtful that any child of limited experience can possibly comprehend the importance of counsel.” *State v. T.G.*, 800 So.2d 204, 211 (Fla.2001) (quoting *P.L.S. v. State*, 745 So.2d 555, 557 (Fla. 4th DCA 1999)). Especially given the observations brought to light by the NJDC's assessment of children's access to counsel in delinquency proceedings in our courts, it is clear that additional safeguards are needed. Accordingly, we conclude that a meaningful opportunity to consult with counsel before waiving the right to counsel is a necessary step in effectuating and protecting the child's substantive right to counsel.

*467 Accordingly, we hereby adopt the amendment to [rule 8.165\(a\)](#) as set forth in the appendix to this opinion. Additions are indicated by underscoring; deletions are indicated by struck-through type. The amendment shall become effective on July 1, 2008, at 12:01 a.m.

It is so ordered.

LEWIS, C.J., and ANSTEAD, PARIENTE, and QUINCE, JJ., concur.

BELL, J., dissents with an opinion, in which WELLS and CANTERO, JJ., concur.

BELL, J., dissenting.

Although I fully agree that the problem of juveniles waiving their right to counsel and entering pleas without an adequate understanding of the implications of that decision is a substantial issue that must be confronted, I cannot agree with the amendment to [rule 8.165\(a\)](#). Essentially, this amendment creates a *new*, unwaivable right in all juveniles to a prewaiver consultation with counsel. Such a change is clearly substantive, not procedural.^{FN4} And, given the complete absence of any substantive law upon which to base this new rule, I do not believe we can or should use our procedural rulemaking authority to impose such a sweeping mandate. To do so puts the proverbial cart before the horse.

[FN4.](#) This Court has defined substantive law, procedural law, and judicial procedural rules as follows:

Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the leg-

islature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions.

Benyard v. Wainwright, 322 So.2d 473, 475 (Fla.1975); see also *Allen v. Butterworth*, 756 So.2d 52, 60 (Fla.2000) (citing *In re Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla.1972) (Adkins, J., concurring)).

On January 27, 2005, we approved all but one of the **Juvenile Court Rules** Committee's 2004 recommended changes to the **Rules of Juvenile Procedure**. Among the approved changes was an **amendment** to **rule 8.165(a)** requiring that any waiver by a child of the right to counsel be in writing. [http://www.westlaw.com/Find/Default.wl?rs=afa1.0&vr=2.0&DB=1000006&DocName=FLSTJU VPR8.165&FindType=LRule 8. 165\(b\)\(3\)](http://www.westlaw.com/Find/Default.wl?rs=afa1.0&vr=2.0&DB=1000006&DocName=FLSTJU VPR8.165&FindType=LRule 8. 165(b)(3)) was also added to require that (1) the written waiver of counsel be submitted to the court in the presence of a parent, legal guardian, responsible adult relative, or attorney assigned by the court to assist the child; and (2) this individual must verify that the child's decision to waive counsel has been discussed and appears to be knowing and voluntary.

The only rule change recommended by the Committee that we declined to adopt in January 2005 was the proposed amendment

to **rule 8.165(a)** that, in addition to the above changes, would mandate that every child consult with an attorney prior to the court accepting a waiver of the right to counsel. The reasons we gave at the time for declining to adopt this mandate were “[b]ecause of the potential financial impact of the amendment ... and our desire to work cooperatively with the Legislature.” *Amendments to the Fla. Rules of Juvenile Procedure*, 894 So.2d 875, 880-81 (Fla.2005). Now, the majority has decided to go ahead and adopt this amendment to **rule 8.165(a)**.

Instead of imposing this substantive change by amending a procedural rule, I believe we should continue to follow the recommendation of the Commission on the Legal Needs of Children (the Commission) and, as we did in January of 2005, encourage efforts seeking *legislative changes* that would (as the Commission properly stated) *468 “create” this new right to a prewaiver consultation and authorize the public defender to provide the required consultation. The Commission recommended changes in Florida *law*, not in our rules of procedure. The Commission rightly understood that a substantive change in the law would be required in order to address the problem of uncounseled waivers of the right to counsel.^{FN5} As we noted in our prior opinion, in its June 2002 Final Report, the Commission specifically recommended that

^{FN5}. The magnitude of a problem with unrepresented juveniles is highlighted in the June 2002 Final Report of the Florida Bar's Commission on the Legal Needs of Children. But, interestingly, the problem discussed

in this report is *not* that unrepresented juveniles were not freely, voluntarily, and knowingly waiving their right to counsel. The problem the Commission discusses was related to waiver of counsel and *recidivism*. Though an important social issue, addressing the problem of recidivism is not the purpose of [rule 8.165](#). The report does say that a preliminary finding that children entitled to legal representation in delinquency cases often waived that right was “[a]larming to many commissioners.” *Final Report of the Florida Bar's Commission on the Legal Needs of Children* 7 (2002). However, when this statement is viewed in context, the substance of the presentation being discussed relates to preliminary research on the relationship between recidivism and waiver of counsel. Two university researchers shared with the Commission their preliminary findings on juveniles transferred to adult court who have no lawyer because they have waived their constitutional right to counsel. What these researchers found was that

[a]bout five percent of the transfers (to adult court) and about 23 percent of juvenile detainees with relatively serious offenses had no counsel of record. There is a representation issue that might be important to look into a little more, and it ties with recidivism. Be careful. The controls haven't been done. But preliminary results show that among the transfers to adult

court who didn't have counsel, 70 percent of them re-offended. And 44 percent of the juvenile justice detainees re-offended when they didn't have counsel. In both instances, this is the highest percentage of re-offense. Failure to have counsel or legal representation is linked, at least at this basic analysis, to higher rates of recidivism.

Id.

5. Florida law should specifically *create* a right for children to consult counsel, short of outright appointment for the duration of the case, in the following instances:

a. Regarding waiver of counsel or other right or legal interest in a delinquency proceeding, prior to the appointment of the Public Defender by a judge, or at any time thereafter where waiver is sought;

....

6. Florida law should specifically authorize the Public Defender to provide the consultation services outlined in # 5 above. This recommendation would necessitate the legislature appropriating additional funds for the Public Defender to adequately provide consultation services.

[Amendments to Fla. Rules of Juvenile Procedure, 894 So.2d at 880](#) (emphasis added). “These two recommended changes in the law could be made by amending sections [985.203\(1\)](#) and [27.51](#), [Florida Statutes](#) (2004).” [894 So.2d at 880](#).

Legislative enactment of the Commission's recommended changes to the statutory law would provide the requisite basis for this Court to amend [rule 8.165](#). This change in law also could come from a change in the case law. Unfortunately, no such change in the law has occurred. And, absent any case holding that such prewaiver consultations are constitutionally or statutorily required, seeking the statutory changes recommended by the Commission remains the only proper means to address this serious public policy issue. Indeed, this is the only means that properly respects*469 the separation of powers mandated by [article II, section 3 of the Florida Constitution](#). See [Boyd v. Becker, 627 So.2d 481, 484 \(Fla.1993\)](#) (“While the Florida Constitution grants this Court exclusive rule-making authority, this power is limited to rules governing procedural matters and does not extend to substantive rights.”) (citing [art. V, § 2\(a\), Fla. Const.](#)).

Seeking a change in Florida law is not only the approach the Commission recommended to solve the problem but also the approach that resolves the concerns raised by both the minority report of the Juvenile Court Rules Committee and the Supreme Court's Steering Committee on Families and Children in the Courts (SCFCC). The minority report dissents from this rule amendment because of the belief that the change is substantive, not procedural. The SCFCC raised similar concerns.

Unwilling to await the necessary change in substantive law, the majority has decided to go ahead and impose this significant change in a rules case. The majority's rationale for doing so rests in large part upon three factors

occurring since our January 27, 2005, decision:

1. The Florida Public Defenders Association continues to support the change. And, the FPDA believes the change will have minimal fiscal impact;
2. In its 2005 report, the National Juvenile Defender Center (NJDC) recommends this change. (The NJDC is a juvenile defense bar advocacy group that describes itself as “created in 1999 to respond to the critical need to build capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system.” National Juvenile Defender Center, *About Us*, [http:// www.njdc.info/about_us.php](http://www.njdc.info/about_us.php); and
3. Proposed legislation supporting this substantive change in the law failed to pass during the 2006 and 2007 Florida legislative sessions.

These three factors are an insufficient basis for this Court to usurp the legislative prerogative to make this policy decision and to impose the change in a rules case.

Awaiting appropriate changes in the substantive law does not mean that the problem of inappropriate waivers of the right to counsel by juveniles cannot be addressed by the judicial system. As the proponents of this rule amendment explained at oral argument, prewaiver consultations with counsel are currently a common, voluntary procedure in many areas of the state. These voluntary procedures are guided by the discretion of the local trial judge and the cooperative efforts of

the public defenders, state attorneys, and the local bar. Until there is a substantive change in the law, I believe every effort should be made to encourage all juvenile judges, state attorneys, public defenders, and local bar associations to adopt similar means to assist the trial judge in assuring that any juvenile who waives the right to counsel does so freely, voluntarily, and knowingly.

In addition to these internal efforts, it is also appropriate to pursue changes in the substantive law. Those who are convinced that the creation of this new right to a prewaiver consultation is the best public policy should continue to urge the Legislature to adopt the Commission's recommendations and make the funds available to hire any additional public defenders necessary to provide these additional services. Otherwise, the change would have to come in an appropriate case. But, until the substantive law is changed, this Court should not use its rule-making authority to, as the Commission phrased it, "create" an unwaivable right to a prewaiver consultation with counsel. In other words, until the substantive law is changed, we should ***470** not unilaterally transform these voluntary efforts across the state into a new "duty and right."

Finally, I must raise one significant, ancillary point of concern about the inevitable, unintended consequences of this new mandate. The creation of this new, unwaivable right to a prewaiver consultation with counsel will spawn significant collateral issues not addressed by the proponents or the majority. The proponents posit that the prewaiver consultations will result in fewer reversals on direct appeal. This might be true. However,

this argument ignores the reality that the conversion of what is now a voluntary procedure into a mandatory one also will generate collateral challenges to the adequacy of the prewaiver consultation afforded by the "consulting counsel." This newly created "consulting counsel" will not have the typical attorney-client relationship with the child. The nature of this new relationship and the scope of duties expected of this "advisory counsel" will have to be developed by case law. Moreover, when a child (who at the time of his collateral proceeding will often have become an adult) challenges the nature and scope of any advice given by his "consulting counsel," ascertaining what actually transpired between the two will be subject to an uncertainty of proof even greater than the troubling uncertainties our courts presently confront in collateral proceedings where there is an established attorney-client relationship.

In summary, the problem of juvenile waivers of counsel is a significant issue that should be addressed by appropriate means. And, if we are to convert the current voluntary procedures into mandatory ones, there should first be a change in the statutory or case law. Once this substantive change is achieved, this amendment to [rule 8.165\(a\)](#) would be appropriate. However, until this substantive right to a prewaiver consultation with counsel is created by a substantive change in the law, it is inappropriate for this Court to amend this procedural rule.

For the reasons stated above, I dissent to this one amendment.

WELLS and CANTERO, JJ., concur.

APPENDIX

RULE 8.165. PROVIDING COUNSEL TO PARTIES

(a) Duty of the Court. The court shall advise the child of the child's right to counsel. The court shall appoint counsel as provided by law unless waived by the child at each stage of the proceeding. Waiver of counsel can occur only after the child has had a meaningful opportunity to confer with counsel regarding the child's right to counsel, the consequences of waiving counsel, and any other factors that would assist the child in making the decision to waive counsel. This waiver shall be in writing.

(b) [No change]

Fla.,2008.
In re Amendment to Florida Rule of Juvenile Procedure 8.165(a)
981 So.2d 463, 33 Fla. L. Weekly S287

END OF DOCUMENT

RULE JuCR 7.15
WAIVER OF RIGHT TO COUNSEL

- (a) A juvenile who is entitled to representation of counsel in a juvenile court proceeding may waive his or her right to counsel in the proceeding only after:
- (1) the juvenile has been advised regarding the right to counsel by a lawyer who has been appointed by the court or retained;
 - (2) a written waiver in the form prescribed in section (c), signed by both the juvenile and the juvenile's lawyer, is filed with the court; and
 - (3) a hearing is held on the record where the advising lawyer appears and the court, after engaging the juvenile in a colloquy, finds the waiver was knowingly, intelligently, and voluntarily made and not unduly influenced by the interests of others, including the parent(s) or guardian(s) of the juvenile.
- (b) This rule does not apply to diversion proceedings. See JuCR 6.2 and 6.3
- (c) Before a waiver can be accepted by the court, an attorney or the juvenile shall file a written waiver of the right to counsel in substantially the following form:

(Adopted effective September 1, 2008.)

**SUPERIOR COURT OF WASHINGTON
COUNTY OF _____
JUVENILE COURT**

STATE OF WASHINGTON v.

Respondent.

NO:

D.O.B.:

**WAIVER OF
RIGHT TO COUNSEL**

1. My true name is: _____.

I am also known as: _____.

2. My age is _____. Date of birth: _____.

3. I have completed the _____ grade in school.

4. I understand that I am accused of:

Count I, the offense of: _____.

Count II, the offense of: _____.

Count III, the offense of: _____.

Additional counts: _____.

The Standard Disposition Ranges for the offenses are as follows:

Local Sanctions:

COUNT	SUPERVISION	COMMUNITY RESTITUTION	FINE	DETENTION	CVC	RESTITUTION
<input type="checkbox"/> 1	0 to 12 months	0 to 150 hours	\$0 to \$500	0 to 30 Days	\$75/\$100	<input type="checkbox"/> As required <input type="checkbox"/> _____
<input type="checkbox"/> 2	0 to 12 months	0 to 150 hours	\$0 to \$500	0 to 30 Days	\$75/\$100	<input type="checkbox"/> As required <input type="checkbox"/> _____
<input type="checkbox"/> 3	0 to 12 months	0 to 150 hours	\$0 to \$500	0 to 30 Days	\$75/\$100	<input type="checkbox"/> As required <input type="checkbox"/> _____

Juvenile Rehabilitation Administration (JRA) Commitment:

COUNT	WEEKS AT JUVENILE REHABILITATION ADMINISTRATION (JRA) FACILITY	CVC	RESTITUTION
<input type="checkbox"/> 1	<input type="checkbox"/> 15 to 36 <input type="checkbox"/> 30 to 40 <input type="checkbox"/> 52 to 65 <input type="checkbox"/> 80 to 100 <input type="checkbox"/> 103 to 129 <input type="checkbox"/> 180 to Age 21	\$75/\$100	<input type="checkbox"/> As required <input type="checkbox"/> _
<input type="checkbox"/> 2	<input type="checkbox"/> 15 to 36 <input type="checkbox"/> 30 to 40 <input type="checkbox"/> 52 to 65 <input type="checkbox"/> 80 to 100 <input type="checkbox"/> 103 to 129 <input type="checkbox"/> 180 to Age 21	\$75/\$100	<input type="checkbox"/> As required <input type="checkbox"/> _
<input type="checkbox"/> 3	<input type="checkbox"/> 15 to 36 <input type="checkbox"/> 30 to 40 <input type="checkbox"/> 52 to 65 <input type="checkbox"/> 80 to 100 <input type="checkbox"/> 103 to 129 <input type="checkbox"/> 180 to Age 21	\$75/\$100	<input type="checkbox"/> As required <input type="checkbox"/> _

The maximum possible punishment that can be imposed by Juvenile Court is _____ years or commitment to JRA to age 21, whichever is less. I also understand that there may be lasting consequences even after I turn eighteen, if I am found guilty, including: employment disqualification, loss of my right to possess a firearm, suspension of ability to keep or obtain a driver's license, and school notification.

5. I understand that I have the right to be represented by a lawyer. If I cannot afford to pay for a lawyer, the court will appoint one to represent me at no cost to me

6. I understand that an attorney would:
 - Represent me and speak on my behalf in court.
 - Advise me about my legal rights and options.
 - Explain and assist me with legal and court procedures.
 - Investigate and explore possible defenses that I may not know about.
 - Prepare and conduct my defense at any court hearing or trial.

7. I understand that if I represent myself:
 - The judge cannot be my attorney and cannot give me any legal advice.
 - The prosecuting attorney cannot be my attorney and cannot give me any legal advice.
 - The judge, prosecuting attorney and court personnel are not required to explain court procedures or the law.
 - I will be required to follow all legal rules and procedures, including the rules of evidence.
 - It may be difficult for me to do as good a job as an attorney.
 - If I represent myself, the judge is not required to provide me with an attorney as a legal advisor or standby counsel.
 - If I later change my mind and decide that I want an attorney to represent me, the judge may require me to continue to represent myself without a lawyer.

8. I am making this decision to represent myself knowingly, intelligently, and voluntarily. No one has made any promises or threats to me, and no one has used any influence, pressure or force of any kind to get me to waive my right to an attorney.

- 9.. I have read, or have had read to me, this entire document. I want to give up my right to an attorney. I want to represent myself in this case.

Dated: _____

RESPONDENT

ATTORNEY FOR RESPONDENT

Type or Print Name/Bar Number

COURT'S CERTIFICATE

After engaging the respondent in a colloquy in open court, I find that the respondent has knowingly, intelligently, and voluntarily waived his or her right to counsel.

_____ DATED: _____
COMMISSIONER/PRO TEM JUDGE /COURT

ROLE OF JUVENILE DEFENSE COUNSEL
IN DELINQUENCY COURT



NATIONAL JUVENILE DEFENDER CENTER

SPRING 2009



ROLE OF JUVENILE DEFENSE COUNSEL
IN DELINQUENCY COURT

WRITTEN BY

Robin Walker Sterling

IN COLLABORATION WITH

Cathryn Crawford, Stephanie Harrison, and Kristin Henning

NATIONAL JUVENILE DEFENDER CENTER

SPRING 2009

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We extend special thanks to the directors of the nine Regional Juvenile Defender Centers for their trenchant suggestions, edits, and comments on the *Role of Juvenile Defense Counsel*. We would also like to thank the juvenile defenders who attended the 12th Annual Juvenile Defender Leadership Summit in New Orleans, Louisiana for their suggestions as well. The editing and production of the *Role of the Juvenile Defense Counsel* has been a truly collaborative project, and we hope that it will help juvenile defense attorneys across the country as they work to zealously protect their young clients facing charges in juvenile delinquency court.

ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT

PREAMBLE AND SCOPE

A. The Origin of the Role of the Juvenile Defender

In a series of cases starting in 1966, the United States Supreme Court extended bedrock elements of due process to youth charged in delinquency proceedings. Arguably the most important of these cases, *In re Gault*¹ held that juveniles facing delinquency proceedings have the right to counsel under the Due Process Clause of the United States Constitution, applied to the states through the Fourteenth Amendment. The Court added juvenile defense counsel to rectify the dilemma ensnaring juveniles across the country, in which juveniles received “the worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”² The Court clearly observed that juvenile defense counsel’s role in delinquency proceedings is unique and critical: “[t]he probation officer cannot act as counsel for the child. His role . . . is as arresting officer and witness against the child. Nor can the judge represent the child.”³ The Court concluded that no matter how many court personnel were charged with looking after the accused child’s interests, any child facing “the awesome prospect of incarceration” needed “the guiding hand of counsel at every step in

the proceedings against him” for the same reasons that adults facing criminal charges need counsel.⁴

The introduction of advocates to the juvenile court system was meant to change delinquency proceedings in several key ways. First, it was meant to infuse the informal juvenile court process with more of the jealously-guarded constitutional protections of adult criminal court and their attendant adversarial tenor. Perhaps more importantly, with attorneys explicitly assigned to advocate on their behalf, juveniles accused of delinquent acts were to become participants, rather than spectators, in their court proceedings. The Court observed specifically that juvenile respondents needed defenders to enable them “to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the client] has a defense and to prepare and submit it.”⁵

With its decisions in *Gault* and other cases,⁶ the Court moved the treatment of youth in juvenile justice systems into the national spotlight. In 1974, with a goal of protecting the rights of children, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDP A).⁷ The JJDP A created the National Advisory Committee for Juvenile Justice and Delinquency Prevention, which was charged with developing national juvenile justice standards and guidelines. The National Advisory Committee standards, published in 1980, require that children be represented by counsel in delinquency matters from the earliest stage of the process.⁸

At the same time, several non-governmental organizations also recognized the necessity of protections for youth in delinquency courts. Beginning in 1971, and continuing over a ten-year period, the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) researched, developed and produced 23 volumes of comprehensive juvenile justice standards, annotated with explicit policies and guidelines.⁹ The IJA/ABA Joint Commission on Juvenile Standards relied

upon the work of approximately 300 dedicated professionals across the country with expertise in the many disciplines relevant to juvenile justice practice, including the judiciary, social work, corrections, law enforcement, and education. The Commission circulated draft standards to individuals and organizations throughout the country for comments. The final standards, which were adopted by the ABA in 1982, were crafted to establish a model juvenile justice system, one that would not fluctuate in response to transitory headlines or controversies.

By the early 1980s, there was professional consensus that defense attorneys owe their juvenile clients the same duty of loyalty as adult clients.¹⁰ That coextensive duty of loyalty requires defenders to represent the legitimate “expressed interests” of their juvenile clients, and not the “best interests” as determined by the attorney.¹¹

B. Present State of Juvenile Defense: A Call for Justice

Recognizing the need for more information about the functioning of delinquency courts across the country, as part of the reauthorization of the JJDP in 1992, Congress asked the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) to address this issue. One year later, in 1993, OJJDP responded to Congress’ request by funding the Due Process Advocacy Project, led by the ABA Juvenile Justice Center, together with the Youth Law Center and the Juvenile Law Center. The purpose of the project was to build the capacity and effectiveness of the juvenile defense bar to ensure that children have meaningful access to qualified counsel in delinquency proceedings. One result of this collaboration was the 1995 release of *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national review of the legal representation of children in delinquency proceedings.¹² The first systemic national assessment of its kind, the report laid the foundation for a closer examination of access to counsel, the training and resource

needs of juvenile defenders, and the quality of legal representation provided by each state's juvenile indigent defense system. The report highlighted the gaps in the quality of legal representation for indigent children across the country.

The findings of *A Call for Justice* prompted an outpouring of concern from judges and lawyers across the country, and pointed to the need for state-specific assessments to guide and inform legislative reforms. In response, a methodology was developed to conduct comprehensive assessments of access to counsel and quality of representation in individual states. Since 1995, first the ABA Juvenile Justice Center, and then the National Juvenile Defender Center, have conducted state-specific juvenile defense assessments in 16 states: Florida, Georgia, Indiana, Illinois, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington. Re-assessments have been conducted in Kentucky and Louisiana. County-based assessments were conducted in Cook County, Illinois, Marion County, Indiana and Caddo Parish, Louisiana. The National Juvenile Defender Center is continuously working with leaders in states who are interested in conducting juvenile indigent defense assessments.

Although each state has its own idiosyncrasies, hundreds of interviews in assessment after assessment reaffirm the findings first uncovered in *A Call for Justice*. Since the *Gault* decision, the role of the juvenile defender has evolved to require a complex and challenging skill set. Juvenile defense attorneys must have all the legal knowledge and courtroom skills of a criminal defense attorney representing adult defendants. In addition, juvenile defenders must be aware of the strengths and needs of their juvenile clients and of their clients' families, communities, and other social structures. Juvenile defenders must: understand child and adolescent development to be able to communicate effectively with their clients, and to evaluate the client's level of maturity and competency and its relevancy to the delinquency case; have knowledge of and

contacts at community-based programs to compose an individualized disposition plan; be able to enlist the client's parent or guardian as an ally without compromising the attorney-client relationship; know the intricacies of mental health and special education law, as well as the network of schools that may or may not be appropriate placements for the client; and communicate the long- and short-term collateral consequences of a juvenile adjudication, including the possible impact on public housing, school and job applications, eligibility for financial aid, and participation in the armed forces.

There are many juvenile defense attorneys who, in the face of daunting systemic and other obstacles, offer their clients zealous, holistic, client-centered advocacy. Unfortunately, as *A Call for Justice* first revealed, these attorneys are the exception and not the norm: in jurisdiction after jurisdiction, systemic and other barriers prevent juvenile defenders from realizing the constitutionally-mandated vision of their role. For example, on average, juvenile defenders' caseloads are staggeringly high, and these crushing caseloads have redounding repercussions: plea agreements function as a case management tool and are entered into without previous, independent investigation; pre-trial advocacy to test the strengths and weaknesses of the government's case is often set aside; and already scarce resources, stretched thin to provide basic services, like office space, computers, desks, and files, are not available for investigators, social workers, and expert witnesses. Also, across the country, juvenile court suffers from a "kiddie court" mentality where stakeholders do not believe that juvenile court is important. Finally, in some jurisdictions, because they view juvenile court first and foremost as an opportunity to "help a child," judges and other system participants undermine attorneys' efforts to challenge the government's evidence and provide zealous, client-centered representation, considering such advocacy an impediment to the smooth function of the court. As a result, many juvenile courts still operate in a pre-*Gault* mode in which the defense attorney is irrelevant, real

lawyering cannot occur, and the fair administration of justice is impeded.

C. Goals of These Principles

The Principles that follow are developed to describe the unique and critical role juvenile defense attorneys play in juvenile proceedings. Hundreds of interviews with juvenile justice system stakeholders reveal that the juvenile defense attorney's role is perceived differently by different courtroom actors. While there are of course exceptions, across the country, prosecutors and probation officers often view zealous juvenile defense attorneys as obstructionists who overlook the compelling needs of their clients in service to the single and monolithic goal of "getting the client off, and communicate, in direct and indirect ways, that the defender should be less adversarial. Similarly, judges rely on juvenile defense attorneys to advocate on the child's behalf, but only as a necessary cog in the machinery of the appearance of fairness and of judicial economy, and not as a zealous, client-centered advocate. Juvenile defenders themselves are unsure of their role. Most understand that, in theory, they are bound to zealously represent their clients' expressed interests. Nonetheless, in practice, many yield to the unified pressure from other stakeholders and from the seemingly irresistible momentum of the proceedings, and advocate for their clients' best interests. The reasons for this capitulation vary. Some set aside their ethical obligation because of a genuinely misguided understanding of their role; others sacrifice zealous advocacy because they have to triage staggering caseloads supported by scant resources; still others bow to systemic barriers that interfere with their advocacy. The defenders' role seems all the more ambiguous in specialty boutique courts, like drug court and mental health court.

In the vision of the *Gault* Court, the juvenile defense attorney is a critical check on the power of the state as it imperils the client's liberty interests. Defenders are not obstructionists; they

protect the child’s constitutional rights. They do this through their practical, everyday duties – from interviewing the child outside of the presence of the child’s parents, to objecting to inadmissible but informative evidence at adjudicatory hearings, to advocating for the least restrictive alternative at disposition, to pressing, at every stage, for the client’s expressed interests. Each of these day-to-day duties has its grounding in defense counsel’s mandatory ethical obligations. These Principles serve to inform indigent defense providers and the leadership of indigent defense organizations, judges, prosecutors, probation officers, and other juvenile justice stakeholders the specifics of the role of defense counsel in the delivery of zealous, comprehensive and quality legal representation to which children charged with crimes are constitutionally entitled.

THE ROLE OF JUVENILE DEFENSE COUNSEL

1. Duty to Represent the Client’s Expressed Interests

ABA Model Rules of Professional Conduct (Model Rules): Preamble; 1.14(a) Client with Diminished Capacity; 1.2(a) Scope of Representation and Allocation of Authority between Client and Lawyer

At each stage of the case, juvenile defense counsel acts as the client’s voice in the proceedings, advocating for the client’s expressed interests, not the client’s “best interest” as determined by counsel, the client’s parents or guardian, the probation officer, the prosecutor, or the judge. With respect to the duty of loyalty owed to the client, the juvenile delinquency attorney-client relationship mirrors the adult criminal attorney-client relationship. In the juvenile defender’s day-to-day activities, the establishment of the attorney-client relationship is animated by allocating the case decision-making, and practicing the special training required to represent clients with diminished capacity.

A. Establishment of the Attorney-Client Relationship:

Juvenile defense counsel do not assume they know what is best for the client, but instead employ a client-centered model of advocacy that actively seeks the client's input, conveys genuine respect for the client's perspective, and works to understand the client in his/her own socioeconomic, familial, and ethnic context.

1. At every stage,¹³ juvenile defense counsel works to provide the client with complete information concerning all aspects of the case, including honest predictions concerning both the short-term (e.g., whether the client will be detained pending trial or whether the client will win the probable cause hearing) and long-term (e.g., whether the child will be acquitted or whether, if found involved, the child will be committed and/or face additional collateral consequences) goals of the case. Juvenile defense counsel's abiding purpose is to empower the client to make informed decisions. Counsel's advice to the client about the likely advantages and disadvantages of different case scenarios is legally comprehensive, candid, and objectively relayed using age-appropriate language.
2. Operating under a client-centered model of advocacy allows juvenile defense counsel to enhance immeasurably the fundamental fairness of the system. Because no other courtroom actor serves the juvenile's expressed interests, without juvenile defense counsel, the juvenile would be subjected to a pre-*Gault* proceeding in which protecting the juvenile's due process rights are relegated to a mere technicality.

B. Allocation of Decision-Making: Unlike the other courtroom actors, who have no obligation to consider a juvenile's expressed interests in their recommendations and orders, juvenile defense counsel allows clients, to the greatest extent possible, to be the primary decision-makers in their cases.

1. Juvenile defense counsel enables the client, with frank information and advice, to direct the course of the proceedings in at least the following areas:
 - a. whether to cooperate in a consent judgment, diversion, or other early disposition plans;
 - b. whether to accept a plea offer;
 - c. if the client can choose, whether to be tried as a juvenile or an adult;
 - d. if the client can choose, whether to have a jury trial or a bench trial;
 - e. whether to testify in his own defense; and
 - f. whether to make or agree to a specific dispositional recommendation.
2. Other decisions concerning case strategy and tactics to pursue the client's goals, like the determination of the theory of the case, what witnesses to call, or what motions to file, are left to juvenile defense counsel, with the critical limitations that counsel's decisions 1) shall not conflict with the client's expressed interests concerning the areas listed in c, and 2) shall not conflict with the client's expressed interests in any other case-related area.

C. **Diminished Capacity:** Minority does not automatically constitute diminished capacity such that a juvenile defense attorney can decline to represent the client's expressed interests. Nor does a juvenile's making what juvenile defense counsel considers to be a rash or ill-considered decision constitute grounds for finding that the client suffers from diminished capacity. In fact, because of the unique vulnerabilities of youth, it is all the more important that juvenile defense attorneys firmly adhere to their ethical obligations to articulate and advocate for the child's expressed interest, and to safeguard the child's due process rights. In other words, in direct contrast to the pervasive informality that characterizes juvenile court practice in so many jurisdictions, minority sharpens defense counsel's ethical responsibilities, instead of relaxing them.

1. In light of current brain development research, it is clear that minority critically affects the scope of the juvenile attorney- juvenile client relationship. Current brain development research posits that youth are categorically less culpable than the average adult offender. This research has gained wide acceptance, as indicated most recently by the United States Supreme Court's opinion in *Roper v. Simmons*, 543 U.S. 551(2005), which struck down the juvenile death penalty as unconstitutional. The *Roper* Court concluded that youths are less culpable than the average adult offender because they: (1) lack maturity and responsibility, (2) are more vulnerable and susceptible to outside influences, particularly negative peer influences, and (3) are not as well formed in character and personality as, and have a much greater potential for rehabilitation than, adults. *Id.* at 569-570. This research requires juvenile defense counsel to be adept at using age-appropriate

language, motivational interviewing, visual aids, and other techniques effective in communicating with, and more specifically, effective in translating legal concepts to, children.

2. It is crucial to recognize that this research does not provide an argument for counsel to disregard a child’s expressed interests merely because of the child’s minority. To the contrary, the unique vulnerabilities of youth, make it all the more important for the child’s lawyers to help the child identify and articulate his or her views to key players in the juvenile justice system. Any juvenile client capable of considered judgment is entitled to a normal attorney-client relationship. And, even youth of diminished capacity and other vulnerabilities have views, concerns and opinions that are entitled to weight in legal proceedings.

Additional sources:

- *IJA/ABA Juvenile Justice Standards, Standards Relating to Counsel for Private Parties (Juvenile Justice Standards): 3.1 The Nature of the Lawyer-Client Relationship; 5.2 Control and Direction of the Case; 9.3(a) Counseling Prior to Disposition*
- *ABA Standards for Criminal Justice, Standards Relating to the Defense Function (Criminal Justice Standards): 4-3.1 Establishment of Relationship*

2. Duty of Confidentiality and Privilege

Model Rules: 1.6 Confidentiality of Information

Juvenile defense counsel is bound by attorney-client confidentiality and privilege. The duty of confidentiality that juvenile defense counsels owe their juvenile clients is coextensive with

the duty of confidentiality that criminal defense counsels owe their adult clients. This duty includes:

- A. **No Exception for Parents or Guardians:** There is no exception to attorney-client confidentiality in juvenile cases for parents or guardians. Practically, this fact means that juvenile defense counsel has an affirmative obligation to safeguard a client's information or secrets from parents or guardians; that interviews with the client must take place outside of the presence of the parents or guardians; and that parents or guardians do not have any right to inspect juvenile defense counsel's file, notes, discovery, or any other case-related documents without the client's expressed consent. While it may often be a helpful or even necessary strategy to enlist the parents or guardians as allies in the case, juvenile defense counsel's primary obligation is to keep the client's secrets. Information relating to the representation of the client includes all information relating to the representation, whatever its source.

- B. **No Exception for Client's Best Interests:** There is no exception to attorney-client confidentiality in juvenile cases allowing disclosure of information in service to what counsel, parents or guardians, or any other stakeholders deem to be the client's best interests. Even if revealing the information might allow the client to receive sorely-needed services, defense counsel is bound to protect the client's confidences, unless the client gives the attorney express permission to reveal the information to get the particular services, or disclosure is impliedly authorized to carry out the client's case objectives.

- C. **Private Meeting Space:** To observe the attorney's ethical duty to safeguard the client's confidentiality,

attorney-client interviews must take place in a private environment. This limitation requires that, at the courthouse, juvenile defense counsel should arrange for access to private interview rooms, instead of discussing case specifics with the client in the hallways; in detention facilities, juvenile defense counsel should have a means to talk with the client out of the earshot of other inmates and guards; and in the courtroom, juvenile defense counsel should ask for a private space in which to consult with the client, and speak with the client out of range of any microphones or recording devices.

Additional sources:

- *Juvenile Justice Standards: 3.3 Confidentiality*

3. Duties of Competence and Diligence

Model Rules: 1.1 Competence, 1.3 Diligence

A juvenile defense attorney provides competent, prompt, and diligent representation based in legal knowledge, skill, thorough preparation, and ongoing training.¹⁴ With respect to the juvenile defender’s day-to-day activities, the Duties of Competence and Diligence are expansive, encompassing the obligations to investigate, to zealously protect the child’s due process rights from arrest through the close of the case, to engage in dispositional advocacy, and to access ancillary services.

A. Comprehensive Skill Set: Juvenile defense counsel possesses a comprehensive skill set that meets the client’s legal, educational, and social needs.

1. Competent representation in juvenile delinquency matters requires legal training that encompasses rules of evidence, constitutional law, juvenile law and procedure, and criminal

law and procedure, as well as trial skills, such as examining witnesses, admitting documents into evidence, and making legal arguments before the court, and appellate procedure.

2. Competent juvenile defense counsel is also well-versed in the areas of child and adolescent development. Child and adolescent development research intersects with counsel's representation in many ways. For example, counsel might rely on recent development research in detention and disposition arguments. Counsel also might use the research to help counsel convey complex legal concepts in age-appropriate language.
3. Competent juvenile defense counsel has a working knowledge of and maintains contacts with experts in ancillary areas of law that often intersect juvenile delinquency matters, including but not limited to the collateral consequences of adjudication and conviction, expungement, special education, abuse and neglect, mental health, cultural competency, child welfare and entitlements, and immigration
4. Competent defense counsel engages in continuing study and education of juvenile-specific subject areas and complies with all relevant continuing legal education requirements.

B. Investigation: Juvenile defense attorneys promptly investigate cases to find witnesses, examine forensic evidence, locate and inspect tangible objects and other evidence that might tend to exculpate the client, that might lead to the exclusion of inculpatory evidence at adjudication or disposition, or that might buttress the client's potential defenses. This duty exists even when

the lawyer believes the client is guilty, and when the client has confessed in interrogation, in interviews with counsel, or to anyone else.

1. Juvenile defense attorneys promptly take the necessary steps to obtain discovery, including filing discovery requests, motions pursuant to *Brady v. Maryland*, and motions to compel if the prosecutor does not comply with counsel’s request.
2. Based on leads from the client and from discovery received from the prosecutor, juvenile defense attorneys conduct independent investigation of, *inter alia*, the allegations against the client, of police conduct, of witnesses’ backgrounds, and of any and all possible defenses and mitigating factors for disposition.
3. Juvenile defense attorneys do not allow clients to plead guilty without first reviewing the government’s file, including police reports, results of forensic examinations and tests, photographs, and other evidence, discussing and pursuing possible exculpatory investigation leads, and providing a fair and informed assessment of the strengths and weaknesses of the government’s case.

C. Protecting Pretrial Due Process Rights: Juvenile defense attorneys have a duty to protect the client’s pretrial due process rights by obtaining discovery, filing motions, and making arguments to protect the client’s rights while serving the client’s expressed interests.¹⁵

1. To ensure that the court system is not being used for societal functions it was not meant to assume – for example, as the disciplinary arm of the school system, or as a reflection of the

racial, ethnic and class biases that often mark police arrest rates – juvenile defense attorneys file pretrial motions that seek pretrial release, that advocate for individualized plans that offer the least restrictive set of release conditions necessary to ensure the client’s return to court and community safety, and that guard against infringement of the client’s federal or state constitutional rights before and during the arrest, including motions to suppress tangible evidence, identifications, and statements.

2. Juvenile defense attorneys also file pretrial motions that clarify points of law, block the admission into evidence of inadmissible or prejudicial information, and otherwise ensure that the client will receive a fair trial.

D. Protecting Due Process Rights at Adjudicatory Hearings: Juvenile defense counsel has a duty to protect the client’s due process rights and to pursue vigorously the client’s expressed interests at adjudication.

1. Juvenile defense counsel ensures that, as *In re Gault* and its progeny clearly intended, juvenile adjudicatory hearings are adversarial proceedings in which the state bears the burden to prove its case beyond a reasonable doubt with credible, admissible evidence.
2. In accord with this constitutional imperative, juvenile defense counsel ensures fairness in the courtroom by litigating the case vigorously consistent with the presumption of innocence, regardless of counsel’s opinion concerning either guilt or innocence or the client’s need for social, educational, and other services.

3. Juvenile defense counsel litigate adjudicatory hearings aware of the elements of each charged allegation, the lesser-includes for each charge, all the client's possible defenses, and relevant case law.
4. Juvenile defense counsel fulfill their role under *Gault* by adhering to and enforcing application of the rules of evidence, lodging objections, examining witnesses, filing written and oral motions, and challenging the credibility and admissibility of the state's evidence. This duty exists regardless of counsel's opinion of the client's guilt.
5. Juvenile defense counsel explains the right to testify, helps the client identify and weigh the advantages and disadvantages of testifying, and helps the client prepare if he decides to testify.

E. Preparing for and Engaging in Dispositional Advocacy: As part of the duty of competence and diligence, juvenile defense counsel has an affirmative duty to prepare for and engage in dispositional advocacy. Accordingly, at disposition, juvenile defense counsel offers the court strengths-based disposition alternatives that look beyond the options considered by the probation officer to address the child's expressed interests while being responsive to the court's concerns.

1. Dispositional investigation and advocacy begin at the initiation of the attorney-client relationship. Regardless of counsel's prognosis of the case outcome, counsel begins disposition planning and investigation at the earliest opportunity to maximize the chance that the appropriate investigation, evaluations and interviews are completed, and the necessary docu-

ments are located and submitted, with the end result that, should the client be found guilty, the client receives the most appropriate, least restrictive disposition with as little delay as possible.

2. Juvenile defense counsel investigates disposition alternatives beyond those available to and considered by probation officers and juvenile court counselors, drawing on community-based resources, according to the client's wishes.
3. Counsel thoroughly engages the child in disposition planning by helping the child identify and understand and weigh the available options. Counsel informs the client about the nature of the presentence investigation process and the importance of statements the client and the client's family might make to probation officers and youth court counselors. Counsel also advises the client about the right of allocution at disposition, and helps the client prepare if the client chooses to allocute.
4. As part of disposition preparation, juvenile defense counsel consults with mitigation specialists, social workers, and mental health, special education, and other experts to develop a plan consistent with the client's expressed interests.
5. At the disposition hearing, juvenile defense counsel prepares and presents the court with a creative, comprehensive, strengths-based, individualized disposition alternative consistent with the client's expressed interests.
6. As at the adjudicatory hearing, at the disposition hearing, juvenile defense counsel protects the client's due process rights by challenging

the state's evidence, including any hearsay and other inadmissible evidence that may be included in the presentence report, by cross-examining the state's witnesses, including the probation officer, and by proffering witnesses in support of the client's own disposition plan, according to the client's expressed interests.

F. Conducting Post-Disposition Representation:

Juvenile defense counsel has a duty to research and understand the legal rights to which the client is entitled and the legal options the client can access at the post-disposition stage of the case and, after consultation with the client, to pursue available options.

1. Juvenile defense counsel files timely notices of appeals, writs of *habeas corpus*, and other motions that challenge orders or outcomes that counsel believes are illegal or otherwise offend principles of fundamental fairness.
2. At periodic intervals after disposition, juvenile defense counsel checks in with the client, with an eye towards averting any potential problems with the client's successful completion of disposition conditions, to maximize the client's chance at closing the case as quickly as possible.
3. In jurisdictions that hold regular post-disposition review hearings, juvenile defense counsel participates in these proceedings. In jurisdictions that do not hold regular post-disposition review hearings, juvenile defense counsel encourages periodic post-disposition reviews by filing motions to review that request hearings or other forms of relief, unless counsel's contract prohibits filing such a motion.

4. In preparation for probation and parole revocation hearings, juvenile defense counsel locates witnesses, investigates allegations, challenges the government's evidence, prepares a defense and offers relevant mitigating factors for the court's consideration.
 5. Defense counsel also keeps a record of any difficulties with, or failings by probation officers, programs or other entities charged with providing service to the client in order to militate against violations of probations. If the client is detained, juvenile defense counsel helps the client to maintain contact with the client's family and/or other positive community-ties, in accordance with the client's wishes.
 6. Because juvenile defense counsel's obligation is to the client, counsel can challenge conditions of confinement, either individually or as part of a larger strategy with other juvenile defense counsel.
 7. Juvenile defense counsel helps the client expunge juvenile adjudications from the client's record, so that the client is better able to live as a productive, law-abiding citizen without the stigma of adjudication.
- G. Accessing Ancillary Services:** Juvenile defense counsel provides to the client, either directly or indirectly through referrals, assistance in ancillary areas of law that intersect juvenile indigent defense, with the goal of affording the client holistic representation. Juvenile defense counsel does whatever counsel can reasonably undertake to facilitate the relationship with the client and the provider, and ensure the attainment of the client's ultimate goal.

1. Juvenile defense counsel is familiar with special education law and works to ensure that the client is in an appropriate educational setting.
2. Juvenile defense counsel ensures that the client's rights are protected at school discipline or expulsion hearings.
3. Juvenile defense counsel is available to assist the client with intersecting, ancillary proceedings that may impact the client's case, including housing and immigration matters, as well as procedures for obtaining Medicaid or other public benefits.
4. Juvenile defense counsel who are prohibited from or face limitations in providing these services directly develop a network of providers to whom these cases can be referred so that ancillary representation is holistic and responsive to the client's legal needs.

Additional sources:

- *Juvenile Justice Standards: 4.3 Investigation and Preparation; 4.1 Prompt Action to Protect the Client; 7.2 Formality, In General; 7.3 Discovery and Motion Practice; 7.8 Examination of Witnesses; 7.9(a) Testimony by the Respondent; 9.1 Disposition, In General; 9.2 Disposition Investigation and Preparation; 9.3 Counseling Prior to Disposition; 9.4 Disposition Hearing; 9.5 Counseling after Disposition; 10.1 Relations with the Client after Disposition; 10.2 Postdispositional Hearings before the Juvenile Court; 10.3 Counsel on Appeal; 10.4 Conduct of the Appeal; 10.6 Probation Revocation; Parole Revocation; 10.7 Challenges to the Effectiveness of Counsel*
- *Criminal Justice Standards: 4-4.1 Duty to Investigate; 4-3.6 Prompt Action to Protect the Accused; 4-1.2(a) The Function of Defense Counsel, Commentary; 4-7.4 Opening Statement; 4-7.5 Presentation of Evidence; 4-7.6 Examination of Witnesses; 4-7.7 Argument to the Jury; 4-8.1 Sentencing; 4-7.9 Posttrial Motions; 4-8.2 Appeal, 4-8.3 Counsel on Appeal*

4. Duty to Advise and Counsel

Model Rules: 2.1 Advisor

To better enable the client to make a fully informed decision about the direction of the case, juvenile defense attorneys offer clients honest and comprehensive advice that considers the client's educational, familial, social, developmental, and other realities, in addition to the client's legal situation.

- A. Pursuing Diversion Options:** Consistent with the client's expressed interests, juvenile defense counsel negotiates, at every possible opportunity, for diversion and other means of case dismissal, regardless of counsel's own opinion of guilt or innocence or the client's need for services. Counsel advises the client on the advantages and disadvantages of each of these alternatives to adjudication, including the consequences of non-compliance with conditions of diversion.

- B. Ensuring Ethical Plea Agreements:** Juvenile defense counsel negotiates reasonable plea offers and ensures that clients make well-considered decisions concerning whether to plead or go to trial.
 - 1. In negotiations with prosecutors, juvenile defense counsel represents and advocates for the client's expressed interests.
 - 2. Juvenile defense counsel promptly relays plea offers, taking time to review the offer with the client in detail and using age-appropriate language, advises the client on the full panoply of rights relinquished by pleading, as well as the range of disposition options.
 - 3. Juvenile defense counsel seeks to ensure the client has sufficient time to understand and weigh the offer.

4. Juvenile defense counsel’s advice as to whether to accept the plea offer includes discussion of the long-term collateral consequences of a juvenile adjudication or transfer to and conviction in adult criminal court (e.g., in some jurisdictions, deportation if the client is undocumented, ineligibility for public housing, federal student loans, and military service). This discussion should also include: the possible dispositions and their impact on the client’s life; if the client is likely to get probation; and the consequences of a probation violation.

Additional sources:

- *Juvenile Justice Standards: 6.3 Early Disposition; 7.1 Adjudication without Trial*
- *Criminal Justice Standards: 4-6.1 Duty to Explore Disposition Without Trial; 4-6.2 Plea Discussions; 4-5.2 Control and Direction of the Case*

5. Duty of Communication

Model Rules: 1.4 Communications

At every stage of the case, a juvenile defense attorney keeps the client informed of the case’s legal progression in frequent discussions using age-appropriate language, so that the client is a fully informed and proactive participant at all stages of the proceedings.

- A. **Communication in Court:** For in-court proceedings, juvenile defense counsel previews for the client each hearing before it happens, and reviews each hearing after it happens, providing an opinion as to how the specific hearing has affected the course of the overall case, and allowing the client ample opportunity to ask questions and raise concerns.

- B. Communication outside of Court:** Juvenile defense counsel keeps the client similarly informed about the case's progression outside of the courtroom by: soliciting and following up on the client's investigatory leads, sharing copies of and discussing motions filed, monitoring the client's compliance with release conditions, or, if the client is detained, making sure that the client is receiving adequate services, and being available to assuage the client's concerns as the case proceeds.
- C. Communication and Confidentiality:** Counsel creates a safe, comfortable, and, to the extent possible, private environment, and allocates adequate time for counseling; engages the youth with age-appropriate language; earns the child's trust over time; and offers balanced and objective advice when appropriate.
- D. Communication with Detained Clients:** If the client is detained pending trial, juvenile defense counsel visits the client at the detention facility, and informs the client's family how and when they can visit the client. If the detention facility is too remote, counsel keeps in regular phone contact with the client.

Additional sources:

- *Juvenile Justice Standards: 3.5 Duty to Keep Client Informed; 4.2 Interviewing the Client; 5.1 Advising the Client Concerning the Case*
- *Criminal Justice Standards: 4-3.1 Establishment of Relationship; 4-3.8 Duty to Keep Client Informed; 4-5.1 Advising the Accused*

ENDNOTES

- 1 387 U.S. 1 (1967).
- 2 *Gault*, 387 U.S. at 19 n. 23 (internal quotations and citation omitted).
- 3 *Gault*, 387 U.S. at 36.
- 4 *In re Gault*, 387 U.S. 1, 36 (1967).
- 5 *In re Gault*, 387 U.S. 1, 36 (1967).
- 6 *See Kent v. U.S.*, 383 U.S. 541 (1966) (holding that due process requirements apply to transfer proceedings); *In re Gault*, 387 U.S. 1 (1967) (holding that juveniles have right to notice of charges, right to counsel, privilege against self incrimination, and right to confrontation and cross-examination); *In re Winship*, 397 U.S. 358 (1970) (holding that fundamental fairness requires proof beyond a reasonable doubt in delinquency adjudications); *Breed v. Jones*, 421 U.S. 519 (1975) (rejecting the rigid categorization of juvenile proceedings as civil, and extending the protection offered by the Double Jeopardy Clause, which had traditionally been applied to criminal proceedings, to juvenile proceedings).
- 7 Pub. L. 93-415 (1974).

- 8 National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* §3.132 Representation by Counsel - For the Juvenile (1980).
- 9 For a description of the project, see *IJA/ABA Juvenile Justice Standards Annotated: A Balanced Approach* xvi-xviii (Robert E. Shepherd, ed., 1996).
- 10 Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 255-56 (2005).
- 11 *Id.*
- 12 ABA Juvenile Justice Center, Juvenile Law Center & Youth Law Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (1995), available at <http://www.njdc.info/pdf/cfjfull/pdf>.
- 13 For purposes of this document, "stage" is broadly defined to include each step at which the state's power intersects the child's life, including, but not limited to, arrest, interrogation at the police station, at school, or at home, initial detention hearings, the probable cause hearing, and post-disposition hearings.
- 14 Under Model Rule 1.16(a)(1), *Declining or Terminating Representation*, if a lawyer cannot provide competent, prompt and diligent representation, and continued representation will result in violation of the rules of professional conduct, a lawyer can decline new cases or terminate representation. This rule gives important support to juvenile defense attorneys whose unmanageable caseloads prohibit the individualized, zealous advocacy to which juveniles are constitutionally entitled.

15 It should be noted that juvenile defense counsel is not the only stakeholder ethically charged with safeguarding the client's pretrial due process rights. Model Rule 3.8, *Special Responsibilities of a Prosecutor*, requires prosecutors to: refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; not seek to obtain from an unrepresented defendant a waiver of important pretrial rights, such as the right to a preliminary hearing; and make timely disclosure to the defense of all mitigating or exculpatory evidence.

APPENDIX A

ABA MODEL RULES OF PROFESSIONAL CONDUCT

PREAMBLE AND SCOPE

Preamble: A Lawyer's Responsibilities

1. A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
3. In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12

and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

4. In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.
5. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.
6. As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their au-

thority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

7. Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.
8. A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.
9. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within

the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

10. The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.
11. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.
12. The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities

compromises the independence of the profession and the public interest which it serves.

13. Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

14. The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role. Many of the Comments use the term “should.” Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.
15. The Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

16. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.
17. Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.
18. Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several

government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

19. Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.
20. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

21. The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

Client-Lawyer Relationship

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Client-Lawyer Relationship

Rule 1.1 Competence – Comment

Legal Knowledge and Skill

1. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

2. A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.
3. In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.
4. A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

5. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation

and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

6. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Client-Lawyer Relationship

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Client-Lawyer Relationship

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer – Comment

Allocation of Authority between Client and Lawyer

1. Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer’s duty to communicate with the client about such decisions. With respect to the means by which the client’s objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.
2. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client’s objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule

1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

3. At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.
4. In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

5. Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

6. The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

7. Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.
8. All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

9. Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
10. When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially del-

icate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

11. Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.
12. Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.
13. If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Client-Lawyer Relationship

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Client-Lawyer Relationship

Rule 1.3 Diligence – Comment

1. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.
2. A lawyer's work load must be controlled so that each matter can be handled competently.
3. Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does

not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

4. Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.
5. To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another

lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Client-Lawyer Relationship

Rule 1.4 Communication

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Client-Lawyer Relationship

Rule 1.4 Communication – Comment

1. Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

2. If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).
3. Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.
4. A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowl-

edge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

5. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).
6. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the law-

yer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

7. In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Client-Lawyer Relationship

Rule 1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury

- to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (6) to comply with other law or a court order.

Client-Lawyer Relationship

Rule 1.6 Confidentiality of Information – Comment

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

Client-Lawyer Relationship

Rule 1.14 Client with Diminished Capacity

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Client-Lawyer Relationship

Rule 1.14 Client with Diminished Capacity – Comment

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person

may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

2. The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.
3. The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.
4. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an

obligation to prevent or rectify the guardian’s misconduct. See Rule 1.2(d).

Taking Protective Action

5. If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client’s best interests and the goals of intruding into the client’s decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections.
6. In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

7. If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

8. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing

matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

9. In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

10. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Client-Lawyer Relationship

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Client-Lawyer Relationship

Rule 2.1 Advisor – Comment

Scope of Advice

1. A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
2. Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.
3. A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept

it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

4. Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

5. In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

APPENDIX B

TEN CORE PRINCIPLES FOR PROVIDING QUALITY PUBLIC DEFENSE DELIVERY SYSTEMS

PREAMBLE

A. Goals of These Principles

The *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*¹ provide criteria by which a public defense delivery system² may fully implement the holding of *In re Gault*.³ These Principles offer guidance to public defense leaders and policymakers regarding the role of public defenders, contract attorneys, or assigned counsel in delivering zealous, comprehensive and quality legal representation on behalf of children facing both delinquency and criminal proceedings.⁴ In applying these Principles, advocates should always be guided by defense counsel's primary responsibility to zealously defend clients against the charges leveled against them and to protect their due process rights.

Delinquency cases are complex and their consequences have significant implications for children and their families. Therefore, every child client must have access to qualified, well-resourced defense counsel. These resources should include the time and skill to adequately communicate with a client so that lawyer and client can build a trust-based attorney-client relationship and so that the lawyer is prepared to competently represent the client's interests. These Principles elucidate

the parameters of this critical relationship already well established in legal ethics rules and opinions.

In 1995, the American Bar Association’s Juvenile Justice Center published *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national study that revealed major failings in juvenile defense across the nation. Since that time, numerous state-based assessments have documented in detail the manner in which these failings result in lifelong, harmful consequences for our nation’s children.⁵ These Principles provide public defense leaders and policymakers a guide to rectifying systemic deficits and to providing children charged with criminal behavior the high quality counsel to which they are entitled.

B. The Representation of Children and Adolescents is a Specialty.

Public defense delivery systems must recognize that children and adolescents are different from adults. Advances in brain research cited favorably by the Supreme Court in *Roper v. Simmons*⁶ confirm that children and young adults do not possess the same cognitive, emotional, decision-making or behavioral capacities as adults. Public defense delivery systems must provide training regarding the stages of child and adolescent development.

Public defense delivery systems must emphasize that juvenile defense counsel has an obligation to maximize each client’s participation in his or her own case in order to ensure that the client understands the court process and to facilitate informed decision making by the client. Defense attorneys owe their juvenile clients the same duty of loyalty that adult criminal clients enjoy. This coextensive duty of loyalty requires the juvenile defense attorney to advocate for the child client’s expressed interests with the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁷

C. Public Defense Delivery Systems Must Pay Particular Attention to the Most Vulnerable and Over-Represented Groups of Children in the Delinquency System.

Because research has demonstrated that involvement in the juvenile court system increases the likelihood that a child will subsequently be convicted and incarcerated as an adult, public defense delivery systems should pay special attention to providing high quality representation for the most vulnerable and over-represented groups of children in the delinquency system.

Nationally, children of color are severely over-represented at every stage of the juvenile justice process. Defenders must zealously advocate for the elimination of the disproportionate representation of minority youth in juvenile courts and detention facilities.

Children with mental health and developmental disabilities are also overrepresented in the juvenile justice system. Defenders must address these needs and secure appropriate assistance for these clients as an essential component of quality legal representation.

Drug- and alcohol-dependent juveniles and those dually diagnosed with addiction and mental health disorders are more likely to become involved with the juvenile justice system. Defenders must advocate for appropriate treatment services for these clients.

Research shows that the population of girls in the delinquency system is increasing, and that girls' issues are distinct from boys'. Gender-based interventions and the programmatic needs of girls in the juvenile delinquency system, who have frequently suffered from abuse and neglect, must be assessed and appropriate gender-based services developed and funded.⁸

The special issues presented by lesbian, gay, bisexual and transgender youth require increased awareness and training to ensure that advocacy on their behalf addresses their needs.

TEN PRINCIPLES

1

The Public Defense Delivery System Upholds Juveniles' Constitutional Rights Throughout the Delinquency Process and Recognizes The Need For Competent and Diligent Representation.

- A. Competent and diligent representation is the bedrock of a juvenile defense attorney's responsibilities.⁹
- B. The public defense delivery system ensures that children do not waive appointment of counsel and that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.¹⁰
- C. The public defense delivery system recognizes that the delinquency process is adversarial and provides children with continuous legal representation throughout the proceedings including, but not limited to, detention, pre-trial motions or hearings, adjudication, disposition, post-disposition, probation, appeal, expungement and sealing of records.
- D. The public defense delivery system includes the active participation of the private bar or conflict office whenever a conflict of interest arises for the primary defender service provider or when the caseload justifies the need for outside counsel.¹¹

2

The Public Defense Delivery System Recognizes that Legal Representation of Children is a Specialized Area of the Law.

- A. The public defense delivery system recognizes that representing children in delinquency proceedings is a complex specialty in the law that is different from, but equally

as important as, the representation of adults in criminal proceedings. The public defense delivery system further acknowledges the specialized nature of representing juveniles prosecuted as adults following transfer/waiver proceedings.¹²

- B. The public defense delivery system leadership promotes respect for juvenile defense team members and values the provision of quality, zealous and comprehensive delinquency representation services.
- C. The public defense delivery system encourages experienced attorneys to provide delinquency representation and strongly discourages use of delinquency representation as a training assignment for new attorneys or future adult court advocates.

3

The Public Defense Delivery System Supports Quality Juvenile Delinquency Representation Through Personnel and Resource Parity.¹³

- A. The public defense delivery system encourages juvenile specialization without limiting access to promotions, financial advancement, or personnel benefits for attorneys and support staff.
- B. The public defense delivery system provides a professional work environment and adequate operational resources such as office space, furnishings, technology, confidential client interview areas¹⁴ and current legal research tools. The system includes juvenile representation resources in budgetary planning to ensure parity in the allocation of equipment and resources.

4

The Public Defense Delivery System Uses Expert and Ancillary Services to Provide Quality Juvenile Defense Services.

- A. The public defense delivery system supports requests for expert services throughout the delinquency process whenever individual juvenile case representation requires these services for quality representation. These services include, but are not limited to, evaluation by and testimony of mental health professionals, education specialists, forensic evidence examiners, DNA experts, ballistics analysts and accident reconstruction experts.
- B. The public defense delivery system ensures the provision of all litigation support services necessary for the delivery of quality services, including, but not limited to, interpreters, court reporters, social workers, investigators, paralegals and other support staff.

5

The Public Defense Delivery System Supervises Attorneys and Staff and Monitors Work and Caseloads.

- A. The leadership of the public defense delivery system monitors defense counsel's workload to promote quality representation. The workload of public defense attorneys, including appointed and other work, should never be so large that it interferes with competent and diligent representation or limits client contact.¹⁵ Factors that impact the number of cases an attorney can appropriately handle include case complexity and available support services.
- B. The leadership of the public defense delivery system adjusts attorney case assignments and resources to guarantee the continued delivery of quality juvenile defense services.

6

The Public Defense Delivery System Supervises and Systematically Reviews Juvenile Staff According to National, State and/or Local Performance Guidelines or Standards.

- A. The public defense delivery system provides supervision and management direction for attorneys and team members who provide defense services to children.¹⁶
- B. The leadership of the public defense delivery system clearly defines the organization's vision and adopts guidelines consistent with national, state and/or local performance standards.¹⁷
- C. The public defense delivery system provides systematic reviews for all attorneys and staff representing juveniles, whether they are contract defenders, assigned counsel or employees of defender offices.

7

The Public Defense Delivery System Provides and Requires Comprehensive, Ongoing Training and Education for All Attorneys and Support Staff Involved in the Representation of Children.

- A. The public defense delivery system recognizes juvenile delinquency defense as a specialty that requires continuous training¹⁸ in unique areas of the law. The public defense delivery system provides and mandates training¹⁹ on topics including detention advocacy, litigation and trial skills, dispositional planning, post-dispositional practice, educational rights, appellate advocacy and procedure and administrative hearing representation.
- B. Juvenile team members have a comprehensive understanding of the jurisdiction's juvenile law and procedure, and the collateral consequences of adjudication and conviction.

- C. Team members receive training to recognize issues that arise in juvenile cases and that may require assistance from specialists in other disciplines. Such disciplines include, but are not limited to:
1. Administrative appeals
 2. Child welfare and entitlements
 3. Special Education
 4. Dependency court/abuse and neglect court process
 5. Immigration
 6. Mental health, physical health and treatment
 7. Drug addiction and substance abuse
- D. Training for team members emphasizes understanding of the needs of juveniles in general and of specific populations of juveniles in particular, including in the following areas:
1. Child and adolescent development
 2. Racial, ethnic and cultural understanding
 3. Communicating and building attorney-client relationships with children and adolescents
 4. Ethical issues and considerations of juvenile representation
 5. Competency and capacity
 6. Role of parents/guardians
 7. Sexual orientation and gender identity awareness
 8. Transfer to adult court and waiver hearings
 9. Zero tolerance, school suspension and expulsion policies
- E. Team members are trained to understand and use special programs and resources that are available in the juvenile system and in the community, such as
1. Treatment and problem solving courts²⁰
 2. Diversionary programs
 3. Community-based treatment resources and programs
 4. Gender-specific programming

8

The Public Defense Delivery System Has an Obligation to Present Independent Treatment and Disposition Alternatives to the Court.

- A. The public defense delivery system ensures that attorneys consult with clients and, independent from court or probation staff, actively seek out and advocate for treatment and placement alternatives that serve the unique needs and dispositional requests of each child, consistent with the client's expressed interests.
- B. The leadership and staff of the public defense delivery system works in partnership with other juvenile justice agencies and community leaders to minimize custodial detention and the incarceration of children and to support the creation of a continuum of community-based, culturally sensitive and gender-specific treatment alternatives.
- C. The public defense delivery system provides independent post-disposition monitoring of each child's treatment, placement or program to ensure that rehabilitative needs are met. If clients' expressed needs are not effectively addressed, attorneys are responsible for intervention and advocacy before the appropriate authority.

9

The Public Defense Delivery System Advocates for the Educational Needs of Clients.

- A. The public defense delivery system recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition.
- B. The public defense delivery system advocates, either through direct representation or through collaborations with community-based partners, for the appropriate provision of the individualized educational needs of clients.

- A. The public defense delivery system demonstrates strong support for the right to counsel and due process in delinquency courts to promote a juvenile justice system that is fair, non-discriminatory and rehabilitative.
- B. The public defense delivery system recognizes that disproportionate representation of minority youth in the juvenile justice system is contrary to notions of fairness and equality. The public defense delivery system works to draw attention to, and zealously advocates for the elimination of, disproportionate minority contact.

NOTES

- ¹ The original *Principles* were developed over an eighteen-month period through a collaborative venture between the National Juvenile Defender Center (NJDC) and the American Council of Chief Defenders, a section of the National Legal Aid and Defender Association (NLADA). NLADA officially adopted the original *Principles* on December 4, 2004. NJDC and NLADA collaborated on additional revisions to release this updated version, which NLDA officially adopted on June 4, 2008.
- ² For the purposes of these *Principles*, the term “public defense delivery system” denotes legal delivery systems that provide defense services to indigent juveniles facing delinquency proceedings. This term is meant to encompass public defender offices, contract, appointed, and conflict counsel, law school clinics, and non-profit legal providers.
- ³ 387 U.S. 1 (1967). According to the *IJA/ABA Juvenile Justice Standard Relating to Counsel for Private Parties* 3.1 (1996), “the lawyer’s principal duty is the representation of the client’s legiti-

mate interests” as distinct and different from the best interest standard applied in neglect and abuse cases. The Commentary goes on to state that “counsel’s principal responsibility lies in full and conscientious representation” and that “no lesser obligation exists when youthful clients or juvenile court proceedings are involved.”

- ⁴ For purposes of these *Principles*, the term “delinquency proceeding” denotes all proceedings in juvenile court as well as any proceeding lodged against an alleged status offender, such as for truancy, running away, incorrigibility, etc.
- ⁵ Common findings among these assessments include, among other barriers to adequate representation, a lack of access to competent counsel, inadequate time and resources for defenders to prepare for hearings or trials, a juvenile court culture that encourages pleas to move cases quickly, a lack of pretrial and dispositional advocacy and an over-reliance on probation. For more information, see *Selling Justice Short: Juvenile Indigent Defense in Texas* (2000); *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* (2001); *Georgia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2001); *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2002); *An Assessment of Counsel and Quality of Representation in Delinquency Proceedings in Ohio* (2003); *Maine: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters* (2003); *Indiana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2006); *Florida: An Assessment of Access to Counsel and Quality of*

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⁶ 543 U.S. 551 (2005).

⁷ *American Bar Association Model Rules of Professional Conduct*, Rule 1.1 Competence.

⁸ *Justice by Gender*: jointly issued by the ABA and the NBA 2001.

⁹ See generally, National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005) [hereinafter *Guidelines*]. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 3.

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¹² For purposes of this Principle, the term “transfer/waiver proceedings” refers to any proceedings related to prosecuting youth in adult court, including those known in some jurisdictions as certification, bind-over, decline, remand, direct file, or youthful offenders.

¹³ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 8.

¹⁴ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 4.

¹⁵ See generally, American Council of Chief Defenders Statement on Caseloads and Workloads, issued August 24, 2007; see also National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), 5.1, 5.3; American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992), 5-5.3; American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993), 4-1.3(e); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts*, Chapter 13, “The Defense” (1973), 13.12; National Legal Aid and Defender Association and American Bar Association, *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985), III-6, III-12; National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems* (1989), 4.1.4.1.2; ABA Model Code of Professional Responsibility DR 6-101; *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 5.

¹⁶ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principles 6 and 10.

¹⁷ For example, Institute of Judicial Administration-American Bar Association, *Juvenile Justice Standards* (1979); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts*, Chapter 13, “The Defense” (1973); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976); American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995).

¹⁸ National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standard 7.2, footnote 2. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 9; National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standards 1 to 9.

¹⁹ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 9; National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standards 1 to 9.

²⁰ American Council of Chief Defenders, *Ten Tenets of Fair and Effective Problem Solving Courts* (2002).



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TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS

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PREAMBLE

A. Goals of These Principles

The *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*¹ provide criteria by which a public defense delivery system² may fully implement the holding of *In re Gault*.³ These Principles offer guidance to public defense leaders and policymakers regarding the role of public defenders, contract attorneys, or assigned counsel in delivering zealous, comprehensive and quality legal representation on behalf of children facing both delinquency and criminal proceedings.⁴ In applying these Principles, advocates should always be guided by defense counsel's primary responsibility to zealously defend clients against the charges leveled against them and to protect their due process rights.

Delinquency cases are complex and their consequences have significant implications for children and their families. Therefore, every child client must have access to qualified, well-resourced defense counsel. These resources should include the time and skill to adequately communicate with a client so that lawyer and client can build a trust-based attorney-client relationship and so that the lawyer is prepared to competently represent the client's interests. These Principles elucidate the parameters of this critical relationship already well established in legal ethics rules and opinions.

In 1995, the American Bar Association's Juvenile Justice Center published *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national study that revealed major failings in juvenile defense across the nation. Since that time, numerous state-based assessments have documented in detail the manner in which these failings result in lifelong, harmful consequences for our nation's children.⁵ These Principles provide public defense leaders and policymakers a guide to rectifying systemic deficits and to providing children charged with criminal behavior the high quality counsel to which they are entitled.

B. The Representation of Children and Adolescents is a Specialty.

Public defense delivery systems must recognize that children and adolescents are different from adults. Advances in brain research cited favorably by the Supreme Court in *Roper v. Simmons*⁶ confirm that children and young adults do not possess the same cognitive, emotional, decision-making or behavioral capacities as adults. Public defense delivery systems must provide training regarding the stages of child and adolescent development.

Public defense delivery systems must emphasize that juvenile defense counsel has an obligation to maximize each client's participation in his or

her own case in order to ensure that the client understands the court process and to facilitate informed decision making by the client. Defense attorneys owe their juvenile clients the same duty of loyalty that adult criminal clients enjoy. This coextensive duty of loyalty requires the juvenile defense attorney to advocate for the child client's expressed interests with the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁷

C. Public Defense Delivery Systems Must Pay Particular Attention to the Most Vulnerable and Over-Represented Groups of Children in the Delinquency System.

Because research has demonstrated that involvement in the juvenile court system increases the likelihood that a child will subsequently be convicted and incarcerated as an adult, public defense delivery systems should pay special attention to providing high quality representation for the most vulnerable and over-represented groups of children in the delinquency system.

Nationally, children of color are severely over-represented at every stage of the juvenile justice process. Defenders must zealously advocate for the elimination of the disproportionate representation of minority youth in juvenile courts and detention facilities.

Children with mental health and developmental disabilities are also over-represented in the juvenile justice system. Defenders must address these needs and secure appropriate assistance for these clients as an essential component of quality legal representation.

Drug- and alcohol-dependent juveniles and those dually diagnosed with addiction and mental health disorders are more likely to become involved with the juvenile justice system. Defenders must advocate for appropriate treatment services for these clients.

Research shows that the population of girls in the delinquency system is increasing, and that girls' issues are distinct from boys'. Gender-based interventions and the programmatic needs of girls in the juvenile delinquency system, who have frequently suffered from abuse and neglect, must be assessed and appropriate gender-based services developed and funded.⁸

The special issues presented by lesbian, gay, bisexual and transgender youth require increased awareness and training to ensure that advocacy on their behalf addresses their needs.

The **National Juvenile Defender Center** (NJDC) is committed to ensuring excellence in juvenile defense and promoting justice for all children. NJDC was created to address the juvenile justice system deficiencies revealed by *A Call for Justice*, *supra*. In addition to conducting assessments of juvenile indigent defense delivery systems around the country, NJDC serves as a resource for juvenile justice professionals, providing technical assistance, training, publications, and other support that improves the quality of representation of children across the country. For more information, see www.njdc.info or call (202) 452-0010.

The **National Legal Aid & Defender Association** (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA is a recognized expert in public defense and a leader in the development of national public defense standards. Representing legal aid and defender programs, as well as individual advocates, NLADA is proud to be the oldest and largest national, nonprofit membership association devoting 100 percent of its resources to serving the broad equal justice community. For more information, see www.nlada.org or call (202) 452-0620.

TEN PRINCIPLES

1 The Public Defense Delivery System Upholds Juveniles' Constitutional Rights Throughout the Delinquency Process and Recognizes The Need For Competent and Diligent Representation.

- A. Competent and diligent representation is the bedrock of a juvenile defense attorney's responsibilities.⁹
- B. The public defense delivery system ensures that children do not waive appointment of counsel and that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.¹⁰
- C. The public defense delivery system recognizes that the delinquency process is adversarial and provides children with continuous legal representation throughout the proceedings including, but not limited to, detention, pre-trial motions or hearings, adjudication, disposition, post-disposition, probation, appeal, expungement and sealing of records.
- D. The public defense delivery system includes the active participation of the private bar or conflict office whenever a conflict of interest arises for the primary defender service provider or when the caseload justifies the need for outside counsel.¹¹

2 The Public Defense Delivery System Recognizes that Legal Representation of Children is a Specialized Area of the Law.

- A. The public defense delivery system recognizes that representing children in delinquency proceedings is a complex specialty in the law that is different from, but equally as important as, the representation of adults in criminal proceedings. The public defense delivery system further acknowledges the specialized nature of representing juveniles prosecuted as adults following transfer/waiver proceedings.¹²
- B. The public defense delivery system leadership promotes respect for juvenile defense team members and values the provision of quality, zealous and comprehensive delinquency representation services.
- C. The public defense delivery system encourages experienced attorneys to provide delinquency representation and strongly discourages use of delinquency representation as a training assignment for new attorneys or future adult court advocates.

3 The Public Defense Delivery System Supports Quality Juvenile Delinquency Representation Through Personnel and Resource Parity.¹³

- A. The public defense delivery system encourages juvenile specialization without limiting access to promotions, financial advancement, or personnel benefits for attorneys and support staff.
- B. The public defense delivery system provides a professional work environment and adequate operational resources such as office space, furnishings, technology, confidential client interview areas¹⁴ and current legal research tools. The system includes juvenile representation resources in budgetary planning to ensure parity in the allocation of equipment and resources.

4 The Public Defense Delivery System Uses Expert and Ancillary Services to Provide Quality Juvenile Defense Services.

- A. The public defense delivery system supports requests for expert services throughout the delinquency process whenever individual juvenile case representation requires these services for quality representation. These services include, but are not limited to, evaluation by and testimony of mental health professionals, education specialists, forensic evidence examiners, DNA experts, ballistics analysts and accident reconstruction experts.

- B. The public defense delivery system ensures the provision of all litigation support services necessary for the delivery of quality services, including, but not limited to, interpreters, court reporters, social workers, investigators, paralegals and other support staff.

5 The Public Defense Delivery System Supervises Attorneys and Staff and Monitors Work and Caseloads.

- A. The leadership of the public defense delivery system monitors defense counsel's workload to promote quality representation. The workload of public defense attorneys, including appointed and other work, should never be so large that it interferes with competent and diligent representation or limits client contact.¹⁵ Factors that impact the number of cases an attorney can appropriately handle include case complexity and available support services.
- B. The leadership of the public defense delivery system adjusts attorney case assignments and resources to guarantee the continued delivery of quality juvenile defense services.

6 The Public Defense Delivery System Supervises and Systematically Reviews Juvenile Staff According to National, State and/or Local Performance Guidelines or Standards.

- A. The public defense delivery system provides supervision and management direction for attorneys and team members who provide defense services to children.¹⁶
- B. The leadership of the public defense delivery system clearly defines the organization's vision and adopts guidelines consistent with national, state and/or local performance standards.¹⁷
- C. The public defense delivery system provides systematic reviews for all attorneys and staff representing juveniles, whether they are contract defenders, assigned counsel or employees of defender offices.

7 The Public Defense Delivery System Provides and Requires Comprehensive, Ongoing Training and Education for All Attorneys and Support Staff Involved in the Representation of Children.

- A. The public defense delivery system recognizes juvenile delinquency defense as a specialty that requires continuous training¹⁸ in unique areas of the law. The public defense delivery system provides and mandates training¹⁹ on topics including detention advocacy, litigation and trial skills, dispositional planning, post-dispositional practice, educational rights, appellate advocacy and procedure and administrative hearing representation.
- B. Juvenile team members have a comprehensive understanding of the jurisdiction's juvenile law and procedure, and the collateral consequences of adjudication and conviction.
- C. Team members receive training to recognize issues that arise in juvenile cases and that may require assistance from specialists in other disciplines. Such disciplines include, but are not limited to:
 - 1. Administrative appeals
 - 2. Child welfare and entitlements
 - 3. Special Education
 - 4. Dependency court/abuse and neglect court process
 - 5. Immigration
 - 6. Mental health, physical health and treatment
 - 7. Drug addiction and substance abuse
- D. Training for team members emphasizes understanding of the needs of juveniles in general and of specific populations of juveniles in particular, including in the following areas:
 - 1. Child and adolescent development
 - 2. Racial, ethnic and cultural understanding
 - 3. Communicating and building attorney-client relationships with children and adolescents
 - 4. Ethical issues and considerations of juvenile representation
 - 5. Competency and capacity
 - 6. Role of parents/guardians

7. Sexual orientation and gender identity awareness
 8. Transfer to adult court and waiver hearings
 9. Zero tolerance, school suspension and expulsion policies
- E. Team members are trained to understand and use special programs and resources that are available in the juvenile system and in the community, such as
1. Treatment and problem solving courts²⁰
 2. Diversionary programs
 3. Community-based treatment resources and programs
 4. Gender-specific programming

8 The Public Defense Delivery System Has an Obligation to Present Independent Treatment and Disposition Alternatives to the Court.

- A. The public defense delivery system ensures that attorneys consult with clients and, independent from court or probation staff, actively seek out and advocate for treatment and placement alternatives that serve the unique needs and dispositional requests of each child, consistent with the client's expressed interests.
- B. The leadership and staff of the public defense delivery system works in partnership with other juvenile justice agencies and community leaders to minimize custodial detention and the incarceration of children and to support the creation of a continuum of community-based, culturally sensitive and gender-specific treatment alternatives.
- C. The public defense delivery system provides independent post-disposition monitoring of each child's treatment, placement or program to ensure that rehabilitative needs are met. If clients' expressed needs are not effectively addressed, attorneys are responsible for intervention and advocacy before the appropriate authority.

9 The Public Defense Delivery System Advocates for the Educational Needs of Clients.

- A. The public defense delivery system recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition.
- B. The public defense delivery system advocates, either through direct representation or through collaborations with community-based partners, for the appropriate provision of the individualized educational needs of clients.

10 The Public Defense Delivery System Promotes Fairness and Equity For Children.

- A. The public defense delivery system demonstrates strong support for the right to counsel and due process in delinquency courts to promote a juvenile justice system that is fair, non-discriminatory and rehabilitative.
- B. The public defense delivery system recognizes that disproportionate representation of minority youth in the juvenile justice system is contrary to notions of fairness and equality. The public defense delivery system works to draw attention to, and zealously advocates for the elimination of, disproportionate minority contact.

NOTES

¹ The original *Principles* were developed over an eighteen-month period through a collaborative venture between the National Juvenile Defender Center (NJDC) and the American Council of Chief Defenders, a section of the National Legal Aid and Defender Association (NLADA). NLADA officially adopted the original *Principles* on December 4, 2004. NJDC and NLADA collaborated on additional revisions to release this updated version, which NLDA officially adopted on June 4, 2008.

² For the purposes of these *Principles*, the term "public defense delivery system" denotes legal delivery systems that provide defense services to indigent juveniles facing delinquency proceedings. This term is meant to encompass public defender offices, contract, appointed, and conflict counsel, law school clinics, and non-profit legal providers.

³ 387 U.S. 1 (1967). According to the *IJA/ABA Juvenile Justice Standard Relating to Counsel for Private Parties* 3.1 (1996), "the lawyer's principal duty is the representation of the client's legitimate interests" as distinct and different from the best interest standard applied in neglect

and abuse cases. The Commentary goes on to state that "counsel's principal responsibility lies in full and conscientious representation" and that "no lesser obligation exists when youthful clients or juvenile court proceedings are involved."

⁴ For purposes of these *Principles*, the term "delinquency proceeding" denotes all proceedings in juvenile court as well as any proceeding lodged against an alleged status offender, such as for truancy, running away, incorrigibility, etc.

⁵ Common findings among these assessments include, among other barriers to adequate representation, a lack of access to competent counsel, inadequate time and resources for defenders to prepare for hearings or trials, a juvenile court culture that encourages pleas to move cases quickly, a lack of pretrial and dispositional advocacy and an over-reliance on probation. For more information, see *Selling Justice Short: Juvenile Indigent Defense in Texas* (2000); *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* (2001); *Georgia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2001); *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2002); *An Assessment of Counsel and Quality of Representation in Delinquency Proceedings in Ohio* (2003); *Maine: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters* (2003); *Indiana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2006); *Florida: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2006); *Mississippi: An Assessment of Access to Counsel and Quality of Representation in Youth Court Proceedings* (2007); *Illinois: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2007). All NJDC Assessments are available at <http://www.njdc.info/assessments.php>.

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⁷ *American Bar Association Model Rules of Professional Conduct*, Rule 1.1 Competence.

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⁹ See generally, National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005) [hereinafter *Guidelines*]. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 3.

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¹⁵ See generally, American Council of Chief Defenders Statement on Caseloads and Workloads, issued August 24, 2007; see also National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), 5.1, 5.3; American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992), 5-5.3; American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993), 4-1.3(e); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts*, Chapter 13, "The Defense" (1973), 13.12; National Legal Aid and Defender Association and American Bar Association, *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985), III-6, III-12; National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems* (1989), 4.1.4.1.2; ABA Model Code of Professional Responsibility DR 6-101; *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 5.

¹⁶ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principles 6 and 10.

¹⁷ For example, Institute of Judicial Administration-American Bar Association, *Juvenile Justice Standards* (1979); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts*, Chapter 13, "The Defense" (1973); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976); American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995).

¹⁸ National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standard 7.2, footnote 2. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 9; National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standards 1 to 9.

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²⁰ American Council of Chief Defenders, *Ten Tenets of Fair and Effective Problem Solving Courts* (2002).

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National Juvenile Defender Center
National Legal Aid & Defender Association



TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS

The National Juvenile Defender Center and the National Legal Aid & Defender Association are pleased to distribute *Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems*, adopted in partnership with the American Council of Chief Defenders in December 2004 and revised and reissued in July 2008.

We hope and trust that they will prove useful in future efforts to reform and improve juvenile indigent defense systems across the country.

Please contact NJDC at (202) 452-0010 or inquiries@njdc.info with any questions or requests for assistance.

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