



SOUTH CAROLINA

**JUVENILE INDIGENT DEFENSE:
A REPORT ON ACCESS TO COUNSEL
AND QUALITY OF REPRESENTATION IN
DELINQUENCY PROCEEDINGS**

**National Juvenile Defender Center
Winter 2010**

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DELINQUENCY PROCEEDINGS**

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ON BEHALF OF

The National Juvenile Defender Center

Winter 2010

This Assessment was made possible by a grant from the South Carolina Department of Public Safety upon recommendation of the Governor's Juvenile Justice Advisory Committee.

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ACKNOWLEDGEMENTS

We are grateful to the juvenile defenders across South Carolina who took time out of their busy schedules to meet with our assessment team members and share the experiences and struggles they face when representing indigent children in delinquency proceedings. We would also like to thank the judges, prosecutors, juvenile court counselors, and administrators who allowed us into their courtrooms and facilities, took part in interviews, and offered candid remarks about their views of the state of juvenile indigent defense in their counties.

The assessment would not have been possible without the on-site assistance and support of the Children's Law Center, University of South Carolina, School of Law, especially Sarah Darbee Smith, the Juvenile Justice Resource Attorney whose knowledge of South Carolina law and dedication to the defense of children is admirable. The leadership of Executive Director Harry Davis paved the way for the assessment team and we are appreciative of the guidance from his talented staff, including Carolyn Morris and Kathy Speed.

We would also like to thank the Advisory Committee, who helped guide the assessment process, including:

Heather Scalzo, *Juvenile Public Defender, Greenville, SC*
Kelley Perkins-Brown, *Juvenile Public Defender, Aiken, SC*
Nadia Black, *Assistant Solicitor, Georgetown, SC*
Mike Etheridge, *Attorney-at-Law, Charleston, SC*
Vance Cowden, *University of South Carolina School of Law, Columbia, SC*
Margaret Barber, *Department of Juvenile Justice, Columbia, SC*
Brett MacGargle, *Department of Juvenile Justice, Columbia, SC*
Nancy McCormick, *Protection & Advocacy for People with Disabilities, Columbia, SC*
Barbara Morgan, *Solicitor (retired), South Carolina Bar Foundation, Aiken, SC*

We are grateful for the comprehensive work of the assessment team members and advisory board members who graciously donated their time and expertise as on-site interviewers and advisors. They include:

Rey Cheatham Banks, *National Juvenile Defender Center, Washington, DC*
Sheila Bedi, *Southern Poverty Law Center, Montgomery, AL*
Marion Chartoff, *Southern Poverty Law Center, Montgomery, AL*
Rebecca DiLoreto, *Children's Law Center, Covington, KY*
Shauna Epps, *Center for Children's Law and Policy, Washington, DC*
Pat Forbis, *Children's Law Center, Columbia, SC*
Melissa Goemann, *Children's Law Center, University of Richmond, Richmond, VA*
Kristin Henning, *Georgetown University Law Center, Juvenile Justice Clinic, Washington, DC*
Clayton Krohn, *State of North Carolina Office of the Juvenile Defender, Durham, NC*
Katayoon Majd, *National Juvenile Defender Center, Washington, DC*
Chris Northrop, *Cumberland Legal Aid Clinic, University of Maine Law School, Portland, ME*
Ilona Picou, *Juvenile Regional Services, New Orleans, LA*
Marlene Sallo, *Children's Law Center, Columbia, SC*

Kim Brooks Tandy, *Children's Law Center, Covington, KY*
Lisa Thureau-Gray, *Strategies for Youth, Cambridge, MA*
Eric Zogry, *State of North Carolina Office of the Juvenile Defender, Durham, NC*

There are always people behind the scenes whose contributions are far too many to mention. We'd like to thank the NJDC staff, especially Rey Cheatham Banks for handling the logistics and coordination of the site visits, and Angela Muse for designing the document.

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

EXECUTIVE SUMMARY

Children have a clearly established constitutional right to the effective assistance of counsel in delinquency cases and juvenile defenders are vital to protect and enforce that right. In addition, skilled juvenile defenders can play an important role in opening doors to positive opportunities and helping children become productive and contributing members of society. As stated in the Federal Advisory Committee on Juvenile Justice 2009 Annual Report, “Effective legal representation protects public safety by helping ensure that a juvenile offender receives the treatment or services necessary to prevent further offending.”¹

The purpose of this assessment is to provide comprehensive information about access to and quality of defense counsel in delinquency proceedings in South Carolina; to identify structural and systemic barriers that impede effective representation of children; to highlight best practices where found; and, to make recommendations that will serve as a guide for improving juvenile defender services for indigent children in the state.

Juvenile defense is a complex specialty, and is significantly different from and broader than the concept of traditional criminal defense of adults. A juvenile defender must understand child and adolescent development, be able to evaluate a client’s maturity and competency, and be able to communicate effectively with a parent or guardian without compromising the defender’s ethical duties to the child. Like the adult criminal defense attorney, the juvenile defender is the sole person responsible for providing the client with a meaningful voice in the proceedings and asserting his stated legal interests throughout the duration of the case. In addition, the juvenile defender must become versed in the specialized arguments critical for advocacy in proceedings unique to juvenile court, like detention, transfer and disposition hearings; complexities that arise in mental health and special education law, and how they might impact the course of a delinquency case; collateral consequences of a delinquency adjudication, including barriers to obtaining college acceptance, student loan awards, and entrance into the military; and, ability to maintain contacts at, and knowledge of, community-based programs for juveniles. Because of these complexities, comprehensive assessments of juvenile indigent defense systems are critical for ensuring that limited resources are deployed wisely and that every child’s constitutional right to due process is protected.

CORE FINDINGS

This assessment revealed grave facts about the provision of juvenile defense services across South Carolina. Many of South Carolina’s own judges, defense attorneys, prosecutors, probation officers, and others expressed concerns about the quality of defense representation that children receive. Assessment team members encountered overworked and underfunded juvenile defenders who did not have time or resources to provide an adequate defense to juveniles facing delinquency charges. While model practice was sometimes observed, these instances of vigorous representation were the exception rather than the rule.

The deep-rooted *systemic barriers* that impede the delivery of the fair administration of justice need to be addressed to ensure that children in South Carolina are afforded their constitutional right to due process and a greater opportunity for a successful future.

The core findings of the assessment include:

Inadequate Resources

South Carolina's juvenile indigent defense system operates with insufficient resources to provide meaningful access to counsel and diligent legal representation. The recent overhaul of the indigent defense system has not resolved this deficiency as there continues to be limited funding from state and county government and discretionary sources. Limited funding has created extreme disparities between defender offices which result in disparities in the quality of representation children receive. The lack of resources, high caseloads, insufficient access to investigators and support staff, and limited client contact have made meaningful investigation and trial practice an anomaly in most of South Carolina's family courts.

Insufficient Access to Specialized Training

One hundred percent of the defenders interviewed stated that they received little or no training prior to handling their first juvenile case. None of the counties assessed have a formal training program in place for juvenile defenders prior to their first juvenile case. Across the state, stakeholders cited a need for training on the full range of practice issues, such as initial motions, detention and disposition advocacy, trials, appeals, and the collateral consequences of a juvenile adjudication. In 40% of the counties visited, the juvenile court stakeholders noted that defenders were not aware of the available disposition options for their clients and thought that defenders would benefit from training on disposition alternatives. Thirteen percent of judges interviewed cited the need for defenders to receive training on how to handle a waiver hearing.

Lack of Zealous Legal Advocacy

Due to high caseloads and compounded by limited resources, approximately 60% of defenders who were interviewed stated that they do not meet with most of their clients until just before the first court hearing. Investigators reported that most of the attorneys observed appeared to have met with their clients just prior to the first court hearing. In nearly every county visited, at least 95% of the juvenile cases resulted in guilty pleas, the vast majority of which took place at the first hearing. A wholesale lack of case preparation quickly leads to other serious deficiencies and outcomes observed across the state including:

-Overwhelming Number of Pleas at First Appearance

Juvenile defense must include analyzing all available evidence, abiding by the client's statement of the facts, and taking appropriate cases to trial.

-Lack of Probable Cause Hearings

In addition to holding the state to its burden, contesting probable cause at a hearing can provide defenders with more information about the solicitor's case and possibly witness testimony. The assessment findings indicate, however, that probable cause hearings were held regularly in only 20% of the counties visited.

-Lack of Motions Practice

Pre-adjudicatory motions practice in juvenile court is necessary to preserve the client's rights, gather information, and advocate for the client's interests. In 80% of the counties visited, defense attorneys rarely file written motions, such as discovery, dismissal, suppression, and recusal motions.

-Lack of Dispositional Advocacy

In 75% of the counties visited, juvenile defenders did *not* make any independent recommendations or arguments at disposition hearings. In most of these counties, it appeared that attorneys conduct little or no preparation for disposition hearings, and many of the defenders simply relied on the reports and information submitted by DJJ and/or the solicitor.

-Lack of Post-Dispositional Advocacy

Juvenile defenders should file for review hearings to ensure that court orders are implemented, services are rendered, and children have a formal opportunity to challenge violations of court-ordered services, ill treatment or harsh conditions within facilities. However, with the exception of a handful of review hearings in only a few counties, defenders across South Carolina rarely provide their clients with post-disposition advocacy.

Lack of Meaningful Contact with Clients in Pre-Trial Detention

Securing the release of detained juvenile clients requires information and preparation. Contact with detained clients prior to the initial detention hearing is essential to learning about the case, exploring options for release, and gathering background information to aid in arguments before the court. In those counties that have detention facilities nearby, few of the attorneys interviewed said that they visited clients at the detention facilities. Another 10% stated that they sometimes utilize the video-conferencing capability provided by the South Carolina Department of Juvenile Justice (DJJ) to talk to detained clients between hearings.

Lack of Confidential Spaces for Attorney-Client Conferences

Confidentiality is at the core of the attorney-client relationship. It is critical for a child to be able to discuss the circumstances of the alleged offense as well as sensitive family and personal issues without strangers listening. In 20% of the counties visited, attorneys had private conference rooms to consult with their clients; these courthouses were recently renovated or constructed. The remaining 80% of the counties provided no

such private meeting space for attorney-client conferences in the courthouse. In some courthouses, a part of the hallway is designated as an area for attorneys to meet with clients and dividers are set up around desks; in still other courthouses, attorneys must meet with their clients in waiting areas outside the courtroom, or in other available space, such as stairwells.

Ethical and Role Confusion about Juvenile Defense Counsel

Juvenile defenders have an ethical obligation to represent the stated interest, not the best interest, of their clients. Investigators observed many instances in which defenders explicitly stated that their request of the court was based on what they perceived as being in their clients' best interests. Defenders are not the only ones in the court system who lack a clear understanding of the appropriate role of counsel in delinquency cases. In fact, 39% of stakeholders interviewed thought that defenders should always employ best interests as the standard for representation, 36% believed defenders should balance best and expressed interest in their advocacy, and only 20% of stakeholders understood the defender must represent the expressed interest of the child.

Lack of Advocacy to Combat Unjust Practices

In 100% of the counties visited, investigators observed that some juveniles were shackled during court proceedings without any objection from their attorney whatsoever. Juveniles were restrained with belly chains, leg irons, and/or handcuffs throughout their entire hearing. In addition, it appeared attorneys missed critical opportunities over and over again to raise awareness or challenge systemic injustices that impact the quality of justice delivered to vulnerable children.

Lack of Awareness of Collateral Consequences and Collateral Issues

Juvenile defenders must effectively ensure that their clients understand all of the serious and long-term collateral consequences that can flow from a delinquency adjudication, such as barriers to obtaining college acceptance, student loan awards, housing, and entrance into the military. Furthermore, juvenile defenders must have a clear understanding of other ancillary areas of law that have a potential impact on a juvenile case, such as immigration, special education, and mental health laws. In the counties visited, many defenders themselves acknowledged they lacked full awareness of the range of collateral consequences and the related areas of law important for effective representation.

CORE RECOMMENDATIONS

The juvenile indigent defense system in South Carolina is sorely in need of attention and repair. Juvenile defenders alone cannot solve these problems. This Assessment calls for collaborative action to remedy systemic deficiencies at the state, regional and local levels. The core recommendations set forth below are followed in Chapter Five in greater detail with a series of implementation strategies that guide key stakeholders toward concrete, collaborative action.

1. *Require Specialized Juvenile Defense Training*
Juvenile defenders should be required to receive specialized, comprehensive, ongoing, affordable juvenile-specific skills training that covers all stages of the delinquency process (initial hearings through post-disposition) and incorporates other critically important topics such as adolescent and brain development, competency, immaturity, disabilities, and, other important issues that have a unique impact on children.
2. *Increase Resources for Juvenile Public Defenders*
The juvenile defense system is woefully under-resourced. It is imperative that the state legislators and local policy makers allocate adequate funds to ensure pay and resource parity. More juvenile public defenders need to be hired and policy makers need to ensure pay parity for juvenile public defenders with adult public defenders and solicitors. In addition, juvenile defense attorneys need access to support staff, investigators, experts, and social workers.
3. *Foster Diligent and Zealous Advocacy*
Juvenile public defenders should act with diligence and zeal in advocating for their clients. Zealous advocacy includes actively trying cases where facts or laws are in dispute; properly investigating cases; making meaningful recommendations at all phases of the court process; filing appropriate motions; challenging the use of secure evaluations and pre-trial detention when such is not necessary or appropriate; objecting to practices such as unnecessary shackling; and, insisting upon uniform, comprehensive, and age-appropriate colloquies. Juvenile public defenders should enter pleas at initial hearings only when appropriate, and they should consider the impact that court fees have on their indigent clientele and argue for waiver of fees when they are perceived to be punitive or unduly burdensome.
4. *Eliminate Unnecessary Shackling*
The indiscriminate and unnecessary shackling of children in courtroom proceedings should be terminated and shackling should only be used in cases in which an individualized determination has been made on the record that it is necessary.

5. *Ensure Timely Appointment of Counsel and Client Contact*
Juvenile defense counsel should be appointed in an early and timely manner and given every opportunity to adequately prepare for the case. Defense counsel must have a meaningful opportunity to confer with the child in a confidential meeting area. Counsel must have the chance to test the sufficiency of the case prior to accepting a plea agreement on behalf of the child, and to explain thoroughly the short and long term consequences of a juvenile court adjudication.

6. *Address Ethical and Role Confusion of Juvenile Defense Counsel*
The South Carolina Commission on Indigent Defense or other appropriate entity should issue an opinion clarifying the role of defense counsel in juvenile delinquency proceedings. The ethical and role confusion that often characterizes juvenile court practice leaves far too many children literally defenseless. All juvenile court professionals must understand that defense attorneys are ethically bound to act with diligence, competence, promptness, and zeal for the stated interests of their young clients. Circuit public defenders must play an important role in adhering to these mandates by providing meaningful supervision and assistance to juvenile public defenders to ensure competent and adequate representation for children.

7. *Establish Ongoing Oversight and Monitoring*
Establish a separate juvenile division within the South Carolina Commission on Indigent Defense or other appropriate entity to centralize leadership, innovation and responsibility around strengthening the practice and policy of juvenile defense. Such an entity could be tasked with ensuring the equitable and fair distribution of resources; collection of needed data; promulgation of standards and implementation of best practices; ensuring the availability of juvenile-specific training; and, identification, development, and implementation of specific policies and practices that will improve the juvenile defense system based on well informed decisions.

PURPOSE AND METHODOLOGY OF THE ASSESSMENT

In the fall of 2008, the Children's Law Center at the University of South Carolina School of Law contracted with the National Juvenile Defender Center (NJDC) to conduct an in-depth assessment of the juvenile indigent defense system in South Carolina. This project was made possible by a grant from the South Carolina Department of Public Safety upon the recommendation of the Governor's Juvenile Justice Advisory Council and had the support of the South Carolina Commission on Indigent Defense and the South Carolina Public Defenders Association. NJDC has over 15 years of demonstrated experience conducting these assessments in almost two dozen states across the nation.

Assessments furnish policy makers and leaders with accurate baseline data and information so they can make informed decisions regarding the nature and structure of the juvenile indigent defense system. Beyond the constitutional mandate to provide children in delinquency courts with counsel, the state of South Carolina has a vested interest in ensuring high-quality juvenile defense. When juvenile defense attorneys provide children with effective representation, they can improve the life outcomes of children. The primary goal of this assessment is to encourage excellence in juvenile defense and to promote fairness for children in South Carolina's juvenile delinquency system.

In consultation with the Children's Law Center, NJDC established a project advisory board. The advisory board provided invaluable insight and helped to guide the project from their unique perspectives. After exhaustive review and deliberation, 15 geographically diverse counties were selected for in-depth study. These counties were selected based on a thorough analysis of state demographics, population rates, arrest data, disposition rates, and accessibility to juvenile courts and different types of indigent defense delivery systems. The study sample included urban, suburban and rural areas and reflects the geographic and cultural diversity of the state.

An expert team of national and state-based investigators were selected to take part in this assessment. Eighteen highly trained and skilled investigators fanned out across the state to conduct site visits, court observations and confidential meetings, and interviews with key justice system stakeholders in the selected counties. Investigators also gathered other documentary evidence and reports while on-site. The interviews focused on the role and performance of defense counsel, but interviews were conducted with all professionals in the justice system. The assessment team included current and former public defenders, private practitioners, academics, and juvenile justice advocates, all of whom possess extensive knowledge of the role of defense counsel in juvenile court. During each site visit, the team observed juvenile court proceedings and interviewed public and private defenders, judges, solicitors, DJJ staff, parents and children.

Each investigator used interview protocols that were developed by NJDC and specifically tailored to South Carolina's juvenile court system. The teams also

visited detention centers, where they interviewed administrators and staff. Prior to all site visits, NJDC and all other participants reviewed research, reports, and background information on the juvenile justice system in South Carolina.

All investigators submitted their field notes which have been compiled, analyzed and incorporated into this assessment.

CHAPTER ONE

BACKGROUND ON THE SOUTH CAROLINA JUVENILE COURT SYSTEM

I. DUE PROCESS AND DELINQUENCY PROCEEDINGS

The first specialized juvenile court in the United States was created in 1899 in Illinois.² Supporters of this reform sought to separate children from the harsh conditions in adult prisons, and to improve their chances at becoming productive citizens.³ This specialized court required only cursory legal proceedings because the intent of the legislation that created the court was to help, rather than punish, the child.⁴ As a result, defense attorneys were not given a role in these courts. Instead, social workers and behavioral scientists assisted the court in determining and carrying out disposition of the cases. Detained children were placed in child-only institutions, such as training and industrial schools, and private foster homes.⁵ Probation officers facilitated their adjustment. Other states quickly adopted the model of a specialized juvenile court, and by 1925, all but two states had created some form of juvenile court.⁶

The history of juvenile courts provides insight into the current problems in the system. The notion that children in the United States should be handled in a court system separate from adults and the idea that they deserve due process protections are both largely creations of the 20th century. Until the 1960's, children in juvenile courts were denied the rights afforded to adults in the criminal justice system, such as the right to counsel and the privilege against self-incrimination. Children could be convicted and incarcerated on hearsay testimony⁷ and found guilty by a preponderance of the evidence, rather than beyond a reasonable doubt. Courts refused to extend these due process rights to children because juvenile proceedings were regarded as civil in nature, and because they were purportedly rehabilitative rather than punitive.⁸ But research on the juvenile justice system showed that in actuality, juvenile courts failed to live up to their promise of rehabilitation and appropriate treatment for children. Juvenile court judges often lacked legal training.⁹ Probation officers received inadequate training and carried heavy caseloads that often prohibited meaningful social intervention. Children were still regularly housed in jails, and juvenile correctional institutions more often than not were used as punishment.

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.¹⁰ 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.”¹¹

In a series of landmark cases that followed this decision, the Court proclaimed that children 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*,¹² 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 children 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.”¹³ 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.¹⁴

Over forty years later, states are still struggling to fulfill the mandate set out in *In re Gault*.

II. SOUTH CAROLINA’S INDIGENT DEFENSE SYSTEM

The South Carolina Office of Indigent Defense and Commission on Indigent Defense are responsible for establishing and monitoring the delivery of indigent defense services.¹⁵ Both the State and individual counties provide some funding for indigent defense. The Office of Indigent Defense holds training programs for public defenders throughout the state and oversees a state-wide reporting system for the compilation of data regarding indigent defense services.¹⁶

In 2007, the South Carolina legislature significantly revised the indigent defense statute and transformed the disparate operation of 30 non-profit defender officers with varying caseloads and compensation, into a system based on the state’s 16 judicial circuits.¹⁷ Each of South Carolina’s 16 judicial circuits now has a Circuit Public Defender, appointed by the South Carolina Commission on Indigent Defense, who is responsible for the administration of public defender services in each of the counties within the circuit. Under this new system, each circuit is supposed to establish a juvenile offender division that specializes in the defense of juveniles.

Sadly however, this overhaul has had little to no impact on juvenile indigent defense. As many of those interviewed expressed, the lack of funding has severely slowed, if not stalled entirely, the progress intended by this new system. Budget cuts and inadequate funding have meant that the South Carolina Commission on Indigent Defense has not been able to direct needed resources to juvenile indigent defense. Standards have yet to be implemented, and little oversight exists to standardize and improve the quality of representation statewide. In some counties, there appeared to be little difference between the pre-2007 non-profit defender offices and the new Circuit Public Defender offices.

III. SOUTH CAROLINA'S JUVENILE JUSTICE SYSTEM

South Carolina implemented a uniform state-wide family court system by statute in 1976. South Carolina's 46 counties are divided into 16 judicial circuits. The family courts' boundaries and number correspond to the 16 judicial circuits.¹⁸ The circuit courts are courts of general jurisdiction. Circuit courts hear criminal and civil matters. Forty-six circuit judges serve the 16 circuit courts on a rotating basis,¹⁹ though budget cuts in 2009 have forced travel restrictions that limit judges to their respective counties. At least two family court judges are assigned to each of the 16 circuits.²⁰ The Court of Appeals consists of a Chief Judge and eight Associate Judges. The Division of Appellate Defense within the South Carolina Commission on Indigent Defense handles appeals on behalf of indigent clients.²¹ The Supreme Court is the highest court in South Carolina and is composed of a Chief Justice and four Associate Justices.²² In addition to the courts and the public defender offices, other stakeholders in South Carolina's juvenile justice system include the solicitors' offices, the South Carolina Department of Juvenile Justice (DJJ), and other agencies.

Prosecutors in South Carolina are called solicitors. Each judicial circuit has an elected Judicial Circuit Solicitor,²³ and each county also has a solicitor's office. The South Carolina Commission on Prosecution Coordination supports the solicitors by coordinating budget issues, providing legal education and training programs, collecting and distributing publications, and assisting solicitors in establishing and maintaining a pretrial intervention program in each judicial circuit.²⁴

DJJ is a state cabinet agency. Its statutory mandate is "to protect the public, and reclaim juveniles through prevention, community services, education, and rehabilitative services in the least restrictive environment."²⁵ DJJ's responsibilities include providing rehabilitation and custodial care for the state's juveniles who are on probation or parole, or who are incarcerated.²⁶ DJJ probation officers supervise juveniles who are placed on probation. Probation officers in South Carolina are also referred to as "community specialists." Either DJJ or the Board of Juvenile Parole determines the release and revocation of release for juveniles who are removed from the custody of their family and committed to DJJ for an indeterminate period.²⁷ Those children who are released after commitment may be supervised by DJJ.²⁸

The current economic crisis came at a particularly unfortunate time for the South Carolina juvenile justice system. In the last seven years, South Carolina's juvenile justice system has undergone a vast transformation, following a decade of neglect. The ultimate goal of this overhaul by DJJ was to increase and improve the level of services for juveniles.²⁹ Instead, all probation officers, solicitors, defenders and judges interviewed for this assessment expressed their frustration with the loss of community-based services that has resulted from funding cuts. A 2009 report issued by a court monitor in a class action case warned that "budget reductions have already begun to unravel the progress made by DJJ over the

past 6-7 years, and further reductions will lead to less than minimally adequate constitutional levels of care at DJJ correctional institutions.”³⁰

IV. RELEVANT DATA AND STATISTICS

A review of DJJ data provides a picture of the juvenile justice landscape within which juvenile defenders practice. In the 2007-2008 fiscal year, DJJ processed 23,826 new juvenile cases. This represented a 4% increase from the previous year and a 13% decrease from 2003-2004.³¹ Since 1996, the number of violent and serious juvenile cases in South Carolina has decreased by nearly 28 percent.³² In 2007-2008 the top ten offenses processed through DJJ intake were misdemeanors with the top three offenses being: (1) disturbing schools (2,888 cases); (2) simple assault and battery (1,911 cases); and (3) public disorderly conduct (1,421 cases).³³

In the same period, 11,779 of the cases DJJ processed were petitioned to the family court based on decisions by the solicitor to prosecute. Also in that period, 9,488 cases were diverted and 6,241 cases were dismissed or not prosecuted.³⁴ Of the cases that proceeded to disposition, 5,075 juveniles received a disposition of probation, 525 juveniles received school attendance orders, and 2,024 juveniles were committed to DJJ. The remaining cases were dismissed, resulted in acquittals, or were resolved in other ways.³⁵ Also in the 2007-2008 time frame, although African American children accounted for 38% of the South Carolina child population, African American children accounted for 58% of juvenile court referrals,³⁶ 61% of children sent for residential evaluations,³⁷ 64% of children in secure detention,³⁸ and 62% of cases committed to juvenile correctional facilities.³⁹

Even before the economic crisis, the children in South Carolina faced many obstacles. Based on data from 2006 and 2007, the Annie E. Casey Foundation’s *2009 KIDS COUNT Data Book* lists South Carolina as 45th in the nation for child well-being, based upon 10 key indicators, including infant mortality rate, child and teen death rates and percentage of children in poverty.⁴⁰ More than 20% of South Carolina’s children live in poverty.⁴¹

By the end of 2008, the state was forced to cut a billion dollars from its budget, bringing the total general fund budget down to \$6.1 billion. The South Carolina juvenile justice system sustained numerous budget cuts. DJJ lost almost 25% of its approximately \$100 million budget.

CHAPTER TWO

JUVENILE COURT PROCESS IN SOUTH CAROLINA

This chapter provides an overview of the relevant South Carolina juvenile law and description of the juvenile court process.

I. STATE POLICY

The General Assembly of South Carolina has formally adopted a policy directing agencies of government to be responsible in their resolution of the problems of children in need of services. Of particular importance to this assessment is Chapter 19 of Title 63, also known as the “Juvenile Justice Code”.⁴²

II. FAMILY COURT JURISDICTION

The family courts in South Carolina have exclusive jurisdiction over children alleged to have committed a criminal or status offense prior to turning seventeen.⁴³ Persons age sixteen or older who are charged with class A, B, C or D felonies, or those felonies that carry a potential fifteen year sentence, are not defined as “children” under the Code and therefore are not under the family court’s original jurisdiction but may be remanded to family court at the discretion of the solicitor.⁴⁴ A delinquency action commences in the family court with a petition that states the charge and the basis for that charge.

III. INTAKE

If a child is referred to family court for prosecution, DJJ will “provide intake...services”. The purpose of intake is to “independently assess the circumstances and needs of children referred for possible prosecution in the family court.”⁴⁵ Intake recommendations are available to the Solicitor and defense attorney, but it is important to note that statements made by the child in intake are not made available to the solicitor.⁴⁶ There are a variety of recommendations that may be made as a result of these intake interviews, including pre-trial intervention, prosecution, and dismissal.

IV. CUSTODY AND DETENTION

When a child is detained by a law enforcement officer in South Carolina, it is deemed a “taking into custody”, not an arrest.⁴⁷ Upon taking a child into custody, an officer may release him or her to a parent or guardian, an alternative placement such as a court approved foster home or group home, or, in certain circumstances, to a detention facility.⁴⁸

A child can be detained only if he or she meets certain criteria. No child, age ten or younger may be detained. Children age eleven or twelve may only be detained by order of the court. Children over the age of twelve who meet certain criteria, are eligible for secure detention, although detention is not automatic if it is determined that they can be adequately supervised in a less secure setting.⁴⁹ While the initial decision to detain is made by law enforcement, that decision is promptly reviewed by the court to determine whether or not continued detention is necessary. If the court determines that continued detention is necessary, the case is eligible for periodic review to determine whether or not secure detention remains necessary. Barring a finding by the court of exceptional circumstances, no child should remain detained longer than ninety days.⁵⁰

V. CHILDREN TRIED IN ADULT COURT

Children referred for prosecution in family court in South Carolina may be waived to adult court in certain circumstances. Waiver generally requires a full investigation (most often this means a waiver evaluation conducted by the DJJ) and hearing. The waiver process may be initiated by the solicitor in cases where a child is:

- (1) charged with murder; or
- (2) is sixteen years or older, charged with a felony or misdemeanor (non-status offense); or
- (3) is fourteen or fifteen years old and charged with a Class A, B, C or D felony or a felony that carries a potential fifteen year (or more) sentence; or
- (4) is fourteen or older and is charged with carrying a weapon on school property, unlawful carrying of a handgun, assault and battery of a high and aggravated nature, or unlawful distribution of drugs within a half mile of a school.⁵¹

The court must waive children age fourteen or older who are charged with an offense that could, for an adult charged with the same offense, carry a term of imprisonment of ten years or more if the child has been adjudicated delinquent for two offenses that would fall under the same category and the second offense was committed after the sentence for the first was imposed.⁵² A child waived to adult court via the waiver process is eligible for remand at the discretion of the Solicitor.

VI. CONDUCT OF JUVENILE COURT PROCEEDINGS

“The general public must be excluded and only persons the judge finds to have a direct interest in the case or in the work of the court may be admitted” in the courtroom during family court proceedings.⁵³ Children are statutorily denied the right to jury trials in delinquency proceedings. Although children are generally in the courtroom during their delinquency proceedings, their presence may be waived by the court at any time.⁵⁴

Children in delinquency proceedings are statutorily guaranteed some rights, including the privilege against self-incrimination and the right to cross-examination. Further, the Code states that, “In all cases where required by law, the child must be accorded all rights enjoyed by adults, and where not required by the law the child must be accorded adult rights consistent with the best interests of the child.”⁵⁵ Children waived to adult court are afforded all rights and protections guaranteed by the U.S. Constitution, including the right to a jury trial.

Juvenile court proceedings may result in a child admitting or denying the allegations in the petition. An admission of guilt, or a finding of guilt following a trial, results in an adjudication of delinquency. No adjudication by the court is considered to be a conviction and no adjudication will impose any of the civil disabilities that normally result from being convicted of a crime.⁵⁶

VII. RIGHT TO COUNSEL IN DELINQUENCY PROCEEDINGS

There is a statutory right to counsel at delinquency proceedings in South Carolina. This right is subject to waiver.

State law requires the retention or appointment of counsel for children at the detention hearing.⁵⁷ The Code states that in cases “where the delinquency proceeding may result in commitment to an institution in which the child’s freedom is curtailed...the child or the child’s parents must be advised in the notice of their right to be represented by counsel and that, if they are unable to employ counsel, counsel will be appointed to represent them.” The Code further states that “in the hearing, the parent and child must be expressly informed of their right to counsel and must be specifically required to consider whether they do or do not waive their right to counsel.”⁵⁸ Finally, the Code specifically addresses indigent defense, requiring that the court “shall” assess parents’ financial situations in an effort to determine whether or not failure to provide counsel is willful or borne out of financial constraints and allows for the court to appoint counsel in cases where, financially, appointment of counsel would not be necessary. Parents in this situation may be ordered to pay attorneys’ fees as determined by the court.⁵⁹

VIII. DISPOSITION

Upon an adjudication of delinquency, the court conducts a hearing to determine the disposition of a case. Disposition hearings are equivalent to sentencing hearings and generally include probation or some form of commitment to DJJ.

In the event the court wishes to consider commitment, it will order a pre-dispositional evaluation which will either be community based or institutional. The purpose of this evaluation, generally conducted in more serious cases, is to present case information and recommendations to the court. Typically, disposition alternatives include the following:

Probation. The court may place a child on probation for any period of time not to exceed a child's eighteenth birthday.⁶⁰ Stipulations of probation vary widely, but most commonly include requirements to attend school, to participate in random drug screens, to abide by a set curfew and to attend counseling.

Commitment. The court may commit a child for either a determinate sentence or an indeterminate sentence. Commitments may be suspended upon another requirement, such as alternative placement or probation, being fulfilled by the juvenile.

Determinate sentences. A determinate sentence may be up to ninety days. Determinate sentences are usually followed by probation.

Indeterminate sentences. An indeterminate sentence is an order placing the child at DJJ up until the child's twenty-first birthday. The actual amount of time a child remains incarcerated on an indeterminate sentence is determined by the Board of Juvenile Parole. Indeterminate sentences are followed by parole. Parole can last up until a child's twenty-first birthday and is governed by the Board of Juvenile Parole.⁶¹

Juveniles committed to indeterminate sentences for certain charges may be transferred to the Department of Corrections at age seventeen. Any juvenile still present at DJJ on their nineteenth birthday is transferred to the Youthful Offender Division of the Department of Corrections.⁶²

IX. APPEALS

A child may appeal a final order of the family court.⁶³

X. EXPUNGEMENT

Any person, after the age of eighteen, who was adjudicated delinquent as a juvenile for a status or non-violent offense, may petition the court for an order destroying all records relating to being taken into custody, the charges filed, adjudication and disposition.

CHAPTER THREE

ASSESSMENT FINDINGS

Institutional and systemic barriers hamper even basic defense advocacy on behalf of court-involved children in South Carolina. The assessment process revealed staggering facts: 100% of the defenders stated that they lacked training opportunities and had had no meaningful training before they represented their first juvenile client; 95% of cases resulted in guilty pleas; 75% of defenders did not make an independent recommendation at disposition hearings; and over 60% of defenders acknowledged that they meet with their clients only moments before a court hearing, rendering that representation effectively meaningless.

Throughout the state, investigators met with juvenile court professionals – defenders, judges, solicitors, probation officers and other DJJ staff – who, through a structured interview process, shared their insights and observations about juvenile indigent defense in South Carolina. Despite the shortcomings in the juvenile indigent defense system, the assessment also identified promising practices. For example, children are represented by counsel at every delinquency proceeding (unlike many other states where children are routinely permitted to waive their right to counsel and proceed without an attorney). Also, specialization in family court has become the rule in South Carolina. The establishment of a separate family court has meant that judges are elected specifically to the family court bench. Every county visited had a dedicated juvenile solicitor. In more than half of the counties visited, public defender offices had attorneys dedicated to juvenile practice. These are positive attributes.

This chapter highlights the detailed findings from the site visits in 15 counties, explains several factors limiting access to counsel, describes the quality of representation in South Carolina as observed by investigators, and concludes with a discussion of systemic barriers to a fair and equitable juvenile indigent defense system.

I. BARRIERS TO THE PROVISION OF JUVENILE INDIGENT DEFENSE SERVICES

“Alleged and adjudicated delinquent children must be represented by well trained attorneys with cultural understanding and manageable caseloads.”⁶⁴ The National Council of Juvenile and Family Court Judges (NCJFCJ) has identified the provision of qualified juvenile defense as a key principle of a juvenile court of excellence. NCJFCJ’s *Delinquency Court Guidelines* state, “Youth charged in the formal delinquency court must have qualified and adequately compensated legal representation.”

South Carolina's juvenile defense system does not consistently meet this standard. The lack of resources directed toward juvenile indigent defense creates an enormous barrier to legal representation on behalf of children in South Carolina. Defender after defender cited high caseloads, lack of administrative and investigative support, lack of training, and other resource-related struggles as factors affecting their ability to meaningfully litigate their cases.

Though every sector in South Carolina has suffered from the recent economic crisis, the defender offices have been particularly hobbled because they started out at a funding disadvantage compared to other juvenile and criminal justice entities. The assessment also revealed that the lack of resources is not the sole obstacle impeding meaningful advocacy by South Carolina juvenile defenders. Throughout the counties visited, interviews with stakeholders revealed a fundamental misunderstanding of the role of the juvenile defender. This has resulted in inadequate representation of many children in the system. Defenders are inhibited not only by their own perceptions of what their roles should be, but by the expectations placed upon them by judges and solicitors as well.

A. IMPACT OF INADEQUATE RESOURCES

The impact of inadequate resources is substantial. Because of insufficient funding, there are not enough public defenders, resulting in high juvenile caseloads (or hybrid caseloads of juvenile and adult clients); low salaries; and limited resources available to juvenile defenders. All these factors, in turn, impact defenders' ability to investigate, prepare cases, and litigate on behalf of their clients.

1. Caseloads

The most obvious effect of the resource shortage is the large number of cases that juvenile defenders must handle. The impact of caseload levels on access to counsel and quality of representation cannot be overstated. Indeed, juvenile defenders stated that high caseloads (coupled with inadequate resources) were the single most important barrier to effective representation. Over 50% of defenders interviewed cited high caseloads as a problem, with many stating that their caseloads reached several hundred cases at any given time. In addition, about one-third of the attorneys juggled large adult caseloads with their juvenile cases. Such large, comingled caseloads make it virtually impossible for the defenders to provide effective representation to their clients.

Adequate legal representation entails devoting sufficient time to interview and counsel clients, performing necessary investigation, seeking the release of detained clients, pursuing discovery from the prosecution, conducting necessary legal research, and preparing for court hearings and trials. The size of caseloads that juvenile defenders reported in this assessment simply precludes their ability to conduct independent advocacy on behalf of every

client. Counsel in such situations relies heavily on the information provided by probation or the solicitor; such information is often incomplete or biased in favor of detention.

The impact this has on children in delinquency proceedings is devastating. Children represented by overworked attorneys receive the clear impression that their attorneys do not have time for them and are not going to make efforts on their behalf. The impact of high caseloads also has a debilitating impact on juvenile defenders as well; burnout is a real problem.

Ultimately, the problems of high caseloads become compounded, and the result is a likely denial of the fundamental fairness that is at the core of due process of law.

2. Insufficient Investigative and Administrative Support

In addition to unmanageable caseloads, many juvenile defenders interviewed have little or no investigative or administrative support. Proper support is absolutely necessary to conduct adequate investigation and other preparation necessary to represent juvenile clients. The Institute of Judicial Administration/American Bar Association Juvenile Justice Standards (IJA/ABA) holds that, “Competent representation cannot be assured unless adequate supporting services are available. Representation in cases involving juveniles typically requires investigatory, expert and other non-legal services.”⁶⁵

While defenders in over half of the counties technically have access to investigators, in actuality they rarely use this resource because requests for investigative help from defenders representing adults are given priority. In many counties, defenders had only limited access to office assistants or investigators.

3. Resource Disparity Between Defenders and Solicitors

The resources of public defender offices throughout the state differ greatly from that of the solicitors. Although the circuit public defender system aimed to achieve pay parity between the solicitors and defenders, only chief defenders became state employees with solicitor level pay parity. Line defenders have remained county employees and most do not have pay parity with their colleagues in the solicitor’s office. This was confirmed by the fact that defenders in only two counties articulated pay parity between their office and that of the solicitors. Additionally, it appeared that solicitors had adequate resources for investigation and had access to a ready pool of support staff where some juvenile defenders did not.

4. Lack of Training

The lack of resources also results in inadequate training for juvenile defenders. One hundred percent of the defenders stated

that they had little or no training prior to handling their first juvenile case. None of the counties assessed had a formal training program in place for juvenile defenders. Fewer than 10% of attorneys stated that they participated in training from the Children's Law Center. Nearly all of the defenders stated that they had attended the annual public defender conference that fulfills South Carolina's continuing legal education (CLE) requirements for the year, but the annual conference generally provides little or no juvenile-specific training.

One of the goals of the new public defender system was to bring uniformity to the public defender delivery systems in all the counties. This included training requirements, standards of practice, regulation of caseloads, and pay parity. By and large, the new system has been unable to achieve these goals, and specialized training for juvenile defenders covering all stages of legal representation and relevant issues specific to adolescence has yet to materialize.

B. ETHICAL AND ROLE CONFUSION

It is alarming that juvenile defenders and other court personnel across the state are unclear or have not accepted the proper role of the attorney in delinquency proceedings. The juvenile defender's role, as that of an adult defender, is to represent the stated interests of the young client. The IJA/ABA Juvenile Justice Standards state that "the lawyer's principal duty is the representation of the client's legitimate interests [D]etermination of the client's interests in the proceedings . . . is ultimately the responsibility of the client after full consultation with the attorney."⁶⁶ Many juvenile defenders wrongly view their role as advocating for what they believe is in the child's best interest, substituting their personal views for those of the young client.

Juvenile defenders' misunderstanding of their role was readily apparent. Investigators observed many instances in which defenders explicitly stated in court that their requests were based on what they perceived as being in the "best interests" of their clients. Exemplifying this problem, during one series of court observations, a defender repeatedly asked for more restrictive placements than either DJJ or the solicitor recommended for the defender's own clients.

Only 20% of the defenders interviewed stated that their job is to represent the expressed interest of their clients. The remaining 80% employ either a balancing approach that they have invented, or a best interests approach in violation of their ethical duties and obligations to represent the stated interest of their clients.

It was the rare instance when juvenile defenders were clear about their role. In one example, the defender did describe the role as being "the voice of the child" and needing to look behind the incident report to see the

child's side of the story; the job was not to represent the child's best interest – that was the role of other people in the courtroom. Other attorneys recognized that their role was similar to that of adult defenders, but pointed out circumstances where this role would be different.

Although client-driven legal advocacy can be daunting, it is imperative that juvenile defenders understand that fundamental fairness and due process cannot be actualized without taking this approach.

C. THE CULTURE OF JUVENILE COURT

Defenders themselves were not the only ones confused about their ethical obligations. Mirroring the views of defenders, 20% of stakeholders interviewed viewed the defender as representing the expressed interests of the child; 36% believed defenders should balance best and expressed interests in their advocacy; and, 39% thought that defenders should always employ best interests as the standard for representation (5% did not respond to this question). A little more than 10% of stakeholders stated that the defender should be part of a team effort to get services for the child, some stating that this is especially true at the point of disposition.

Many solicitors articulated that defenders should identify and plead out children who they thought needed services. In some sites, the solicitor, judge and DJJ worker saw the public defender's role as balancing the child's need to get help with protection of the child's rights. Interestingly, solicitors who had previously been public defenders more often regarded the defenders' role as that of protector of their client's constitutional rights.

This misunderstanding of the juvenile defender's role seemed to create overwhelming pressure for the juvenile defender to be a "team player" and play a part in getting services for the children, often prioritizing this goal ahead of zealous advocacy. The expectation to be a "team player" manifested in different ways in the counties visited. In 20% of the counties, both defenders and solicitors pointed to the "good relationship" with the solicitors as the reason that few motions were filed. Both solicitors and defenders stated that motions were not necessary because they knew they would be able to work matters out between themselves if investigation revealed that the search was bad or there was a problem with the government witness. Stakeholders expressed concern that certain types of hearings, such as probable cause hearings, were viewed as a waste of time because they considered the outcome to be a foregone conclusion.

In rural parts of the state, investigators observed informal conferences taking place before the court hearings, some with the judge, others just between the DJJ worker, the solicitor and the defender. The stakeholders would reach a consensus on issues such as detention, plea agreement, or disposition placements prior to the actual court hearing without any

apparent consultation with clients. Because all decisions had been made beforehand, the actual courtroom hearings took place in minutes.

Adding to the conformist culture of the court was the power of the solicitor apparent in many of the counties. As provided by South Carolina law, the solicitor's office maintained control of the docket, that is, the juvenile solicitor put cases on calendars for all hearings including detention, disposition and trials. In some of the counties, it was understood by the defenders and the other stakeholders that if the defender did not cooperate with recommendations of the solicitor, it would be harder for the defender to obtain discovery or receive favorable plea offers. Some juvenile defenders who requested trials and filed motions more frequently stated that they felt that the solicitors penalized them for their advocacy; for example, these defenders reported that solicitors set their trial dates on consecutive or concurrent dates or filed more violation petitions against their clients.

D. JUVENILE COURT SPECIALIZATION

Not recognizing juvenile defense as a specialty wastes limited resources and hurts children, tantamount to providing ineffective assistance of counsel. Some perceive juvenile court as the “dumping ground” for less skilled attorneys. Juvenile defense is a complex specialty in the law requiring fluency across many arenas that go above and beyond criminal defense. A juvenile defender must understand child and adolescent development, be able to evaluate a client's maturity and competency, and be able to communicate effectively with a parent or guardian without compromising counsel's ethical duties to the child. As in adult defense, the juvenile defender is the sole person in the courtroom charged with being the voice of the client and representing his stated interests, and not his best interests, throughout the case. In addition, a juvenile defender must become versed in the specialized arguments critical for uniquely juvenile proceedings like detention, transfer and disposition hearings; be informed as to the complexities that arise in mental health and special education law, and how they might impact the course of a delinquency case; inform the client of all collateral consequences of a delinquency adjudication, including barriers to obtaining college acceptance, student loan awards, and entrance into the military; and maintain contacts at, and knowledge of, community-based programs for juveniles.

As the Supreme Court recognized in its case striking down the juvenile death penalty, *Roper v. Simmons*,⁶⁷ children do not possess the same cognitive, emotional, decision-making and behavioral capacities as adults. Juvenile defenders must understand these developmental realities and incorporate them into their advocacy and communications with clients. Defenders must also understand how to provide representation sensitive to clients from diverse backgrounds. For example, juvenile defenders must be aware of the ways in which mental health and development differ for girls and boys. They must understand and argue against the ways in which the system has a disproportionate impact on children of color or

responds punitively and inappropriately to lesbian, gay, bisexual and transgender (LGBT) children.

Juvenile indigent defense is a dynamic area of the law; juvenile defenders must continuously inform and educate themselves about new developments in the law, as well as emerging social science research. For example, the increasing frequency with which schools blur the lines between school discipline and criminal punishment has resulted in an overwhelming number of school cases in South Carolina, necessitating juvenile defenders to become adept in applicable law. In South Carolina, the misdemeanor offense of disturbing schools was the number one offense processed through DJJ intake in 2007-2008.

The IJA/ABA Standards state that defender systems should provide an opportunity to specialize in juvenile court representation if local circumstances permit.⁶⁸ The recent indigent defense legislation mandates that each circuit defender office include one position for a juvenile defender. Though some defenders in South Carolina represent juveniles exclusively, 30% of the defenders interviewed continue to divide their time between adult and juvenile cases. In some of the counties with no full-time juvenile defender, the circuit public defenders stated that the lack of resources prevented them from dedicating a full-time position to juvenile cases. Forty-one percent of the defenders interviewed were only part-time juvenile defenders, devoting the rest of their time to their private practices.

II. ACCESS TO COUNSEL

In the seminal case *In re Gault*, the United States Supreme Court unequivocally held that a young person's right to counsel in juvenile delinquency proceedings is a constitutional right, not simply a privilege. A child facing delinquency charges and the "awesome prospect of incarceration" needs protection in order to ensure balance and fairness in the process. The juvenile defender is the sole person in the courtroom mandated to represent the child's stated interest. The importance of this role necessitates access to counsel in situations in which the child's liberty is at stake, regardless of the financial limitations of the child.

A. TIMING AND APPOINTMENT OF COUNSEL

Court-involved children in South Carolina are represented by counsel at every delinquency proceeding. Investigators observed no waiver of counsel in the counties visited and interviews with judges, solicitors, defense counsel and probation officers confirmed this practice. At a time when waiver of counsel is still a major issue in many states across the country, South Carolina's practice of non-waiver of counsel is no minor feat.⁶⁹ Meaningful access to counsel can be improved upon, however, by establishing a mechanism for attorneys to meet with their clients in advance of the first court hearing, and by providing representation to a

child where incarceration may be imposed as a consequence for non-compliance with court conditions.

Early appointment of counsel is crucial to all aspects of case preparation and to the building of a productive and meaningful attorney-client relationship. The earlier an attorney is appointed to a case, the more time he has to gather information from the client and family and to begin to establish rapport with the young client. The attorney can also seek out and interview potential witnesses and investigate the scene of the alleged offense before it is altered.

For non-detained juveniles in South Carolina, defenders should have ample time to meet with their clients well before the first hearing. In all the jurisdictions visited, the decision by the solicitor to petition the case came weeks before a child's first appearance in court. In some instances, as many as twelve weeks lapsed between the referral of a child to the DJJ and the child's first court appearance. In many of the counties visited, an average of six weeks lapsed from the time the solicitor makes the charging decision to the time the child appears in court for the first court hearing. Despite the lag time between the charging decision and the first court appearance, however, defenders typically met their clients for the first time on the morning of the court hearing.

Two primary factors drive this failure of defense counsel to meet with their non-detained clients prior to the first hearing: scarce resources allotted to juvenile indigent defense, and a failure of adequate communication and coordination between the different stakeholders.

Some attorneys indicated that they did not interview their clients earlier because they do not get their clients' information from the solicitors until shortly before the first court date. Conversely, the solicitors stated that they routinely handed over that information in a timely manner weeks before the hearing. Whatever the reason, when there is a lack of meaningful contact, it will hurt children.

In some jurisdictions, lack of resources and time caused the delay in meeting with clients. In these counties, clients and their families appeared in court prior to the first court hearing for indigency determinations, DJJ intake and/or screening by the solicitor. With more resources and a larger base of juvenile defenders, these informal appearances would present an excellent opportunity for defenders to interview their clients and family members to begin case preparation and investigation. However, the majority of the defenders in these counties did not have the time or resources to take advantage of this opportunity, and thus their case preparation is minimal.

For detained juveniles, defense counsel is appointed prior to the initial detention hearing. Although the appointment is made in a timely manner, children do not have meaningful contact with their attorney

prior to their first detention hearing because the attorneys do not visit at the detention center.

B. SPECIALTY COURTS

Critically, the positive virtues of non-waiver of counsel do not extend to specialty courts in South Carolina. Routinely, children appear in front of judges in truancy court and drug court with no attorneys even though the consequence of non-compliance with court orders is often a stint in a detention facility or alternative placement setting. Public defenders are not a part of these courts. In fact, in one county, the probation officers stated that they “stopped notifying the PDs when the specialty court meets because they were just stirring up a hornet’s nest.” In over 90% of the counties visited, public defenders did not participate in initial truancy proceedings (at which judges entered a school attendance order). Most stakeholders interviewed expressed a belief that defense counsel is unnecessary at the initial hearing because it is not a delinquency proceeding. However, counsel should be present to advise children about the consequence of non-compliance and ensure they understand they could spend time in detention or an alternative placement if they violate the court order.

In addition to truancy courts, nearly 50% of the counties had a drug court as part of their disposition alternatives. In those counties with drug courts, children had to plead guilty to the delinquency charges to participate in drug court. In many of those counties, the child pleads guilty and receives a 90-day suspended sentence. If the child is successful in drug court, the case is dismissed and the charges are dropped; if the child fails in drug court, then the 90-day sentence is instituted. Only one county had a consistent defender presence in the drug court, but that defender expressed concern and desire for training about the proper role of defense counsel in drug court. In all the other drug courts, defenders had no involvement; defenders in one county stated that they trusted the judge who ran it and felt that there was no need for their presence. It appeared that in all of these courts, the defender presence was not prohibited but staffing limitations in most counties did not allow for a juvenile defender to be assigned.

C. INDIGENCY DETERMINATION

Indigency determinations and concomitant fees can affect access to counsel for indigent children. In South Carolina, by statute, the determination of whether a child is indigent and eligible for public defender services depends upon the income of his or her parents; a \$40 fee is to be assessed for the screening.⁷⁰ The entity administering the indigency screen varies from county to county. In some counties the indigency screen is administered by the defender agency but in other counties the screen is administered by DJJ or the court. The \$40 fee can be a hardship for indigent families, the very families who must rely on indigent defense services. Many juvenile court professionals expressed

frustration about imposing fees on poor families. In many counties, DJJ staff and public defenders were under the impression that they were not allowed to waive the fee; in one-fifth of the counties, stakeholders stated that the fee can be waived. In addition to being a hardship for families, a fee can also pose a conflict if the parents of the child do not want to pay any amount, for example if the parent or another relative is the complaining witness.

Conversely, having no indigency determination or fee can negatively impact public defender offices because of the inadequate funding allocated to indigent defense in South Carolina. In those counties where screening was eliminated or intermittent, the influx of clients strained the resources of the public defender's office.

III. QUALITY OF REPRESENTATION

Access to counsel and competent counsel go hand in hand. Providing an ineffective lawyer is arguably worse than having no lawyer at all. The IJA/ABA Standards state that it is “the responsibility of courts, defender agencies, legal professional groups, individual practitioners, and educational institutions to ensure that competent counsel . . . [is] available for representation of all persons with business before juvenile and family courts.”⁷¹

According to the NCJFCJ *Delinquency Court Guidelines*, “Qualified counsel should have completed all of the following responsibilities prior to going to trial: 1) Investigate all circumstances of the allegations; 2) Seek discovery of any reports or other evidence to be submitted or considered by the juvenile delinquency court at the trial; 3) If circumstances warrant, request appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protect the child's rights; and 4) Inform the youth of the nature of the proceedings, the youth's rights, and the consequences if the youth is adjudicated on the petition.”⁷²

In county after county, assessment investigators encountered overworked and underfunded juvenile defenders who did not have the time or resources to provide an adequate defense to juveniles facing delinquency charges lodged by the state.

A. CONFLICTS

According to the South Carolina Rules of Professional Conduct, attorneys are advised not to represent clients who may have interests adverse to their other clients.⁷³ This ethical obligation of an attorney extends as well to entities such as public defender offices. The nature of delinquency proceedings make it difficult to anticipate the types of adverse interests that may arise in the course of a case. For example, two juveniles in a case may end up pointing fingers at each other as the perpetrator of an offense. In such a case, it would be impossible to maintain the

appropriate ethical obligations to both clients. But in many counties across South Carolina, public defender offices routinely represent correspondents. In all of the counties visited, one to three attorneys from the public defender's office handle the entire caseload of the delinquency court. With so few attorneys handling delinquency matters from the defender's offices, the way in which conflict cases are handled is an important issue. In one county, conflict counsel other than the public defender is only appointed in extenuating circumstances. In another county, counsel outside the public defender's office is called upon only when "conflict protocols" in place have been exhausted. These "conflict protocols" involve putting up "conflict walls" between attorneys.

The use of conflict attorneys raises the question of whether these attorneys are properly trained to represent children in delinquency proceedings. Regardless of what their practice specialty is, most attorneys in South Carolina are required to sign up on a list to receive either criminal or civil case appointments. Though some people on the civil list may have some familiarity with juvenile cases, others do not. Many solicitors, DJJ staff and judges noted that it is difficult to work with private counsel who are unfamiliar with the workings of family court, and in some instances, unfamiliar with the law.

The compensation rate of conflict attorneys may also affect the quality of representation provided. South Carolina law provides for the following fee structure:

"Fifty dollars an hour for time spent out of court and sixty dollars an hour for time spent in court. The same hourly rates apply in post-conviction proceedings. Compensation may not exceed three thousand five hundred dollars in a case in which one or more felonies is charged and one thousand dollars in a case in which only misdemeanors are charged. Compensation must be paid from funds available to the Office of Indigent Defense for the defense of indigents represented by court-appointed, private counsel. The same basis must be employed to determine the value of services provided by the office of the public defender ..."⁷⁴

Some attorneys stated that they simply do not apply for fees because the low rate of compensation did not make the application process worthwhile.

B. CASE PREPARATION AND CLIENT CONTACT

The opportunity for meaningful consultation between the attorney and the client early on in the case is vital to building the attorney-client relationship as well as essential to adequate case preparation. In virtually all of the counties visited, public defenders had little to no time to prepare for cases or to contact clients before court and between court proceedings. Hurried hallway conversations moments before the hearings were the norm. Defenders rushed to see as many of their clients as possible,

sometimes having to interrupt these conversations in order to be in front of the court for another client. Approximately 60% of defenders that were interviewed admitted that they met their clients just prior to the court hearing and less than 10% stated that they met with their clients prior to the first appearance in court.

Meetings of such short duration held just prior to the court hearing impacted the types of conversations that defenders had with their clients. As one mother insightfully explained, “Sometimes if you talk with kids in general conversation, it will loosen them up. But [my son’s public defender] does none of that. They don’t open kids up enough to let them talk and explain their half of it. The kids don’t know the law, so they need someone to help them understand.” One young man stated that he had met with his public defender twice – once on the original case and then that morning for 10 minutes before the case was called on his probation violation. The attorney had simply asked, “did I understand what I did?”

Securing the release of detained juvenile clients requires information and preparation. Contact with detained clients prior to the initial detention hearing is essential to learning about the case, exploring options for release, and gathering background information to aid in arguments before the court. In those counties that have detention facilities nearby, fewer than 5% of the attorneys interviewed said that they visited clients at the detention facilities. Another 10% stated that they sometimes utilize the video-conferencing capability provided by DJJ to talk to detained clients between hearings. None of the defenders stated that they picked up the telephone to call their clients. Without visits or calls, the only communication between attorney and client happens in the lock-up prior to the court hearing, often using a space that is not conducive to the type of conversation required.

C. PRIVATE SPACE FOR ATTORNEY/CLIENT MEETINGS

Confidential attorney-client conversations are the very foundation of due process and fairness. It is critical for a child to be able to discuss the circumstances of the alleged offense as well as sensitive family and personal issues without strangers listening. In 20% of the counties visited, attorneys had private conference rooms to consult with their clients; these courthouses were recently renovated or constructed. The remaining 80% of the counties provided no such private space for attorney-client meetings in the courthouse. In some courthouses, part of the hallway is designated as an area for attorneys to meet with clients and dividers are set up around desks; in other courthouses, attorneys must meet with their clients in waiting areas outside the courtroom, or in whatever space exists, such as stairwells.

Confidential spaces become even more important when, as was frequently observed, the attorney is meeting the client for the first time on the date

of the court hearing, or is meeting the client for a subsequent hearing and has not spoken to the child in the intervening period.

D. DIVERSION

Virtually all diversion decisions in South Carolina are made by the solicitor's office prior to the filing of the petition. In some counties, DJJ makes an initial recommendation that is generally accepted by the solicitor. For the vast majority of these cases, the defenders have no part in the decision making process or in any kind of representation of the diverted child. After the filing decision is made, however, attorneys could engage in a conversation with the solicitor about the possibility of diversion, using information gained through interviews with family members and the child. The majority of the defenders interviewed stated that they did not discuss diversion in their plea negotiations or their initial conversations with solicitors.

E. DETENTION ADVOCACY

A defender's role at the detention hearing is crucial and a child's experience in detention can have a negative impact over both the short and long term. Research clearly indicates that children who are initially placed in detention are more likely to be placed out of home after adjudication. Detention also deprives children of their regular educational opportunities as well as community relationships. Across all the counties visited, investigators witnessed detention hearings at which defenders presented scant information in support of their clients. Many of the children detained were charged with relatively minor offenses, which echoed DJJ's own statistics. Three of the top five offenses most commonly associated with juvenile detention are misdemeanors or status offenses: disturbing school, simple assault and battery, and contempt of court. The most common offense is simple assault and battery, which alone accounts for 7% of detention cases.⁷⁵

Because of the importance of the detention hearing, defenders should gather relevant information from the client, the family and DJJ in order to formulate a compelling argument for release which includes specific information about the client's positive social factors and ability to comply with court conditions if released. For example, one defender made the argument that his young female client should be released because she had not been the cause of the fight at issue; there was no argument related to the statutory detention factors of risk of flight or dangerousness of the offense. Many detention arguments consisted solely of a recommendation from the defender without factual support or details.

In the large counties where detention facilities were nearby, detention was used more often than in rural counties where detention facilities were sometimes hours away, an observation confirmed by interviews with stakeholders.

Almost universally, initial detention hearings were held within the statutorily required period of 24 to 72 hours (depending on the offense) and courts also routinely held detention review hearings. But in one rural county where juvenile proceedings only took place once a month, the juvenile defender often waived the initial detention hearing so the child remained in detention and did not appear in court until the ten-day hearing; even though initial detention hearings could take place at a neighboring county thirty minutes away where family court is held once a week.

1. Initial Detention Hearing

The overuse of secure pre-trial detention is a major issue in South Carolina. It is crucial for juvenile defenders to argue against the inappropriate use of detention. Pre-trial detention should be used only when a child meets the statutorily defined criteria for detention related to age, public safety, and risk of flight. Much deference is given to the DJJ recommendation at the initial detention hearing and the defenders did not use individualized information about their clients to counter this recommendation. Defenders in South Carolina should not acquiesce to the detention recommendation from DJJ and should stringently argue for the release of each client.

2. Review of Detention Determinations

South Carolina law provides for the Court to periodically review its detention determinations. Such review hearings are opportunities for defenders to present information gathered after the initial detention hearing that might persuade the court to release the child. Review hearings *may* be held 10 days after the initial detention hearing and then every 30 days following the 10 day period. In counties with larger initial detention populations, it appeared the juvenile defenders had more information at the 10 day hearing and were either prepared to plea or made stronger arguments for release. Although the arguments at the 10 day hearings had more substance than the initial detention hearings, their arguments were stymied by their inability to gather more information or seek out alternative placements due to their lack of contact with their clients. Accordingly, many non-violent juveniles are held in detention unnecessarily, sometimes only because no one has developed an alternative plan for their release.

3. Probable Cause

Probable cause determinations must be made by the court before a child can be continued in detention. Contesting probable cause can provide defenders with more information about the solicitor's case and may also help build the attorney-client relationship, particularly if the child is contesting the charges. Only 20% of the counties had regular probable cause hearings. The defenders in the remaining counties routinely waived probable cause hearings. It should be noted that in one large county the defenders said they

would start asking for probable cause hearings because an additional defender had been hired. In another county, the defender stated that probable cause hearings were not requested, for the most part, because the court generally finds probable cause and because so few children are detained in the county. A judge confirmed that probable cause is generally found. Skill development around litigating probable cause determinations should be a part of the required training for juvenile defenders.

4. Plea and Disposition at the Detention Hearing

Perhaps one of the most troubling observations made by many of the investigators was the exceedingly high percentage of pleas taken at detention hearings. The IJA/ABA Standards provide that defenders “may conclude, after full investigation and preparation that under the evidence and the law, the charges involving the client will probably be sustained.”⁷⁶ In almost every county, investigators observed many pleas at the detention hearing immediately followed by dispositions. These observations were all the more concerning because of the inadequate time that defenders spent with detained clients prior to that first detention hearing. Based on interviews and observations, defenders generally spent less than 30 minutes, sometimes even as little as five minutes, with clients, before the decision to plead at a detention hearing.

F. INVESTIGATION AND DISCOVERY

In all delinquency cases, information about the case is necessary to aid in the decision to plead or to go to trial. The IJA/ABA Standards state that it is the lawyer’s duty to conduct prompt investigation and to:

“Explore all avenues leading to facts concerning responsibility for the acts or conditions alleged 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 client’s admissions. . . .”⁷⁷

The value of investigatory work is manifold. In addition to aiding in the client’s decision to plead or go to trial, useful information can persuade the solicitors to drop the case against their clients, or to dismiss certain charges, either because of bad facts or because the police conducted an unconstitutional search or seizure. Without investigating or pursuing all available discovery from the government, the attorney has very limited information to counsel clients on whether to admit to the petition or to take the case to trial.

Many of the defenders interviewed stated that they do not conduct much investigation and have limited or no access to investigators. This typically results in defenders conducting inadequate independent investigation or no investigation at all.

Similarly, discovery from the government can help inform important decisions about the case, as well as ensure that the government is meeting its obligations under the applicable law. As further discussed below, motions practice is not common in South Carolina. Of the motions that are filed, however, motions for discovery are the most common. In 20% of the counties, attorneys, both defenders and solicitors, cited an “open file” policy with the solicitor’s office as obviating the need to file any formal discovery requests, or to file a request only if a case were set for trial. Though it may be the case that solicitors give over all information to the defender, reliance on an “open file” policy leaves the defender with the possibility that all discovery may not be shared, even if for benign reasons, and then with no recourse. Without filing a request or a formal motion, the defender is left with no real remedy if discovery is introduced at a later point that may have impacted decisions made in the case. In one county where defenders stated that they operated with an “open file” policy, a defender acknowledged that at times she has been surprised by the documents in the government’s possession at disposition or another type of hearing.

Not all counties have an “open file” policy. In another 20% of counties, defenders engage in regular and ongoing battles over discovery. In one county, the defenders must file the Rule 5 discovery motion in order to receive even the petition and police report. This discovery issue only recently came about after a juvenile defender won a probable cause argument based on a statement obtained by the defender through the “open file” system.

G. MOTIONS PRACTICE

Pre-adjudicatory motions practice in juvenile court is necessary to preserve the client’s rights, gather information, and advocate for the client’s interests. The IJA/ABA Standards provide that defense counsel “should promptly seek disclosure of any documents, exhibits or other information potentially material to representation of clients,” and “[w]here the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client’s rights. . . . Such motions should ordinarily be made in writing”⁷⁸ Motions, such as discovery (discussed above), dismissal, suppression, and recusal motions, are rare in most counties in South Carolina. In 80% of the counties visited defenders filed very few formal written motions. In these counties, if motions are used as an advocacy tool, they are raised in the midst of a hearing, are argued orally, and are non-evidentiary, which results in the cursory review of often complex issues.

The reasons for the dearth of motions practice given by both prosecutors and defense attorneys in many counties were nearly identical: the parties sorted out matters informally, outside the purview of the court and off the record to preserve docket time. This practice, however, disallows the possibility of formal review if an issue arises later in the case. Additionally, in these counties, as stated above, the practice is to have

“open discovery” and therefore the parties do not see the need to file formal discovery motions. As one judge explained “[There is] no need for motions practice because the parties work that out before court.” If there is an issue, the attorneys request to meet with the judge in chambers and work it out. Other defenders admitted that motions were only filed if absolutely necessary because the prosecutors in their jurisdiction would take it personally.

One type of motion that *is* argued regularly across counties is a competency motion, however even these motions tend to be argued orally. During all of the court observations across South Carolina, investigators observed only two formal hearings on a motion (i.e. where a written motion had been filed in advance of the hearing and the defense and prosecution were prepared for argument). In one instance, the solicitor had filed a waiver motion, and in the other, the defense had filed a motion for competency evaluation.

In the 20% of counties where motions are filed more frequently, a more formal approach to juvenile court practice exists. Juvenile defenders in these counties file written motions for discovery in every case. In addition, parties are more likely to argue legal points formally before the judge in court rather than to work out issues informally prior to court.

H. PLEAS AND ADJUDICATIONS

“Counsel may conclude, after full investigation and preparation, that under the evidence and the law the charges involving the client will probably be sustained.”⁷⁹ Competent juvenile defense requires ensuring the government’s evidence proves the charges in the petition, obtaining favorable plea agreements, and taking cases to trial. In all of the counties visited at least 95% of the juvenile cases resulted in guilty pleas. One judge recalled that in his 10 years on the bench he has heard only four trials.

The large number of pleas occurring across the state makes it imperative for juvenile defenders to have a meaningful opportunity to inform their clients of the rights they are waiving; of the consequence of the plea, such as sex offender registration; the type of disposition they are likely to face; and, the collateral consequences of a juvenile adjudication impacting such things as public housing purposes, student aid eligibility, and employment. The reason for the high numbers of pleas seems to vary across the state. In some counties the juvenile defender and solicitor work out all of their cases in plea negotiations prior to court. One public defender described convincing juvenile clients who want to go to trial to take a plea, a practice the defender would not employ with adult clients, but the defender believes that juvenile clients are often found guilty. One stakeholder commented that some defense attorneys may pressure their clients to plead guilty so that their clients can avail themselves of the services of the court. One defender offered that deals are occasionally

worked out for clients who could “get off” in order to get the client services.

Another factor in the large number of pleas may lay in the solicitors’ charging practices. A number of defenders indicated that the petitions reflected over-charging by the solicitor. Indeed, one solicitor in a large county described her charging discretion as a form of a plea negotiation, for example, using the threat of waiver as a negotiation tool, or having two charges on the petition to “help the public defender out” so that the juvenile perceives a benefit to taking a plea. In other counties, there are heightened concerns about resources. Defenders and solicitors feel pressured to work out a plea to save the court’s time and money. Pressure also comes from the judge to work out a deal.

The issue of sex offenses and the possibility of life-long registration for juveniles has captured the attention and awareness of all stakeholders in South Carolina. Investigators observed hearings that reflected careful negotiation of pleas when clients were charged with sex offenses. The few trials that do occur typically involve sex offenses because there is a universal understanding that the stakes are very high in these cases.

Unfortunately for juveniles who receive indeterminate commitments, there is not the same heightened attention and awareness of the South Carolina parole guidelines. The majority of defenders interviewed were well-versed in the sex offender registration statute; no defender interviewed expressed more than passing familiarity with the parole guidelines, most saying that this was something calculated by DJJ upon commitment.

Children in South Carolina who receive an indeterminate commitment to DJJ are subject to strict parole guidelines for review and release based on their underlying offense and prior record. Interviews with defenders and other stakeholders revealed that most juvenile court professionals do not fully understand the parole process. The offense to which a juvenile pleads matters a great deal in terms of the length of DJJ secure confinement. However, defenders, solicitors and judges alike held the mistaken belief that no matter what charge was pled to, the disposition would be the same. Though this is true in the sense that the child will get probation or commitment, the amount of time spent in secure confinement hinges on the underlying offense. This information is an important part of the client counseling that should occur prior to a plea and when defenders are negotiating pleas with the solicitors.

With such a large number of cases resulting in pleas, the number of trials in family court is very low. Across the state, only a handful of juvenile cases in each county result in trial. Another systemic pressure against trials is the fact that in many counties, the court only hears delinquency cases one afternoon a week, which makes it difficult to get time on the court calendar.

The lack of resources and access to investigation means that when trials do occur they are abbreviated. Twenty percent of the defenders interviewed acknowledged that any trials they had lasted less than 15 minutes. In one county, an investigator observed a trial for contempt of a school order. The trial lasted three minutes, during which the public defender did not cross-examine the witness, offer any evidence, or make a closing argument. The allegations included the juvenile skipping classes since his last court appearance. The juvenile denied the allegations, but the defender did not offer any evidence to counter the only government witness, an attendance clerk, who testified that the child had signed himself out of class one day to go to the nurse's office but instead went to the gym.

Significant research has concluded that children have an attenuated understanding of complex legal proceedings and terms used in such proceedings. Attorneys and judges must use language that is age-appropriate and understandable by the child. In all of the counties observed, the judge inquired into the voluntary and knowing nature of the plea, though in 80% of the cases observed, the judges engaged in a fairly rapid colloquy, not utilizing terms specific for adolescents, or terms that would be easier for a child to understand. In these situations, investigators observed defenders in some cases stopping the court to "translate" for their clients, yet not one juvenile defender objected to the nature of the colloquy. In the other 20% of counties, judges engaged in a slower colloquy, and used phrases that demonstrated efforts to make the language of the plea accessible to and relevant for children.

I. DISPOSITION

Disposition is a critical stage of practice in delinquency proceedings. The IJA/ABA Juvenile Justice Standards state that, "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 proceedings."⁸⁰ The disposition of a child's case can impact the possibility of their long-term future success. Juvenile defenders have an obligation to consult with their clients, to ascertain their interests, and actively present a disposition recommendation, independent of the court or probation staff.

The IJA/ABA Standards state that counsel should be "familiar with the dispositional alternatives available to the court" and should independently assist in the "formulation of a dispositional plan appropriate to the client's circumstances." Yet in 75% of the counties visited the juvenile defender did *not* make an independent or proactive recommendation or argument at disposition. In most of these counties, attorneys did little or no disposition preparation, and many of the defenders simply relied on the reports and information submitted by DJJ and/or the solicitor. One of the defenders admitted to only skimming the summary of the DJJ report, and in court, seemed taken aback by the

arguments made by the solicitor which reflected a far more careful reading of the report. Several defenders described working with DJJ and the solicitor before the disposition hearing to ensure their client's interests were heard. In one county, the juvenile defender gets the DJJ recommendation a week before the court hearing and meets with the solicitor before court to broker agreements for disposition. In another county the juvenile defender said that opposing DJJ in court was not successful so he now meets with DJJ beforehand and gets what he wants into the DJJ report that is used in court.

In 40% of the counties other juvenile court stakeholders noted that defenders were not aware of the available disposition options for their clients and thought that defenders would benefit from training on disposition alternatives. Furthermore, there were isolated instances in which solicitors successfully argued for less restrictive outcomes and defenders argued for more restrictive outcomes at disposition. These examples indicate a heightened level of role confusion at the disposition phase in delinquency matters. Of all of the parties interviewed, 90% thought the juvenile defender should be acting in the child's best interest (versus stated interest) at the disposition hearing.

Although they did not present proactive recommendations, juvenile defenders in 40% of the counties did offer a reactive statement to the DJJ recommendation. Proactive recommendations require preparation, collection of records, witnesses, contacts with service providers and a thorough analysis of the individual needs of each client. In observing court and speaking with the solicitor and defender in one county, it was clear that the solicitor came better prepared to disposition hearings than the defender. The solicitor had taken notes on the DJJ evaluation, highlighting paragraphs in the report, and finding facts in the DJJ materials to support tougher sentences. The defender never disputed any of the facts contained in the DJJ report and often relied upon this information when presenting their abbreviated disposition argument, and in some instances admitted to reading only the summary.

The defenders themselves acknowledged that it was difficult, and in some cases futile, to make dispositional recommendations because the court was inclined to accept the recommendations of DJJ and the solicitor. DJJ or solicitor recommendations were accepted by the court in 90% of the cases observed during the assessment. However, the frequent concurrence with these recommendations does not obviate the need for client-centered arguments on behalf of the child at disposition. As one probation officer stated, "Juveniles would benefit if counsel played a more significant role in disposition planning."

J. POST-DISPOSITION

Defenders in juvenile cases must engage in advocacy on behalf of their clients post-disposition. The IJA/ABA Standards state that, "The lawyer's responsibility to the client does not necessarily end with ... 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 proceedings.”⁸¹ Review hearings, institutional administrative proceedings, and other forms of informal advocacy can ensure that court orders are implemented, services are rendered, institutions are monitored, records are expunged, and children are given the opportunity to succeed outside the jurisdiction of the court.

Post-disposition advocacy, however, is rare across the state of South Carolina. Even in the 20% of counties where some post-disposition practice was observed by juvenile defenders, all stakeholders said there were very few hearings on issues that arise after disposition with the exception of violations of probation filed by DJJ. Despite the utility and importance of post-disposition advocacy, a circuit public defender admitted that he did not have the manpower to do any post-disposition representation given the massive caseloads and lack of support. Some of the attorneys interviewed mentioned that they kept in touch with clients that they took a particular and personal interest in, but even in those cases did not conduct any formal advocacy. Most, however, have no contact with clients after disposition whatsoever.

1. Lack of Review Hearings

Defenders in just two counties filed for review hearings, and only one defender interviewed said that he conducts regular facility visits to see his clients after disposition. Review hearings throughout South Carolina are few and far between and are typically requested by DJJ without the involvement of the solicitor or the defender. When review hearings are held, they are used to check on services to be provided by an agency like the Department of Mental Health, for sex offense cases, to amend a disposition order, or to make sure that a child is not waiting in jail for too long if alternative placement was part of disposition. Defender participation and increased frequency of review hearings would give defenders the opportunity to monitor court disposition orders, advocate on issues affecting placement, treatment, and aftercare, and ensure their clients are in the least restrictive and most appropriate environment deemed necessary for rehabilitation.

2. Probation Violations

Review hearings post-disposition and other types of post-disposition advocacy could also aid in reducing the number of probation violations that are filed. Stakeholders stated that changes in placement or the termination of services are typically the reasons for probation violations. Juvenile court professionals all expressed concern that placing a child on probation may just be setting him up for failure because violations of probation will likely lead to commitment. In every county visited, investigators observed at least one or two hearings involving allegations of a probation violation; in some counties, probation violations occurred in almost half of the hearings. Nearly all of those hearings

resulted in guilty pleas. DJJ's own statistics support this anecdotal evidence. In 2007-2008, probation violation for minor, misdemeanor-level cases was listed as the eighth most common offense referred to the solicitor's offices and accounted for 3% of total cases, or 757 cases.⁸² In the same period, probation violation for minor, misdemeanor-level offenses was the most frequent offense associated with suspended and final commitments, constituting 13% of total cases.⁸³ Probation violations of all types of offenses made up 31% of cases that resulted in dispositions of suspended or final commitments.⁸⁴

In the cases observed by investigators, many of the violations occurred either because of a change in the child's placement or because of some other disruption in the child's life. Interviews with DJJ staff confirmed this. Requiring post-disposition advocacy by defense counsel and having review hearings before the court could ameliorate many of these issues before they turn into non-compliance with probation orders.

3. Parole Hearings

As previously mentioned, defenders were generally uniformed regarding the application of parole guidelines. This lack of understanding can result in children spending much longer periods incarcerated than necessary. The actual amount of time a child remains incarcerated on an indeterminate sentence is determined by the Board of Juvenile Parole. Parole can last up until a child's twenty-first birthday and the Board of Juvenile Parole follows guidelines for review and release based on the underlying offense and prior record.⁸⁵ Defenders should fully understand the parole guidelines and counsel their clients about the parole guidelines as they decide how to move forward in each case. For any child who ultimately receives an indeterminate sentence, the offense(s) to which he pleads matter a great deal in terms of the length of DJJ secure confinement. Currently, two attorneys conduct all the parole hearings for juveniles sentenced to indeterminate commitments. Once a month the attorneys prepare for an average of 50 parole hearings. The attorneys read the reports provided by DJJ and the facility staff as well as the institution's social worker. The attorneys may meet with the clients, if the hearing involves more than a paper review of the juvenile's file.

4. Conditions of Confinement

Children in South Carolina's DJJ facilities or other places of confinement can file a complaint in the facility to raise issues regarding harmful conditions of confinement. No attorneys are provided to children for this specific purpose.

5. Appeals

Appeals offer each client the opportunity to correct wrongful rulings or to address other troubling aspects of the case. The dearth of trial practice in the state results in a similar dearth of appellate advocacy. In more than 90% of the counties visited, there was consensus on the lack of appellate practice.

Several juvenile defenders noted that they had *never* filed a notice for appeal, and many others said that they filed one every couple of years. Appeals are handled by the appellate attorneys at the Office of Indigent Defense. One defender described filing an appeal but needed to keep calling the appellate attorneys in order to make sure that an attorney was assigned to the case. Education and training about appellate issues and building a record for appeal is vital to adequate representation of children.

IV. SYSTEMIC BARRIERS TO JUST AND BALANCED OUTCOMES

Investigators also observed additional systemic barriers to just and balanced outcomes for children in South Carolina's juvenile justice system. Though the remedies for these barriers is not entirely within the control of the juvenile defender, as the representative of the client, the juvenile defender can incorporate these issues into their legal advocacy and can play a major role in bringing these issues to the attention of other system stakeholders.

A. SHACKLING

Shackling can cause both physical and psychological harm to children. Growing recognition of these potential harms, and that shackling runs counter to the rehabilitative purpose of court, has sparked challenges to the indiscriminate practice of shackling children.

It is common practice in South Carolina for children to enter the courtroom shackled, many with belly chains and cuffs on the wrists and ankles. The shackled children were charged with offenses ranging from serious assault charges to simple probation violations. Investigators did not observe any individualized determination to justify the use of these restraints. In less than 20% of the counties visited, juvenile court professionals stated that defenders periodically challenged the use of restraints on their clients. In the vast majority of the counties, however, the use of such restraints had become commonplace and the underlying policy and practice left uncontested. In a few counties, defenders stated that they had not even thought of raising it as an issue.

B. SCHOOL DISCIPLINE

All stakeholders commented on the overwhelming number of school-related cases in South Carolina's family courts. As mentioned previously,

in fiscal year 2007-2008, Disturbing Schools was the single most common offense referred to DJJ.⁸⁶

The Disturbing School statute encompasses a wide range of behavior, from fighting to being uncooperative with a teacher, or using foul language.⁸⁷

In nearly all of the interviews, juvenile court professionals cited the fact that virtually every public middle and high school now has a school resource officer as a contributing factor to the rise of school-related offenses referred to court. Situations that might previously have been dealt with by the school are now being referred as delinquency cases.

One hundred percent of the defenders interviewed about Disturbing School cases seemed to regard these petitions as a *fait accompli*. Close to 30% of the pleas observed by investigators involved some form of disturbing schools, whether it was the basis of a petition, or a probation violation. Defenders did not challenge the school searches or interrogations by school resource officers, nor did investigators observe mitigating facts being offered either at a detention or disposition hearing.

Although school-related referrals have increased, South Carolina's juvenile justice system has seen a vast decrease in charges for the offense of truancy. However, in most counties, attorneys did not represent children at the initial hearing where the court entered a school attendance order and these children often return to court on contempt of the school order. At the contempt hearing children are often adjudicated and either sent for an evaluation or committed to DJJ; many investigators observed children in court for contempt of school orders who were sent for evaluation or received a determinate sentence. Though the number of truancy proceedings is low, the relatively high percentage of cases that come into the delinquency system on contempt charges evidences the need for counsel at the initial truancy hearing to properly explain the order and the potential consequences to the child.

C. SPECIAL EDUCATION

The majority of the defenders and probation officers seemed to know very little about special education law or the rights of a child with special education needs. Federal law requires school districts to provide certain accommodations and programming for children with special education needs. Many defenders stated that they did not know the significance of the Individual Education Plan (IEP) and did not know how it could be used to benefit or mitigate their clients' cases. All special education children are required to have an IEP which details any disabilities or special education needs as well as the methods by which schools will accommodate those needs. This lack of knowledge seemed to be particularly unfortunate for petitions involving Disturbing School charges where many of the children had been expelled from alternative school settings for conduct that may have been a manifestation of their

disability. Such cases are ripe for challenges under the various federal special education protections, yet system stakeholders were unaware of these federal remedies and protections.

D. USE OF SECURE EVALUATIONS

One of the many reasons for defining juvenile defense as a specialized area of practice is the knowledge an attorney should have about child and adolescent development issues. In South Carolina this need for knowledge about adolescent development is especially critical because of the frequency of evaluations. In 2007-2008, DJJ estimated that 20% of the children in their residential beds were at Regional Evaluation Centers where children were evaluated. By statute a child who is being considered for commitment to the South Carolina Department of Juvenile Justice for an *indeterminate* period *must* undergo an evaluation. And typically, an evaluation is conducted by DJJ if a child is facing waiver to adult court. In half of the cases observed, juveniles had undergone an evaluation. The implications for juvenile defenders practicing in South Carolina are enormous.

These post-adjudicatory, pre-disposition evaluations and waiver evaluations include a battery of psychological and psychometric testing, substance abuse evaluation, parent interviews, review of school records, medical and psychiatric records, and observations. These evaluations can occur in one of the 3 regional evaluation centers, Upstate Evaluation Center, Midlands Evaluation Center, and Coastal Evaluation Center. Although the majority of evaluations ordered during court observation were secure (i.e. to occur at one of the three regional evaluation centers) some do occur in the community and in two counties the majority of the evaluations were conducted in the community. Overall, however, the system relies heavily on secure settings to conduct evaluations.

This means that even if a child walks in off the street for a hearing, they may leave in shackles to get an evaluation. The child may be placed in detention for 1-2 days and then transported to one of the regional evaluation centers where it takes 30-45 days to complete the evaluation.

Juvenile defenders must ensure that their clients understand exactly what is happening during the period of evaluation and why the court is seeking information. Several children interviewed thought the evaluation was their punishment and were surprised when they were placed on probation or committed upon their return to court. As one judge stated, "Defense counsel should stress to the juvenile the importance of their behavior during evaluations. Their 30 day behavior can affect the outcome of their case."

One judge explained that he orders secure evaluations because they are faster and more thorough. He also stated that the court needs to find out if the child has been previously victimized. Another noted rationale for the use of secure evaluations is discipline; i.e. to teach the child a lesson.

A handful of stakeholders stated that the court uses detained evaluations as punishment. Stakeholders explained that secure evaluations were the only option because community evaluations take much longer and were sometimes impossible to complete. Whatever the rationale, the fact remains that the majority of children who are sent for secure evaluations are placed on probation and returned home after the evaluation is complete. Juvenile defenders can play an important role in advocating for the use of community evaluations.

Juvenile defenders must become fluent in the language of these evaluations. In the majority of the court hearings observed the judge relied heavily on the information and recommendations in the evaluation. The juvenile defenders in many counties receive the evaluation on the eve of court and do not have time to adequately prepare a response. A juvenile solicitor in one of the larger counties said that she has never seen a defender challenge the accuracy of the information in an evaluation. Specialization in juvenile defense demands that juvenile defenders receive training on reading and understanding the content of all juvenile evaluations to ensure they can diligently argue on behalf of their clients.

E. RACE, ETHNICITY, CLASS, AND GENDER

Defenders are best situated to defend against bias that may arise from a child's race, ethnicity, class, and gender issues. By being aware of the ways that the juvenile justice system may negatively impact children of color, girls, immigrants or children from low-income backgrounds, defenders can seek to ensure that they are provided with appropriate level and type of services and court conditions.

Reducing disproportionate minority contact (DMC), the term of art to signify the disproportionately high number of minority children who come into contact with the juvenile justice system, is a priority on both the federal and state level. The Juvenile Justice and Delinquency and Prevention Act identifies the reduction of DMC as a priority. The South Carolina Department of Public Safety, upon the recommendation of the South Carolina Governor's Juvenile Justice Advisory Council, has funded a state-level project to promote greater awareness and understanding of DMC issues. Though African American children make up only 37.5% of the children in South Carolina, they comprise the majority of children arrested for crimes, referred to delinquency court, securely detained and confined to secure juvenile correctional facilities. Front-line defenders can play a major role in reducing these numbers by providing effective advocacy at every decision point.

South Carolina's court-involved juvenile population is also overwhelmingly from low-income households. Children from low-income families may confront obstacles at every stage of delinquency involvement, from not being able to pay the \$40 indigency screening fee, to having difficulty getting to court or to the DJJ intake office, to not

being able to adhere to any number of probation conditions. Defenders should point out when certain conditions or court obligations will pose a hardship on children and families and ensure that they are not penalized because of their economic status.

Nationwide, there has been a rise in the number of girls being referred to the delinquency system. South Carolina is not an exception. Seventy percent of stakeholders cited a rise in the number of girls as a recent trend. Girls present differently than boys in terms of the way they may communicate, mental health issues, and are more often victims of trauma. Research has shown that gender-specific services and conditions should be imposed for girls that take into account their needs. Such services can decrease the likelihood of recidivism. Though there is a lack of community-based services funded by the state or county, gender-specific programming can be found in the community. Creative advocacy by the defender can ensure that girls are afforded the treatment they need and are not put in environments that are not conducive to their rehabilitation.

F. IMMIGRATION

The Latino population in South Carolina has grown exponentially in the past decade. Twenty-seven percent of the counties have accommodated this change in demographic by having court interpreters available. In other counties, interpreters were not available; investigators observed hearings where defenders never requested an interpreter for non-English speaking families present in the courtroom. In one county, one of the investigators served as an interpreter for a parent because no one, including the defender, requested an interpreter for a Spanish-speaking parent. Parents play a significant role in procedural matters such as ensuring that their child appears in court and complies with court conditions, and their involvement in their child's case is crucial. Even more importantly, defenders should inform family members of the court proceedings; without an interpreter, it is more likely that family members will misunderstand the ramifications and consequences faced by their child.

Although juvenile court professionals seemed aware of the collateral consequences stemming from sex offender registration, they seemed much less aware of other collateral consequence, such as the potential immigration consequences for children who are not United States citizens. In one county, an attorney recounted a case where the county's ICE liaison officer had been used as an interpreter during a juvenile's police interrogation. The juvenile then had an Immigration and Customs Enforcement (ICE) detainer lodged against him and his father was also detained. When asked about the response to the immigration case and how that would affect the juvenile proceedings, the defender provided an answer that reflected misunderstanding of immigration law and its consequences for court-involved juveniles.

G. LESBIAN, GAY, BISEXUAL, AND TRANSGENDER CHILDREN

Recent research has found that as many as 13% of detained children in the juvenile justice system are lesbian, gay, bisexual, and transgender (LGBT.) LGBT children have largely been an invisible population in the juvenile justice system partly due to the lack of awareness by juvenile court professionals. Based on interviews throughout South Carolina, this lack of awareness by court professionals was consistent in South Carolina.

LGBT children face significant bias both inside and outside the system, and it is critical that defenders understand the relevance of these experiences at all stages of delinquency proceedings for children who are LGBT or are perceived to be LGBT. Defenders must be trained on how to provide sensitive advocacy on behalf of LGBT children while protecting the child's confidences and privacy. Defenders who represent LGBT clients must be aware of the range of issues many LGBT children face in the system, including serious physical, sexual and emotional abuse within detention and incarceration facilities, as well as inappropriate dispositional services; defenders must advocate protecting LGBT clients from these harms.

H. WAIVER TO ADULT COURT

Waiver hearings were rare in nearly all of the counties visited. The juvenile court professionals in these counties stated that the number of waiver hearings has decreased substantially since South Carolina passed direct file statutes which allow children to be automatically prosecuted in adult court for certain types of offenses. In South Carolina, waiver statutes allow for the direct file of adult charges against juveniles ages fourteen to sixteen depending on the offense.

Though waiver hearings are infrequent, training of defenders in waiver practice and law was cited as necessary by 13% of the judges interviewed. For the juveniles who are subject to these discretionary waiver statutes, an attorney's trial skills and knowledge of juvenile-specific areas such as adolescent development and competency are imperative.

Many stakeholders in the family court recognized the importance of keeping children in juvenile court. Some solicitors indicated a reluctance to request waiver for children unless there is a history of violent offending, or repeated failures in the juvenile justice system. In two of the counties visited, investigators observed juveniles of either sixteen or seventeen years of age who were brought back into the juvenile justice system through "remand" or reverse waiver, usually pursuant to a plea agreement.

I. SEX OFFENSES

South Carolina has one of the most strict sex offender registration laws in the country. A juvenile found guilty of one of twenty-one enumerated sex offenses is required to register on the sex offender registry for life. In many of the counties visited, juvenile court professionals had a heightened awareness of this onerous collateral consequence. In nearly the same percentage of counties, however, judges noted and investigators observed defenders who did not understand the lifetime registration requirement for certain offenses; in one county, a defender actually asked for sex offender registration even though it was not required for the offense petitioned. Given the harsh sex offense registration laws in South Carolina, all defenders must be given adequate training in litigating these types of cases as well as adolescent development issues pertinent to this subject. For example, research has shown that this type of behavior in adolescents can be isolated to the adolescent development period and does not indicate that a person will commit another sexual offense as he matures.

V. CONCLUSION

The assessment process revealed institutional barriers and systemic problems across South Carolina's juvenile indigent defense system. Much of this breakdown stems from a severe lack of funding by the state and county governments. An appropriately funded Commission could provide oversight and management of several key issues including but not limited to enforcing pay parity; promulgating and implementing practice standards; and designing and mandating specialized and ongoing training for juvenile defenders. In order to dispense limited resources wisely and effectively, and to ensure that children receive fundamental fairness in the South Carolina courts, the juvenile indigent defense system must be re-tooled and reinvigorated.

CHAPTER FOUR

PRINCIPLES FOR EFFECTIVE DELINQUENCY REPRESENTATION AND PROMISING PRACTICES

During the course of the assessment, investigators observed dedicated juvenile defenders who advocated for their clients to the best of their abilities despite the lack of resources and support. These defenders were passionate and committed to defending their clients and garnered the respect of their peers and other stakeholders in the system. These defenders persevered despite the many structural and institutional barriers they faced.

In order to improve representation of all children in the justice system, juvenile defender offices must incorporate certain standards and practices. Those juvenile defender programs that provide a level of defense that meets constitutional standards have some general characteristics in common including: recognition of juvenile defense as a specialized practice; strong leadership; adequate resources and resource materials; limitations on caseloads; comprehensive training and opportunities for skill development; non-lawyer staff support; supervision of attorneys; and a work environment that values the role of the juvenile defender.

Core principles that aid defender offices in achieving these elements of policy and practice can be found in the *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems* (promulgated by the American Council of Chief Defenders of the National Legal Aid and Defenders Associations and the National Juvenile Defender Center). These *Ten Core Principles* are as follows:

1. Competent and Diligent Representation

The public defense delivery system upholds juveniles' constitutional rights throughout the delinquency process and recognizes the need for competent and diligent representation.

2. Specialization

The public defense delivery system recognizes that legal representation of children is a specialized area of law.

3. Personnel and Resource Parity

The public defense delivery system supports quality juvenile delinquency representation through personnel and resource parity.

4. Expert and Ancillary Services

The public defense delivery system uses expert and ancillary services to provide quality juvenile defense services.

5. Supervision and Workload

The public defense delivery system supervises attorneys and staff and monitors work and caseloads.

6. Professional Accountability

The public defense delivery system supervises and systematically reviews juvenile staff according to national, state, and/or local performance guidelines or standards.

7. Ongoing Training

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.

8. Dispositional Advocacy

The public defense delivery system has an obligation to present independent treatment and disposition alternatives to the court.

9. Educational Advocacy

The public defense delivery system advocates for the educational needs of clients.

10. Systemic Advocacy

The public defense delivery system promotes fairness and equity for children.

Investigators observed examples of promising practices in South Carolina that have strengthened the juvenile indigent defense system, including:

Non-Waiver of Counsel. Judges, defenders, solicitors, and DJJ staff universally stated that no child is allowed to proceed without counsel in a delinquency hearing. At a time when many states still routinely allow children to waive counsel, South Carolina has succeeded in institutionalizing non-waiver of counsel. All stakeholders recognize the importance of having a child represented by counsel in order to ensure that his constitutional rights are enforced. This achievement will help pave the way for further improvements in juvenile indigent defense practice and should be solidified through a formal statutory amendment disallowing waiver in delinquency proceedings to reflect the accepted and promising practice of non-waiver of counsel in family court.

Juvenile Court Specialization. In recognition of the fact that children are different from adults, South Carolina has implemented a separate family court system with judges limited exclusively to family court practice. Solicitor's offices have put in place juvenile solicitors, most self select into that section, and who have been in that role for years. Similarly, the new indigent defense statute requires that each public defender office designate a position for a defender dedicated to juvenile defense. In many counties, this has been put into effect with full-time juvenile defenders who have chosen to do the work, and who are not penalized in terms of salary or esteem by their choice. While these practices are not uniform across the state, it is significant to note that resources appear to be the obstacle - not a lack of will or awareness of the importance of juvenile specialization.

Indigent Defense Commission. South Carolina has had an Indigent Defense Commission since 1993. Though this entity has not been allocated appropriate levels of funding by the legislature, it provides existing infrastructure from which indigent defense standards of practice, monitoring and oversight, and training can be implemented.

“Ticketing” System and Early Access to Counsel. It is important for defense counsel to meet and consult with a client as early in the case as possible. Early access to counsel gives an attorney more time to investigate, gather relevant information about a child and her family, and prepare for the case. In many of the counties visited, defenders did not meet with clients in the several weeks that lapsed between the petition and the first court hearing. In one county, however, the juvenile court professionals implemented a “ticketing” system whereby juveniles were given a ticket by the police officer to show up to court on a date certain. On that date, the solicitor would make the petitioning or diversion decision, DJJ would conduct an intake interview and the public defender’s office would screen and meet with the client and her family. Another large county that has suffered similar court delays has started this system in the past couple of months.

Though this measure was implemented because many children were either not showing up to the DJJ intake interview or showing up without counsel, thus delaying the court process, this “ticketing” system has the potential to improve representation for children. First and foremost, it gives the defender the opportunity to meet with the client and the client’s family prior to the court hearing. In addition, the defender could advocate for diversion with the solicitor, and could participate in the intake interview.

CHAPTER FIVE

RECOMMENDATIONS AND IMPLEMENTATION STRATEGIES

In county after county, investigators met with juvenile defenders, judges, solicitors and DJJ staff who are dedicated to ensuring an effective juvenile indigent defense system is in place in South Carolina. Despite the limited resources and other structural barriers, key system stakeholders have made strides towards a fairer and more equitable juvenile indigent defense system. The assessment revealed key issue areas that can improve children's' access to and quality of juvenile defense counsel.

CORE RECOMMENDATIONS

The juvenile indigent defense system in South Carolina is sorely in need of attention and repair. Juvenile defenders alone cannot solve these problems. This Assessment calls for collaborative action to remedy systemic deficiencies at the state, regional and local levels. The core recommendations set forth below are followed in greater detail with a series of implementation strategies that guide key stakeholders toward concrete, collaborative action.

1. **Require Specialized Juvenile Defense Training**

Juvenile defenders should be required to receive specialized, comprehensive, ongoing, affordable juvenile-specific skills training that covers all stages of the delinquency process (initial hearings through post-disposition) and incorporates other critically important topics such as adolescent and brain development; competency; immaturity; disabilities; and, other important issues that have a unique impact on children.

2. **Increase Resources for Juvenile Public Defenders**

The juvenile defense system is woefully under resourced. It is imperative that the state legislators and local policy makers allocate adequate funds to ensure pay and resource parity. More juvenile public defenders need to be hired and policy makers need to ensure pay parity for juvenile public defenders with adult public defenders and solicitors. In addition, juvenile defense attorneys need access to support staff, investigators, experts, and social workers.

3. **Foster Diligent and Zealous Advocacy**

Juvenile public defenders should act with diligence and zeal in advocating for their clients. Zealous advocacy includes actively trying cases where facts or laws are in dispute; properly investigating cases; making meaningful recommendations at all phases of the court process; filing appropriate motions; challenging the use of secure evaluations and pre-trial detention when such is not necessary or appropriate; objecting to practices such as unnecessary shackling and insisting upon uniform, comprehensive and age-appropriate colloquies. Juvenile public defenders should

enter pleas at initial hearings only when appropriate, and they should consider the impact that court fees have on their indigent clientele and argue for waiver of fees when they are perceived to be punitive or unduly burdensome.

4. **Eliminate Unnecessary Shackling**

The indiscriminate and unnecessary shackling of children in courtroom proceedings should be terminated and shackling should only be used in cases in which an individualized determination has been made on the record that it is necessary.

5. **Ensure Timely Appointment of Counsel and Client Contact**

Juvenile defense counsel should be appointed in an early and timely manner and given every opportunity to adequately prepare for the case. Defense counsel must have a meaningful opportunity to confer with the child in a confidential meeting area. Counsel must have the chance to test the sufficiency of the case prior to accepting a plea agreement on behalf of the child, and to explain the short- and long-term consequences of a juvenile court adjudication thoroughly.

6. **Address Ethical and Role Confusion of Juvenile Defense Counsel**

The South Carolina Commission on Indigent Defense or other appropriate entity should issue an opinion clarifying the role of defense counsel in juvenile delinquency proceedings. The ethical and role confusion that often characterizes juvenile court practice leaves far too many children literally defenseless. All juvenile court professionals must understand that defense attorneys are ethically bound to act with diligence, competence, promptness, and zeal for the stated interests of their young clients. Circuit public defenders must play an important role in adhering to these mandates by providing meaningful supervision and assistance to juvenile public defenders to ensure competent and adequate representation for children.

7. **Establish Ongoing Oversight and Monitoring**

Establish a separate juvenile division within the South Carolina Commission on Indigent Defense or other appropriate entity to centralize leadership, innovation and responsibility around strengthening the practice and policy of juvenile defense. Such an entity could be tasked with ensuring the equitable and fair distribution of resources; collection of needed data; promulgation of standards and implementation of best practices; ensuring the availability of juvenile-specific training; and, identification, development and implementation of specific policies and practices that will improve the juvenile defense system based on well-informed decisions.

IMPLEMENTATION STRATEGIES

Realizing these recommendations requires the cooperation of numerous entities and groups in South Carolina. The legislature, judiciary, South Carolina Commission on Indigent Defense, law enforcement agencies, and individual defenders must work together to improve the quality of juvenile indigent defense in South Carolina. Implementation strategies set forth below are designed to complement and put into effect the core recommendations, including:

The South Carolina Legislature should:

1. Allocate adequate funding to the Indigent Defense Commission so that the Commission can provide resources for conflict attorneys and public defenders.
2. Allocate sufficient funding for each of the county's public defender's offices and mandate that a certain portion be reserved for juvenile indigent defense.
3. Enact caseload limits for juvenile defenders.
4. Require juvenile defenders' representation of children to continue after the disposition and provide funding for this representation.
5. Amend the waiver of counsel statute to explicitly disallow waiver in delinquency proceedings to reflect the accepted and promising practice of non-waiver of counsel in family court.
6. Consider either enacting a presumption of indigence for children, or eliminate the screening fee for indigency determinations.
7. Enact a provision eliminating the use of shackles during court appearances unless an extenuating individual situation warrants the use of those restraints.
8. Enact legislation that will require the court to set the docket for all court hearings.
9. Reconsider South Carolina's waiver statutes to do away with direct file statutes and submit all waivers to a hearing for a determination by the court.
10. Amend the law to limit its use to channel children into the juvenile justice system.
11. Enact a provision requiring an attorney to be present whenever a child is brought in for interrogation for a law violation, in recognition of adolescent development research which shows

that children are particularly vulnerable to custodial interrogation and require further due process protections. Allocate sufficient funds to allow for the presence of an attorney.

The South Carolina Indigent Defense Commission should:

1. Take a leadership role in reforming juvenile indigent defense and in implementing the core recommendations of this assessment.
2. Promulgate practice standards for juvenile defenders that require attorneys to meet with clients prior to court proceedings; consult with clients and families about the case and social information; investigate cases; file motions when appropriate; provide vigorous and independent advocacy at detention, adjudication and disposition hearings; negotiate for fair and favorable plea agreements; prepare for and set trials to make sure that the government can meet its burden; and advise clients about all proceedings and consequences for any decisions made.
3. Create oversight mechanisms for the Indigent Defense Commission and circuit and chief defenders to monitor compliance with the promulgated practice standards.
4. Create uniformity in juvenile indigent defense practice and resources available to public defender offices in each county.

State and local bar associations should:

1. Recognize juvenile defense as a specialized area of practice.
2. Develop and promote policies that will support and improve juvenile indigent defense reform efforts.
3. Work with the Indigent Defense Commission, circuit public defenders and other stakeholders to promulgate legislation enacting juvenile indigent defense reform.

Juvenile defenders should:

1. Adhere to their ethical obligation to represent the expressed interests of their clients at all stages of the delinquency proceedings.
2. Meet with clients as soon as practicable in order to gather information about the alleged offense and about the clients' background to prepare for court hearings.

3. Educate themselves on areas relevant to representation of children, such as adolescent development and special education, and collateral issues such as immigration law.
4. Become competent in advocacy skills such as motions practice, waiver hearings, and trial skills.
5. Oppose the use of shackles at all routine court appearances unless an extenuating individual situation warrants the use of those restraints.
6. Attend or send a staff member to pre-disposition staffing meetings with the Department of Juvenile Justice whenever possible to advocate for the child's preferences and better prepare for the disposition hearing.
7. Become knowledgeable about the parole guidelines and the implication of those guidelines to the client's decision to plead or go to trial. Ensure that clients are well aware of the sentencing and parole guidelines that they face in DJJ secure facilities if they are committed after adjudication.
8. Retain independent experts for mental health evaluations or other evaluations instead of relying on the reports of DJJ or DMH.

Circuit Public Defenders should:

1. Support and advocate for permanent attorney positions dedicated to juvenile defense and recognize the unique and varied skills needed for effective representation of children.
2. Ensure that juvenile defenders have adequate access to office space and resources such as investigators and other support staff.
3. Seek out alliances with attorneys who specialize in special education, mental health and school discipline cases in order to address collateral issues.
4. Consider creating "bridge units" that provide a specialized approach to representing juveniles who are facing adult criminal charges. Attorneys in these units should be aware of issues such as adolescent development and mental health.

The Judiciary should:

1. Ensure that attorneys have had a meaningful opportunity to meet with clients and prepare for detention hearings.

2. Conduct detention hearings in the afternoon court docket so that defenders will have time to interview and prepare properly for detention hearings.
3. Require attorneys from the conflict panel to have a minimum level of training in juvenile defense before taking delinquency cases.
4. Prohibit the indiscriminate use of shackles for children appearing in family court unless extenuating circumstances necessitate such restraints in individual cases.
5. Ensure that children fully understand their rights before pleading guilty, in accordance with applicable case law, rules of procedure and statutes.
6. Provide leadership in working with school officials and mental health providers to ensure that family court is not a repository for children who are having difficulty in those systems.
7. Receive training on issues such as adolescent development as well as the ethical obligations and proper role of juvenile defense counsel.

The Department of Juvenile Justice should:

1. Ensure that private space is made available at all DJJ facilities for children to speak with their attorneys.
2. Ensure that children have telephone or video-conference access to defenders at no cost and that conversations over those mediums protect attorney-client confidentiality.

Solicitors should:

1. Receive training on issues such as adolescent development as well as the ethical obligations and proper role of juvenile defense counsel.

Law enforcement should:

1. Establish practices that allow children access to counsel during any interrogations.
2. Refrain from utilizing interrogation techniques that have been found to be especially coercive, such as the Reid Technique, a common law enforcement interrogation technique that has been found to be particularly harmful when used with children.

3. Mandate training of law enforcement officers on developmental differences between children and adults in order to help officers understand adolescent decision-making capacity and to enhance the safety of officers and the public.
4. Mandate training of law enforcement officers on appropriate uses of juvenile detention and the long term harm of overuse of juvenile detention to include a review of the South Carolina statutory language regarding detention.

School Districts should:

1. Train school resource officers to adequately respond to situations at school with the aim of reducing the number of referrals to delinquency court.
2. Create in-school programs and disciplinary measures to address disciplinary problems within the school.
3. Ensure that children who have disciplinary issues are being given appropriate services as dictated by current and accurate IEPs and are accorded their rights under applicable federal law.

Citizens' Groups, Parents, and Advocates should:

1. Insist that children involved in the juvenile justice system are accorded effective assistance of counsel and that juvenile defenders are given the support and training necessary to provide such representation.
2. Educate children and parents about due process rights, the benefits of an attorney and the consequences of pleas and waiver.
3. Encourage adoption of the recommendations set forth in this assessment.

Law Schools and Universities should:

1. The Children's Law Center and other academic institutions should continue to offer continuing legal education seminars and other presentations to improve the quality of juvenile defense.
2. Collaborate with public defender offices to provide cross-disciplinary support to juvenile defenders and increase the opportunities for internships and paid fellowships in conjunction with these offices.

3. The Children's Law Center should organize trainings on trial skills and juvenile specific issues, such as adolescent development, special education, waiver hearings, dispositional planning, and other juvenile specific areas. These trainings should be accessible to defenders across the state and should be free of charge to ensure that all juvenile defenders are able to attend.
4. Establish juvenile justice clinics and offer juvenile justice related courses at law schools in order to create greater interest in juvenile justice issues and train future juvenile defenders. Clinics can also take on some of the post-disposition representation, such as staffing juvenile detention centers to monitor conditions of confinement or represent juveniles in administrative disciplinary proceedings.
5. Conduct needed research on issues related to the juvenile justice system and identify areas in need of reform.

ENDNOTES

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- ⁵*Id.* at 95-96.
- ⁶*Id.* at 94.
- ⁷Note, *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. at 11.
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- ⁹*Id.* at 15, n. 14.
- ¹⁰*Gideon v. Wainwright*, 372 U.S. 335 (1963).
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- ¹²387 U.S. 1 (1967).
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- ²⁸Children's Law Center, *Quick Reference Guide to South Carolina's Juvenile Justice System* 85, available at <http://childlaw.sc.edu/frmPublications/JudgesQuickReferenceGuidetoSouthCarolinasJuvenileJ.pdf>.
- ²⁹Karen Chinn, South Carolina Department of Juvenile Justice, *Report on Progress* 2 (2009), <http://www.state.sc.us/djj/pdfs/2009-chinn-report.pdf>.
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- ³¹South Carolina Department of Juvenile Justice, *2008 Statistical Report* 4 (2008), <http://www.state.sc.us/djj/pdfs/2008-Statistical-Report.pdf> [hereinafter *DJJ Statistical Report*].
- ³²This number includes juveniles referred more than once during the fiscal year. See South Carolina Department of Juvenile Justice, *2008 Report Card* 8 (2008), <http://www.state.sc.us/djj/pdfs/2008-Report-Card.pdf> [hereinafter *DJJ Report Card*].
- ³³*Id.* at 4.
- ³⁴*Id.* at 5.
- ³⁵*Id.*
- ³⁶*DJJ Statistical Report*, *supra* note 31, at 25.
- ³⁷*Id.*
- ³⁸*Id.* at 7.
- ³⁹*Id.* at 25.

⁴⁰ Annie E. Casey Foundation, *2009 Kids Count Data Book 39*, (2009), available at http://www.aecf.org/~media/Pubs/Other/123/2009KIDSCOUNTDataBook/AEC186_2009_KCDB_FINAL%2072.pdf. The other key indicators are percent low-birthweight babies, teen birth rate, percent of teens who are high school dropouts, percent of teens not attending school and not working, percent of children living in families where no parent has full-time, year-round employment, and percent of children in single-parent families.

⁴¹ *Id.*

⁴² S.C. Code Ann. §§63-19-10 – 2460 (2008).

⁴³ S.C. Code Ann. §63-3-510 (A)(4) (2008).

⁴⁴ S.C. Code Ann. §63-19-20(1) (2008).

⁴⁵ S.C. Code Ann. §63-19-1010 (A) (2008).

⁴⁶ *Id.*

⁴⁷ S.C. Code Ann. §63-19-810(A) (2008).

⁴⁸ *Id.*

⁴⁹ S.C. Code Ann. §63-19-820 (2008).

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⁵² S.C. Code Ann. §63-19-1210(10) (2008).

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⁶¹ S.C. Code Ann. §63-19-1440 (2008).

⁶² *Id.*

⁶³ South Carolina Rules of Appellate Practice, Rule 201.

⁶⁴ National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Court Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 25 (2005) [hereinafter *NCJFCJ Guidelines*].

⁶⁵ IJA/ABA *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties*, Standard 2.1(c) [hereinafter *IJA/ABA Juvenile Justice Standards*].

⁶⁶ *Id.* at Standard 3.1(a)-(b).

⁶⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁶⁸ *IJA/ABA Juvenile Justice Standards*, *supra* note 65, at Standard 2.2(b)(iii).

⁶⁹ It is important to note, however, that disallowing waiver of counsel is not currently required by South Carolina law. Cementing this practice requires strengthening the statutory language.

⁷⁰ S.C. Code Ann. §17-3-45 (2008).

⁷¹ *IJA/ABA Juvenile Justice Standards*, *supra* note 65, at Standard 2.1(a).

⁷² *NCJFCJ Guidelines*, *supra* note 64, at 122.

⁷³ S.C. Rules of Professional Conduct, Rule 1.7(a).

⁷⁴ S.C. Code Ann. §17-3-50(A) (2008).

⁷⁵ *DJJ Statistical Report*, *supra* note 31, at 8.

⁷⁶ *IJA/ABA Juvenile Justice Standards*, *supra* note 65, at Standard 7.1.

⁷⁷ *IJA/ABA Juvenile Justice Standards*, *supra* note 65, at Standard 4.3(a).

⁷⁸ *Id.* at Standard 7.3(a)(i) and (b).

⁷⁹ *Id.* at Standard 7.1.

⁸⁰ *Id.* at Standard 9.1.

⁸¹ *Id.* at Standard 10.1(a).

⁸² *DJJ Statistical Report*, *supra* note 31, at 13.

⁸³ *DJJ Statistical Report*, *supra* note 31, at 21.

⁸⁴ *DJJ Statistical Report*, *supra* note 31, at 21.

⁸⁵ S.C. Code Ann. §63-19-1440 (2008).

⁸⁶ *DJJ Statistical Report*, *supra* note 31, at 4.

⁸⁷ See generally, S.C. Code § 16-17-420.) The statute has been upheld by the South Carolina Supreme Court against an overbreadth challenge. See *In re Amir X.S.*, 639 S.E.2d 144 (S.C. 2006).

APPENDICES



TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS

July 2008
2nd Edition

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>.

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.

¹⁰ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 3.

¹¹ A conflict of interest includes both codefendants and intra-family conflicts, among other potential conflicts that may arise. See also *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 2.

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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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.

ROLE OF JUVENILE DEFENSE COUNSEL
IN DELINQUENCY COURT



NATIONAL JUVENILE DEFENDER CENTER

SPRING 2009



ROLE OF JUVENILE DEFENSE COUNSEL
IN DELINQUENCY COURT

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NATIONAL JUVENILE DEFENDER CENTER

SPRING 2009

ACKNOWLEDGEMENTS

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.

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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 inter-

views are completed, and the necessary documents 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.



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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.

NATIONAL JUVENILE DEFENDER CENTER

Summer 2006

Encouraging Judges to Support Zealous Defense Advocacy from Detention to Post-Disposition

An Overview of the *Juvenile Delinquency Guidelines* of the National Council of Juvenile and Family Court Judges

The *Juvenile Delinquency Guidelines (Guidelines)* issued in 2005 by the National Council of Juvenile and Family Court Judges (NCJFCJ) set forth essential elements of effective practice in juvenile delinquency courts. In addition to creating a mandate for juvenile court judges, the *Guidelines* provide standards and support for improving juvenile indigent defense systems and daily court practice. The National Juvenile Defender Center has summarized NCJFCJ's recommendations regarding the role of the juvenile defender and has extracted key quotations from the *Guidelines*, organized topically, to assist defenders in navigating and citing this extensive resource. Please feel free to use and adapt these materials for your own purposes.

Background

The *Juvenile Delinquency Guidelines* of the National Council of Juvenile and Family Court Judges ("*Guidelines*") is a comprehensive benchbook of best practices developed by a committee of judges, prosecutors, defense attorneys, and other key juvenile justice stakeholders. Released in July 2005, the *Guidelines* volume can assist juvenile court systems nationwide in planning for improvement and change.

In the *Guidelines*, the nation's leading professional organization of juvenile court judges promotes the active participation of defense counsel in creating fair and efficient delinquency courts. The *Guidelines* identify 16 core principles that characterize a juvenile court of excellence. The seventh principle states that "*youth charged in the formal juvenile delinquency court must have qualified and adequately compensated legal representation.*"¹

The *Guidelines* recognize zealous defense advocacy as a necessity for children in delinquency proceedings. To this end, the *Guidelines* support policies such as appointment of counsel prior to the detention hearing, adequate training and resources for defenders, and continuity of representation through post-disposition

and reentry. Juvenile defenders can use the best practices endorsed in the *Guidelines* to advance systemic changes in their jurisdictions and outstanding defense practice in every court appearance.



ensuring excellence in juvenile defense and promoting justice for all children

Access to Qualified Counsel

In its core principles and throughout the *Guidelines*, NCJFCJ unequivocally supports the need for qualified defense counsel in establishing a delinquency court of excellence. The *Guidelines* acknowledge that accused children’s right to counsel is frequently underutilized and youth who waive the right are less likely to secure other elements of a fair trial.² Although courts often subscribe to the misperception that defense advocacy slows down court processing, the *Guidelines* suggest that early access to counsel leads to early case resolution.³

NCJFCJ therefore holds delinquency judges responsible for providing children with access to counsel at every stage of the proceedings, from before the initial hearing through post-disposition and reentry.⁴ The *Guidelines* advise judges to be “extremely reluctant” to permit waiver of counsel by youth.⁵ Judges should accept waivers from children only on “rare occasion[s]” and should do so only after the child has consulted with an attorney about the decision and persists in desiring to waive the right.⁶ The court should always take independent steps to ensure that the child understands the waiver decision and its possible consequences.⁷

Moreover, the court process should be sensitive to the individual characteristics of each child. Judges are also expected to ensure that all courtroom professionals, including defense attorneys, receive adequate training.⁸ Youth should have access to defenders who are culturally competent, and to foreign language interpreters if

necessary for conversing with the court and counsel.⁹ NCJFCJ repeatedly states that defenders must also have manageable caseloads in order to represent child clients effectively.¹⁰

In addition, NCJFCJ notes that youth must have access to experienced attorneys who can provide effective assistance.¹¹ Thus, “representation of youth in juvenile delinquency court should not be an entry-level position that eventually graduates attorneys to other areas of defense work.”¹² Defenders should be “selected on the basis of their skill and competence” and should have both an interest and training in juvenile law, adolescent development, education, substance abuse, and mental health issues.¹³ In short, the *Guidelines* acknowledge that juvenile delinquency defense is a specialized area of law requiring highly skilled lawyering.

Zealous Representation

Juvenile defenders may find that their active representation of child clients is sometimes resisted by other courtroom participants. However, the diverse stakeholders who framed the *Guidelines* recognize that zealous defense advocacy helps resolve cases efficiently and benefits all courtroom participants.¹⁴

Managers and front-line defenders can use the *Guidelines*, as well as other professional standards, to educate their jurisdictions about the role of counsel for the child. According to NCJFCJ, juvenile defenders must:

- Represent the position expressed by the child client,
- Appear in all hearings as for an adult client accused of the same act,
- Advocate to prevent the child from being inappropriately detained,
- Promptly investigate and actively pursue discovery,
- File all appropriate pre-trial motions,
- Know about disposition options and inform the court of the child’s needs.¹⁵

By articulating these duties, the *Guidelines* make clear that no court should frown upon a defender’s pursuit of these core responsibilities. Defenders can refer to the *Guidelines* in individual cases or when influencing policy debates to explain why limitations on legitimate advocacy efforts are inappropriate and inefficient.

Quick Reference:

NCJFCJ *Juvenile Delinquency Guidelines* Related to the Role of Counsel

References to the Role of Counsel can be found on the following pages of the *Guidelines*:

Access to counsel: 25
Early appointment of counsel: 77-79, 90-91
Waiver of counsel: 25
Primary responsibility to child client: 30, 122, 137, 161
Detention alternatives: 81-84
Detention advocacy: 90
Adjudication: 122, 126
Disposition: 137
Appeals: 161-62
Post-disposition: 169, 181
Reentry: 187
Probation/parole violations: 196-97

Practice Recommendations on Elements of Zealous Defense

- Meet with the child prior to the detention or initial hearing
- Have the opportunity, in every hearing, to cross-examine prosecution witnesses, present evidence, and make arguments
- Inform the court of each youth's special needs
- Zealously represent each child client's expressed interests
- File appropriate pre-trial motions
- Actively pursue discovery
- Appear in all hearings where the attorney would appear for an adult accused of the same crime
- Know the available disposition resources
- Secure the child's appeal rights and explain them to the child

Expressed Interests of the Child

Many juvenile justice practitioners mistakenly believe that juvenile defenders are obliged to argue for a child's "best interests" in court. The *Guidelines* join other professional standards in recognizing that a juvenile defender's primary responsibility is to the child client.¹⁶ At every stage of court proceedings, a defender is ethically bound to advocate for the legitimate interests and goals expressed by the child.¹⁷ Defenders may not substitute their own judgment, or that of the client's caretakers, for the preferences of the child.¹⁸

Although parents also have important interests and can play a significant role in delinquency proceedings, at times their position may be adverse to the child's. In such cases, the *Guidelines* make clear that defense counsel's primary duty is to the child. Under the *Guidelines*, where there are conflicts of interest or opinions between a child client and his or her caretaker, defenders need not discuss the case with parents¹⁹ or represent the views of a parent that are contrary to the child's wishes.²⁰

Courtroom Culture

Assessments of state juvenile indigent defense systems conducted by the National Juvenile Defender Center and their partners routinely find that juvenile courts across the country are chaotic, extremely informal, and perceived as less important than adult criminal courts.²¹ One juvenile court clerk in Louisiana summed up the issue: "Families and children have no meaningful idea what is going on here. They move through the system quickly and are humiliated and demeaned in the process."²²

NCJFCJ recognizes that substandard proceedings in delinquency courts are unacceptable. The judge "must explain and maintain strict courtroom decorum and behavioral expectations for all participants ... [and] ensure that the juvenile delinquency court is a place where all ... participants are treated with respect, dignity, and courtesy."²³ Courtroom facilities should be secure and offer separate supervised waiting areas for witnesses and family members, with defense and prosecution witnesses waiting separately. The *Guidelines* repeatedly stress the need for delinquency courts to treat all participants, including defenders and youth, with politeness and cultural understanding.²⁴ These provisions are a resource for defenders to combat common misperceptions of juvenile court and to insist upon appropriate decorum in the proceedings.

Detention Advocacy

Early appointment of defense counsel is critical to resolving cases fairly and efficiently. The *Guidelines* specify that in a delinquency court of excellence, counsel is appointed *before* any initial or detention hearing and has enough time to prepare.²⁵ Only if unavoidable should children meet with counsel for the first time on the day of the hearing, and only if they are then afforded time to discuss the case outside the courtroom.²⁶ Zealous and prepared detention advocacy is so important that NCJFCJ advises judges and public defenders to take a leadership role in promoting systemic reforms that will redirect resources toward early appointment of counsel, for example by diverting less serious cases from formal processing.²⁷

The *Guidelines* discuss several compelling reasons for early appointment of counsel, especially courtroom organization and quality of representation. NCJFCJ

recognizes that early appointment of counsel conserves judicial resources by preventing delays and minimizing additional hearings.²⁸ Moreover, timely appointment helps defenders meet their ethical obligations and secure due process for children. Defenders are expected to:

- Spend time with the child before the hearing to review the delinquency petition, explain the child's rights, and discuss whether the child wants to admit or deny the allegations;²⁹ and
- Based on these early interactions, help the court recognize when there are competency issues that require further assessment.³⁰

Defenders can invoke these arguments to encourage reforms that will enable courts to appoint counsel earlier or to gain additional time to talk with each child client before a detention hearing. Given the critical importance of attorney-client interaction, the *Guidelines* also stress that juvenile court facilities should provide private spaces where attorneys can meet with clients and families.³¹

The harmful effects of secure detention on children's case outcomes and life chances are well documented. Youth placed in secure detention are more likely than non-detained youth to be formally processed and to receive more punitive sanctions at disposition, controlling for demographic and offense characteristics.³² Secure detention is far more costly than community-based alternatives, and jurisdictions that have pioneered reforms find that these alternatives do not harm public safety and may lower recidivism rates.³³ The *Guidelines* acknowledge the ruinous consequences of overcrowding in detention centers, which endangers youth and prevents services from being delivered.³⁴ The burdens of detention fall disproportionately on African American youth and other racial minorities, who are locked up at higher rates than white youth accused of comparable offenses.³⁵

The *Guidelines* discuss at length the desirability and availability of alternatives to secure detention, including temporary shelters for children whose guardians

cannot be located but for whom secure detention is unnecessary.³⁶ One of the key functions of juvenile defenders is drawing the court's attention to appropriate alternatives for each child, and the *Guidelines* emphasize that overuse of secure detention wastes public funds.³⁷ These arguments have long been raised by defenders, but have added persuasion when seconded by NCJFCJ.

The *Guidelines* note that a police affidavit in support of a request to detain a child should specify the reasons why a youth should be securely confined.³⁸ Defenders should urge courts to hold police to this standard. Moreover, defenders should ensure that children are detained only when statutory criteria are met and that judges enter written findings regarding the detention decision.³⁹

Throughout the *Guidelines*, NCJFCJ encourages early and effective defense advocacy as a means of conserving public resources and streamlining court processing. Defenders can use these principles, propounded by judges and for judges, to expand their jurisdiction's acceptance of a vigorous defense role in delinquency court. This expansion is especially needed in detention hearings, which are too often dismissed as merely a prelude to the main show.

Plea Agreements

Youth may have many misconceptions about the process of entering a plea agreement. The *Guidelines* recommend that all courtroom participants, including defenders, ensure that plea negotiations do not give the child the impression that he or she will be able to manipulate the system or avoid consequences by taking a plea offer.⁴⁰ Based on this principle, judges are expected to conduct a thorough colloquy in understandable language any time a youth is entering a plea.⁴¹ The *Guidelines* state that judges should determine whether a child's plea is knowing and voluntary in light of the child's age, educational attainment, literacy level, and trauma history.⁴²

Policy Recommendations for Juvenile Defense

- Limitation of waiver of counsel to rare occasions, only following a colloquy and consultation with an attorney
- Appointment of counsel prior to the detention or initial hearing
- Diversion of less serious cases from the formal delinquency system
- Continuity of representation, including availability of counsel for appeals and post-disposition reviews
- Manageable caseloads for defense counsel and other participants

The *Guidelines* hold defenders responsible for telling each youth that the plea agreement is not a way to achieve gain and that the court makes a final decision about whether to accept an agreement.⁴³ The *Guidelines* thereby imply that defenders need adequate time to counsel child clients regarding the momentous direct and collateral consequences of admitting delinquency charges. Defenders can refer to these portions of the *Guidelines* to request additional reasonable time from the court to fulfill all of these responsibilities for each child client.

The *Guidelines* emphasize that it is “unacceptable practice” for prosecutor or counsel to begin plea discussions for the first time on the day of adjudication or as a result of inadequate preparation for adjudication.⁴⁴ The court should receive any proposed plea agreement, with a plea petition signed by the child, at least one week ahead of the scheduled adjudication date.⁴⁵ However, the *Guidelines* also recognize that untimely plea discussions may be “caused by unmanageable caseloads.”⁴⁶ These *Guidelines* provisions provide defenders with policy arguments in favor of caseload reductions. The *Guidelines* recommend diverting less serious cases from the formal delinquency system in order to conserve resources.⁴⁷

Adjudication

The *Guidelines* expect juvenile defenders to be qualified and to prepare thoroughly for each child’s adjudication.⁴⁸ Diligent preparation includes factual investigation, discovery, requests for experts if needed, and communication with the child.⁴⁹ Remaining conscious of the need to minimize a child’s time in detention, defenders can cite this provision when urging the court to set an adjudication date that will provide adequate time to prepare a client’s defense. The *Guidelines’* expectations for defenders also provide grounds for policy reforms to fund defense investigators or experts and to set reasonable caseload standards.

The *Guidelines* specify that defenders should have the opportunity to cross-examine all witnesses presented at adjudication or to present contrary evidence on the child’s behalf.⁵⁰ Statements made by children during intake or detention processing should not be admissible against them at adjudication.⁵¹ Defenders, like prosecutors, must be afforded the opportunity to present closing arguments.⁵² The *Guidelines* also note

Using the NCJFCJ *Guidelines* in Court

Invoking the *Guidelines* in a courtroom presentation could feel awkward. A defender does not want to appear to be telling the judge how to do his or her job. With a little forethought, there are ways to raise the *Guidelines* with finesse and respect.

For example:

- *Your Honor, as you are probably aware, the National Council of Juvenile and Family Court Judges encourages courts to*
- *Your Honor, I would appreciate the opportunity to present [argument on a motion, defense witness, defense evidence, etc.], in accordance with the guidelines for excellence set out by your National Council of Juvenile and Family Court Judges.*

that in delinquency adjudications, like criminal trials, the state has the burden of proof.⁵³ It is clear from the *Guidelines* that defenders should never be inhibited from conducting vigorous cross-examination, challenging admissibility of evidence, demanding that the state prove every element of the crime beyond a reasonable doubt, or otherwise engaging in a zealous defense. The process that is due to a child in delinquency court demands an effort comparable to the process that would be provided in adult criminal court. It is not acceptable for courts to conduct informal adjudications that compromise the protections required in an adversarial delinquency system.

Disposition

NCJFCJ recognizes the importance of thorough preparation and advocacy at disposition. Defenders should notify the court at the time of adjudication if additional evaluations or expert witnesses will be needed for disposition.⁵⁴ The *Guidelines* recommend that a pre-disposition investigator should contact defense counsel for information, and should give a copy of his or her report and recommendations to defense counsel *at least three days before* the disposition hearing.⁵⁵ In addition, defenders are responsible to consult with the child client regarding options and preferences.⁵⁶ Defenders can use these best practices as a benchmark to argue that the court should not proceed with a rushed disposition hearing. In particular, the *Guidelines* provide that a case

should not proceed from adjudication immediately to disposition unless all necessary preparation has been completed beforehand.⁵⁷

At the disposition hearing, defenders inform the court about each child's needs and preferences regarding services and providers.⁵⁸ As in other hearings, defense counsel must have the opportunity to represent the child actively by cross-examining prosecution evidence and presenting evidence on the child's behalf.⁵⁹ The *Guidelines* show that these are necessary steps for which courts should provide adequate time in every case. Moreover, the *Guidelines* offer a basis for policy reforms to help give defenders the resources and time to prepare for the comprehensive preparation that is expected of them at the disposition stage.

Although the *Guidelines* acknowledge that parents' views may be relevant, they state that defense counsel has no obligation to present to the court the disposition preference of a parent that is contrary to the child's wishes.⁶⁰ NCJFCJ thus reinforces other professional standards in concluding that, at any stage of delinquency proceedings, defense counsel's primary allegiance is to the child client and to the representation of his or her legitimate expressed interests.

Appeals

As in other stages of the proceedings, defenders' responsibility at the appellate stage is to the child client.⁶¹ NCJFCJ recognizes that it is part of defense counsel's role to take appeals when necessary to protect a client's rights or clarify legal rules.⁶² However, judicial performance affects the likelihood of appeal. Delinquency judges can help to avoid the necessity of an appeal by ensuring that there are correct procedures and clear communication throughout the proceedings.⁶³

The *Guidelines* expect defenders to consult with a child client about the possibility of appeal, to obtain and review critically the adjudication transcripts, and to take the procedural steps necessary to safeguard the client's right to appeal.⁶⁴ Juvenile defenders can invoke these principles to advocate for systemic reforms that will secure more resources for appellate representation in juvenile cases.

Post-Disposition, Reentry, and Probation/Parole Violations

NCJFCJ urges judges to ensure that counsel is available to children at every stage of delinquency proceedings, specifically including post-disposition and reentry hearings.⁶⁵ Indeed, the *Guidelines* state that a court of excellence will ensure that the *same lawyer* remains assigned to the case and appears for progress reports, hearings, and conferences.⁶⁶

Whether children remain in the home or are placed outside the home, defense counsel should not rely on probation reports but should actively seek information about the child's progress through independent interviews.⁶⁷ At progress review hearings, defenders state the child's agreement or disagreement with the progress report, have the opportunity to challenge prosecution evidence, and present any additional information or testimony needed.⁶⁸ Presenting the child's perspective during post-disposition should not be an unusual event, but a routine step of any progress review. When a child is placed outside the home, the *Guidelines* state that defense counsel should be invited to participate in planning for reentry to the community.⁶⁹

Likewise, children should be represented at hearings on probation or parole violations by the *same lawyer* who represented the youth on the original law violation.⁷⁰ This defender should be afforded time to question and present evidence on whether the child violated probation or parole.⁷¹ The defender should have the opportunity to respond to reports about the child's progress.⁷²

The *Guidelines* anticipate that defense representation will be as vigorous during the post-disposition phases of a case as in earlier stages. NCJFCJ further envisions that delinquency systems will need to receive and allocate sufficient resources to ensure that children have continuity of representation throughout their involvement with the delinquency system. These recommendations are a clear condemnation of current practice in many jurisdictions, in which defenders of indigent children are expected or required to abandon the case after disposition.

Role of the Juvenile Defender

Counsel's Ethical Obligations

- “Whether performed by a public defender or the private bar, counsel for youth is responsible to be an advocate, zealously asserting the client’s position under the rules of the adversary system[.]” (page 30)
- “[C]ounsel for the youth’s primary responsibility is to the youth client[.]” (page 122)
- At disposition, “[c]ounsel for the youth is not obligated to present the view of the parent, if this view is in opposition to the view of counsel’s client.” (page 137)

Counsel's Specific Responsibilities

“Counsel for youth must be able to explain the juvenile delinquency court process in terms the youth can understand.” (page 30)

“Whether performed by a public defender or the private bar, counsel for youth is responsible to:

- Promptly and thoroughly investigate the client’s case in order to be an effective advocate;
- Ensure the juvenile delinquency court has been informed of the youth’s special needs;
- Be knowledgeable of all the disposition resources available in the jurisdiction;
- Appear as an attorney for the youth in all hearings concerning a juvenile accused of an act where the defense attorney would appear if an adult committed the same act. This includes, but is not limited to, hearings for detention, speedy trial, motions, dismissal, entry of pleas, trial, waiver, disposition, post-disposition reviews, probation or parole violation hearings, and any appeal from or collateral attacks upon the decisions in each of these proceedings;
- Before the trial and adjudication hearing, file all appropriate pre-trial motions in order to protect the youth’s rights and preserve the fairness of the trial and adjudication hearing. Such motions may include efforts to obtain discovery materials, to suppress physical evidence and confessions, or to challenge the circumstances of a pretrial identification, etc; and
- Actively pursue discovery from the prosecutor under informal procedures, court rule, and motions practice as appropriate. Effective representation of the client’s interests is frustrated when counsel for the youth is ignorant of information contained in discovery materials. Where the jurisdiction requires reciprocal discovery, counsel for youth should provide such materials as promptly as possible.” (page 30-31)

Defender's Relationship to Client's Parents

“Although counsel for the youth’s primary responsibility is to the youth client, in most instances it is in the youth’s best interest that his or her parents also be informed. Consequently, in most cases, in order to serve the client’s needs, counsel must include the parent. In some instances, such as when a parent is the victim, it may not be appropriate for counsel for the youth to engage the parent. In this instance, the prosecutor would be the most appropriate person to inform the parents of the proceedings, their rights, the youth’s rights, and the consequences if the youth is adjudicated on the petition, since the parent will probably be a prosecution witness.” (page 122)

Counsel's Qualifications

Experience:

- Counsel for youth should be “an experienced attorney in order to provide effective legal assistance. The representation of youth in juvenile delinquency court should not be an entry-level position that eventually graduates attorneys to other areas of defense work.” (page 30)
- “They should be selected on the basis of their skill and competence[.]” (page 30)

Specialized knowledge and interests:

- “Counsel for youth should have a particular interest in youth and family systems, focus on juvenile law, and be trained in the development, education, substance abuse and mental health of youth.” (page 30)
- “Qualified counsel has an understanding of child development principles, cultural differences, mental health, trauma, mental retardation, and maturity issues that relate to juvenile competency to stand trial issues; treatment options that could serve as effective alternatives to detention; and special needs issues including prior victimization and educational needs.” (page 78)
- “Qualified counsel understands juvenile delinquency court process and knows enough about disposition resources to advocate for a disposition response that will meet the youth’s needs.” (page 78)

Juvenile Defense Policy

Access to Counsel

- “Alleged and adjudicated delinquent youth must be represented by well trained attorneys with cultural understanding and manageable caseloads.” (page 25)
- “Juvenile delinquency court administrative judges are responsible to ensure that counsel is available to every youth at every hearing, including post-disposition reviews and reentry hearings.” (page 25)

Waiver of Counsel

- Judges “should be extremely reluctant to allow a youth to waive the right to counsel.” (page 25)
- “A waiver of counsel should only be accepted after the youth has consulted with an attorney about the decision and continues to desire to waive the right.” (page 25)
- “On the rare occasion when the court accepts a waiver of the right to counsel, the court should take steps to ensure that the youth is fully informed of the consequences of the decision.” (page 25)
- “Juveniles who are not represented by counsel are not likely to effectively exercise their other due process rights.” (page 78)

Leadership Role of Delinquency Judges

- Judges “are responsible to ensure that counsel is available to every youth at every hearing, including post-disposition reviews and reentry hearings.” (page 25)
- If the system does not permit the provision of qualified and effective counsel for youth in formal delinquency proceedings, delinquency judges “should work with the public defender, private bar, funding sources, and the legislature to overcome the barriers to creating [an adequate] system.” (page 79)
- An important principle of timeliness in case management and docketing is “to respect and efficiently use the time of ... counsel for youth” and all other court participants. (page 44)

Court Capacity

- “Juvenile delinquency systems must have sufficient numbers of ... public defenders [and other personnel]... to create manageable caseloads and timely process.” (page 24)
- “Juvenile delinquency systems ... must have private meeting space for youth and counsel[.]” (page 24)

Juvenile Court Jurisdiction

- “The *Delinquency Guidelines* recommend that all juveniles who have not yet turned 18 should be under the original jurisdiction of the juvenile delinquency court.” (page 37 (citing *Roper v. Simmons*))
- Key Principle 6 states that “Juvenile delinquency court judges should ensure their systems divert cases to alternative systems whenever possible and appropriate.” (page 25)

- “Juvenile delinquency courts should encourage law enforcement and prosecutors to consider diversion for every status offender, every first-time, non-violent misdemeanor offender, and other offenders as appropriate.” (page 38)
- NCJFCJ takes the policy position: “The determination as to whether a juvenile charged with a serious crime should be handled in juvenile delinquency court or transferred to criminal court is best made by a juvenile judge in a judicial hearing with the youth represented by qualified counsel.” “Accordingly, prosecutorial waiver, mandatory transfers, and automatic exclusions are not recommended.” (page 39)

Case Processing: Confidentiality, Timeliness, Minority Youth

- “The *Delinquency Guidelines*-recommended practice regarding openness of juvenile delinquency hearings is that hearings should be presumed to be open to the general public, unless sufficient evidence supports a finding that an open hearing will harm the juvenile and that the juvenile’s interests outweigh the public’s interest.” (page 40)
- “Because of [adolescent] developmental dynamics, timeliness throughout the juvenile justice process is critical[.]” Timeliness reinforces the lesson of accountability and protects youth from experiencing a period of prolonged uncertainty and anxiety. (pages 43-44) “Delays in the response of the juvenile justice system lessen the impact of an intervention.” (page 66)
- “Although it remains true that societal issues may subject minority youth to risk factors for delinquency, ongoing work in many juvenile delinquency court jurisdictions shows that the practices of individual justice agencies can exacerbate or alleviate the disparity at each decision point.” (page 50)

Appointment of Counsel Prior to Detention or Initial Hearing

- “In a juvenile delinquency court of excellence, counsel is appointed prior to the detention or initial hearing, and has time to prepare for the hearing.” (page 90)
- “Delays in the appointment of counsel create less effective juvenile delinquency court systems.” (page 90)
- “Effective counsel becomes involved in the case prior to the first hearing, has a manageable caseload, and is present at all juvenile delinquency court hearings.” (page 78)

Providing Early Access to Counsel

- When the child is served with a summons, “information should also be provided to the youth and family that describes ... why counsel for the youth is important, and options to obtain legal representation for the youth prior to the hearing.” (page 74)
- “The *Delinquency Guidelines* recommends that the youth, parent, and counsel for the youth meet prior to the initial hearing to determine the position they will take at the hearing.” (page 74, 90)
- “The better the preparation prior to the hearing, the more timely and efficient the process will be.” (page 74)
- If meeting before the hearing is “not possible[.]” then “the second preference is to provide access [to counsel] on the day of the first hearing with sufficient time for the youth, family, and counsel to discuss the case before entering the courtroom.” (page 90)

Consequences of Untimely Appointment of Counsel

- “Juvenile delinquency courts that do not create systems that enable counsel to be obtained in advance of the initial hearing, and as a consequence, allow counsel to be absent or unprepared at the first hearing, make it difficult for time-specific hearings to be set and adhered to, cause additional unnecessary hearings to be set which wastes juvenile delinquency court resources, and delay timely justice. Such systems end up with unnecessary continuances, waste expensive resources due to extensive waiting times, and are disrespectful to its citizens.” (page 74)
- “When juvenile delinquency courts do not create systems that enable counsel to be appointed and engaged in advance of the initial hearing, they cause additional unnecessary hearings to be set. Families who can afford private counsel do not have these barriers and rarely appear at the first juvenile delinquency court hearing without prior consultation with counsel.” (page 222)

Need for Systemic Change to Allow Early Appointment of Counsel

- “This [Principle 7] recommendation is anticipated to be one of the more controversial recommendations of the *Delinquency Guidelines* because juvenile delinquency systems may believe they simply do not have the resources to comply. In addition, juvenile delinquency court personnel have sometimes perceived that when counsel represents youth, the court process is delayed and made more cumbersome. In contrast to this perception, juvenile delinquency courts have found that providing qualified counsel facilitates earlier resolution of summoned cases.” (page 221-22)
- NCJFCJ suggests systemic reforms that will allow for earlier appointment of counsel (pages 78-79, 222):
 - Change relevant rules or statutes
 - Develop Memorandum of Understanding between the court and public defender
 - Provide interim legal services
- “When a juvenile delinquency court improves its system in these ways, there is a strong likelihood that existing resources for appointment for counsel for youth can handle a greater percentage of formal cases with reduced caseloads that allow a higher degree of quality.” (page 222)

Practice of Juvenile Defense at Each Stage of a Case

Initiating the Court Process

- “*Key Principle 7: Youth Charged in the Formal Juvenile Delinquency Court Must Have Qualified and Adequately Compensated Legal Representation* applies regardless of whether the youth is released or detained.” (page 77)
- “In some instances, the youth does not need to be detained but a parent or custodian or relative cannot be located. When this occurs, intake should arrange the release of the youth to an appropriate shelter care or non-secure holdover facility until the parent, custodian, or a relative can be located.” (page 77)

Detention or Initial Hearing

Preparation for the Hearing:

- “In a juvenile delinquency court of excellence, counsel is appointed prior to the detention or initial hearing, and has time to prepare for the hearing.” (page 90)
- “When qualified counsel represent youth and have prepared before the hearing, counsel will have also carefully reviewed the petition and rights with the youth and family. Counsel will have significant information from these interactions to assist in identifying whether there are questions of competency to stand trial that need to be addressed.” (page 92)
- “Consultation between the youth, parent or guardian, and counsel regarding whether the youth wishes to admit or deny the charge should have occurred before entering the courtroom.” (page 94)

Competency:

- “[W]hen counsel, prosecutor, or the juvenile delinquency court judge observe indicators that competency to stand trial may be an issue, each is obligated to pursue the question further.” (page 93)
- “Counsel for the youth is obligated to request a clinical assessment of decisional capacity if the youth’s competency to stand trial is in question.” (page 93)

Conduct of the Hearing:

- Present at the hearing (page 91):
 - Youth
 - Counsel for the youth
 - Certified interpreters if youth or parent does not speak English or is hearing impaired

- “If the youth is on probation or involved in services, it may not be necessary for the probation officer or other worker to be present as long as there is a system to ensure that all necessary information is available to the judge, prosecutor, and counsel[.]” (page 91)
- “[I]f the youth in consultation with the parent or guardian and counsel chooses to waive any right, the youth, parent or guardian, and counsel should sign a written waiver.” (page 92)
- “Both prosecutor and counsel for the youth should turn over all discovery materials according to juvenile delinquency court rule and as properly requested as soon as possible as well as pursue discovery under informal procedures as appropriate[.]” (page 95)
- Among the questions that must be answered at this hearing: “Has the youth had access to, and been appointed qualified legal counsel?” (page 96)
- Written findings and orders should include: “If counsel was not present, the plan to ensure the presence of counsel at the next hearing[.]” (page 97)

Waiver & Transfer Hearing

Counsel’s Qualifications and Duties:

- “Counsel for the youth must become sufficiently knowledgeable of the alleged incident and of the youth’s circumstances in order to be properly prepared for cross-examination and to determine whether or not to call witnesses for the defense. In order to complete these critical steps, prosecutors and counsel for youth must have reasonable caseloads, with resources to investigate all necessary aspects of the case, and counsel for youth must have been appointed prior to the detention hearing[.]” (page 103)
- “Counsel must understand child and adolescent development, developmental disabilities, victimization and trauma, mental health, mental retardation and maturity issues, and the treatment services that are available in the juvenile justice system. Counsel must also understand the criminal court system in order to determine whether counsel believes the youth will be better served in juvenile delinquency court or criminal court.” (page 105)
- “If... an attorney does not represent the youth at the detention or initial hearing, the court must appoint legal representation for the alleged offender prior to the probable cause hearing on a waiver motion.” (page 105)

Preparation for the Hearing:

- “Because of the very serious potential consequences if the juvenile delinquency court decides to waive jurisdiction and transfer the youth to the criminal court, including lengthy incarceration, and possible abuse in adult prison of immature or special needs youth, it is critical that counsel has the time and resources to prepare for the probable cause hearing.” (page 105)
- “Prior to the probable cause hearing on a motion to waive juvenile delinquency court jurisdiction and transfer a case to criminal court, counsel should investigate all circumstances of the case relevant to the appropriateness of transfer. Counsel should also 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. If circumstances warrant, counsel should have requested appointment of an investigator or expert witness to aid in the preparation of the defense, and any other order necessary to protect the youth’s rights, during pre-trial proceedings. Counsel should also fully explain the nature of the proceedings and the consequences of transfer to the youth and the youth’s parent or legal custodian.” (page 105)

Conduct of the Probable Cause Phase:

- Present at the hearing (page 105):
 - Youth
 - Counsel for the youth
 - Certified interpreters if youth or parent does not speak English or is hearing impaired
- “The burden of proof is on the state, and consequently, the youth is not required to present any witnesses or to prove that he or she did not commit the offense. Counsel may choose, however, to present evidence that challenges the evidence of the prosecutor.” (page 106)
- “As with the prosecutor’s evidence, any evidence presented by counsel should be under oath and subject to cross-examination.” (page 106)

- After the prosecutor’s rebuttal, “the prosecutor and counsel for the youth may present closing arguments regarding the probable cause phase.”

Conduct of the Waiver/Transfer Phase:

- Present at the hearing (page 112-13):
 - Youth
 - Counsel for the youth
 - Certified interpreters if youth or parent does not speak English or is hearing impaired
- “The evaluation reports should be provided to the prosecutor and counsel for the youth not less than three days before the hearing. It is recommended that the social and physical evaluations be provided to the prosecutor and counsel for youth prior to the forensic evaluation in order to provide as much review and preparation time as possible.” (page 113)
- “It is important that the prosecutor and youth’s counsel have sufficient time to determine whether ... they wish to challenge the conclusions by either questioning the evaluator or presenting additional information through written reports or testimony.” (page 113)
- “If additional written reports are to be presented by the prosecutor or youth’s counsel, they should similarly have been provided to all parties prior to the hearing.” (page 113)
- If the probation officer or other person who prepared the evaluations testifies, then “the prosecutor and counsel for the youth should have the opportunity to question the preparer.” (page 113)
- “After each [prosecution] witness’ testimony, the defense should have the opportunity to cross-examine.” (page 113)
- “If there is evidence that counsel for the youth can present to defend his or her client against waiver, or to challenge the information in the evaluations, it should be presented at this time [after the prosecution’s case].” (page 113)
- “Counsel should present an alternative plan for the court to consider that would continue juvenile delinquency court jurisdiction.” (page 113)
- “The prosecutor and counsel for the youth may present closing arguments.” (page 114)

Interlocutory Appeals Should Be Allowed:

- “[B]ecause of the potentially serious consequences of a juvenile’s charges being transferred to criminal court, counsel for the youth should have the opportunity to request expedited interlocutory appellate review of the juvenile delinquency court’s decision if counsel believes that the juvenile delinquency court judge has made an error in process or judgment.” (page 107)
- “[A]ppellate courts should work with juvenile delinquency courts, prosecutors, and public defenders to design an expedited appellate review of interlocutory orders to waive juvenile delinquency court jurisdiction and transfer a youth to criminal court. This should be a streamlined and speedy memorandum review process that would allow counsel for the youth’s memoranda to be reviewed within two weeks.” (page 163)

Trial or Adjudication Hearing

Preparing for the Hearing:

- “A case should not go to trial in the juvenile delinquency court without a prosecutor and counsel for the youth who are qualified and who have exercised due diligence in preparing for the proceeding.” (page 122)
- “Prior to the trial, counsel completed all of the following responsibilities:
 - Investigated all circumstances of the allegations;
 - Sought discovery of any reports or other evidence to be submitted to or considered by the juvenile delinquency court at the trial;
 - If circumstances warrant, requested appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protect the youth’s rights; and
 - Informed the youth of the nature of the proceedings, the youth’s rights, and the consequences if the youth is adjudicated on the petition.” (page 122)

Conduct of the Hearing:

- Present at the hearing (page 124):
 - Youth
 - Counsel for the youth
 - Certified interpreters if youth or parent does not speak English or is hearing impaired
- “Unless waived by counsel, the statements of a juvenile or other information or evidence derived directly or indirectly from statements made during the juvenile delinquency court intake or detention processing of the case should not be admissible at the trial.” (page 125)
- “After each [prosecution] witness’ testimony, counsel for the youth should have the opportunity to cross-examine.” (page 125)
- “The burden of proof is on the prosecutor and consequently the youth is not required to present any witnesses or to prove that he or she did not commit the alleged offense. Counsel for the youth may choose to present evidence that challenges the evidence of the prosecutor or proves the youth’s innocence.” (page 126)
- “All evidence presented at the trial should be under oath and subject to cross-examination.” (page 125)
- After the prosecutor’s rebuttal, “the prosecutor and counsel for the youth may present closing arguments.” (page 126)

Plea Agreements

- “Part of the role of counsel for the youth is to tell the youth that he or she should not expect gain in exchange for a plea agreement. Counsel must also advise the youth that the juvenile delinquency court has the final determination over whether to accept the plea agreement.” (page 123)
- “When a plea agreement is appropriate, the prosecutor and counsel for the youth should negotiate plea agreements prior to the time the trial is set. ... It is unacceptable practice for last minute plea agreements to occur because the prosecutor or counsel for the youth has not adequately prepared in advance of the trial. It is also unacceptable practice to wait routinely to first address the question of a plea agreement until the day of the trial.” (page 123)
- “If a plea agreement has been proposed, the prosecutor and counsel for youth should submit to the juvenile delinquency court judge, at least one week before the scheduled trial, a proposed plea agreement and a signed plea petition that, in addition to listing rights waived, has a section completed by the youth that describes what occurred, that has a statement of admission, and that is signed by the youth. The juvenile delinquency court judge should immediately review the plea petition and proposed plea agreement[.]” (page 124)

Disposition Hearing

Role of Defense Counsel:

- “Counsel for the youth plays an important role in the disposition hearing with the responsibility to ensure that all significant needs relating to the delinquent behavior of the adjudicated delinquent youth have been brought to the attention of the juvenile delinquency court.” (page 137)
- “[C]ounsel for the youth is not obligated to present the view of the parent, if this view is in opposition to the view of counsel’s client.” (137)

Preparing for the Hearing:

- “If additional evaluations or expert witnesses are needed to aid in the preparation of the disposition hearing, counsel is responsible to request this assistance at the end of the adjudication hearing.” (page 137)
- Prior to the hearing, counsel should:
 - “[F]ully explain the possible disposition options to the youth and the youth’s parents or legal custodian.” (page 137)
 - “[A]sk them what options they feel would be appropriate and which service providers the youth and family will feel most comfortable working with.” (page 137)
 - “[Determine] whether to agree with the recommendation [of the pre-disposition report] or to present a different recommended disposition.” (page 142)

- “[Determine] whether to call witnesses to testify as to the appropriateness of her or his recommendation or to challenge the conclusions or recommendations of the pre-disposition report.” (page 142)
- “Whenever a juvenile delinquency court can obtain the “buy-in” of youth and family by considering their opinions, needs, recommendations, and preferences, and give them options to choose from, the court enhances the youth’s chances of a successful outcome.” (page 135)
- “Pre-disposition investigations should include ... [c]ontacting the prosecutor and counsel for the youth for additional information, and their perspectives and recommendations[.]” (page 138)
- “The pre-disposition investigator should provide the pre-disposition report, recommendations, and proposed probation or initial reentry plan to the prosecutor and counsel for the youth *not less than three days before the disposition hearing.*” (page 140, emphasis added)

Conduct of the Hearing:

- Present at the hearing (page 141):
 - Youth
 - Counsel for the youth
 - Certified interpreters if youth or parent does not speak English or is hearing impaired
- “The prosecutor and counsel for youth have the opportunity to ask the [pre-disposition] investigator questions.” (page 142)
- “Counsel for the youth has the opportunity to cross-examine evidence or testimony presented by the prosecutor” (page 142)
- “Counsel for the youth indicates agreement or disagreement with the recommendation and presents any evidence or testimony accordingly.” (page 142)
- “The juvenile delinquency court judge gives the ... youth [and other participants] ... the opportunity to address the court.” (page 142)

Appeals Process

Process and Procedure:

- “[T]he juvenile delinquency judge should do everything possible to ensure that the juvenile delinquency court does not err in process nor create circumstances due to lack of clear communication that would create the necessity of counsel filing an appeal. It is important to clarify that this statement is not intended to discourage appeals where they are needed for counsel to adequately represent her or his client, protect the client’s rights, or refine points of law.” (page 145)
- “If the juvenile delinquency court accepted waiver of counsel, the youth and parents should be informed of their right to counsel to assist in the filing of the appeal.” (page 161)
- “If inadequate representation by counsel is an issue on appeal, procedures should be in place to avoid further delay in appointing new counsel.” (page 161)

Role of Counsel:

- “In order to shorten the time [for appeals] as much as possible, counsel for youth should file the appeal as soon as possible and in no case, more than 30 days from disposition.” (page 160)
- “Counsel for the youth is responsible to review the juvenile delinquency court’s orders of adjudication and disposition critically. Counsel must explain the orders to the youth, doing everything possible to help the youth understand the nature and impact of each component of the juvenile delinquency court’s orders. It is counsel’s responsibility to explain to the youth the right to appeal, the pros and cons of filing an appeal, and counsel’s opinion as to the likely outcome of an appeal.” (page 161)

Counsel’s Interaction with Client’s Parents:

- “Although counsel is not required to explain appeal issues to the youth’s parents, in most instances it will be helpful to the youth if the parents also understand all of these issues. Consequently, in order to best represent the client, counsel should, unless contraindicated, include the parents in explanations and recommendations regarding the appellate process.” (page 161-62)

Post-Disposition Review

“All parties and key participants who were involved in hearings prior to and including the disposition hearing should be involved in post-disposition review, including the prosecutor and counsel for the youth.” (pages 167, 178)

Youth Remains at Home

Preparing for the Review:

- “The prosecutor and counsel for the youth are always invited to negotiation interventions; however, they would be notified of, but not invited to family conferencing, unless the youth or family asked them to attend.” (page 168)
- “*Key Principle 7: Youth Charged in the Formal Juvenile Delinquency Court Must Have Qualified and Adequately Compensated Legal Representation*, not only states that all youth must be represented by counsel in the formal juvenile delinquency court but that counsel should be involved in every juvenile delinquency court hearing. A juvenile delinquency court that has incorporated this *Key Principle* ensures that counsel stays assigned to a case when a progress report due date, progress conference, or progress hearing is set at disposition” (page 169).
- “The probation officer should provide copies of the [progress] report to the juvenile delinquency court two weeks prior to the juvenile delinquency court’s scheduled review of the report. The juvenile delinquency court should immediately forward the report to the prosecutor, counsel for the youth, parent, legal custodian, service provider, and tribal council representative, if applicable. Each legal party and key participant should have the opportunity to prepare a response to the report if they choose to do so, and to submit the response for the juvenile delinquency court judge’s consideration at the same time the judge reviews the progress report.” (page 170)
- “When the juvenile delinquency court has set any of these methods [specifically progress review conferences, case staffings and dispute resolution alternatives] for post-disposition review, the probation officer should ensure that the youth, parents, legal custodian, prosecutor, counsel for the youth, tribal representative, if applicable, and primary service providers are included.” (page 170)

Role of Counsel:

- “In order for counsel to be effective at this [post-disposition] stage of the juvenile delinquency court process, counsel must not only rely on the information provided by the probation officer, but should also independently speak with the youth, the youth’s parent or legal custodian, and the service provider.” (page 169)
- Prior to the progress hearing, “[c]ounsel has discussed the reports with the youth, parent, and legal custodian.... The prosecutor and counsel have determined whether they agree with the reports or will present other information either by report or through testimony.” (page 171)

Conduct of the Review:

- Present at the review (page 170):
 - Youth
 - Counsel for the youth
 - Certified interpreters if youth or parent does not speak English or is hearing impaired
- “The prosecutor and counsel for youth have the opportunity to question the probation officer or caseworker.” (page 171)
- “Counsel for the youth indicates agreement or disagreement with the report and present any additional information or testimony, if needed.” (page 171)
- “The juvenile delinquency court judge gives the ... youth the opportunity to address the court.” (page 171)
- “The juvenile delinquency court’s findings and orders should be set out in writing and made available to all legal parties and key participants at the conclusion of the hearing.” (page 172)

Youth Placed Outside the Home

Preparing for the Review:

- “For the first 30 days following the youth’s release, the juvenile delinquency court judge should calendar the case for weekly progress hearings with mandatory attendance by the youth and family (if reunification has or will occur), and participants of the reentry team, including prosecutor and counsel for the youth.” (page 183)
- “[T]he juvenile delinquency court should immediately provide copies of the [progress] report to the prosecutor, counsel for the youth, parent or legal custodian, future custodian, and tribal council representative, if applicable. Each of these individuals should have the opportunity to prepare a response to the report if they choose to do so, and to submit the response to the juvenile delinquency court. The juvenile delinquency court should give two weeks for submission of responses[.]” (page 184)

Role of Counsel:

- “A juvenile delinquency court should ensure that counsel remains active when a youth is placed out of the home under the continuing jurisdiction of the juvenile delinquency court.” (page 181)
- “In order for counsel to be effective at this [post-disposition] stage of the juvenile delinquency court process, counsel must not only be informed by the case manager, but should independently speak in-depth with the youth, the youth’s parent, legal custodian, future physical custodian, probation officer, child protection worker, and placement staff.” (page 181)
- Prior to the progress hearing, “[c]ounsel has discussed the reports with the case manager, probation officer, child protection worker, or corrections authority staff, and with the youth and parents. The prosecutor and counsel have determined whether they agree with the reports or will present other information, either by report or through testimony.” (page 185)

Conduct of the Hearing:

- Present at the hearing (page 184):
 - Youth
 - Counsel for the youth
 - Certified interpreters if youth or parent does not speak English or is hearing impaired
- “The prosecutor and counsel for youth have the opportunity to question the case manager.” (page 185)
- “Counsel for the youth has the opportunity to cross-examine any witnesses or challenge any reports presented by the prosecutor.” (page 185)
- “Counsel for the youth indicates agreement or disagreement with the report and present any additional information or testimony, if needed.” (page 185)
- “The juvenile delinquency court judge gives the ... youth ... the opportunity to address the court.” (page 185)
- “The juvenile delinquency court’s findings and orders should be set out in writing and made available to all legal parties and key participants at the conclusion of the hearing.” (page 186)

Reentry Planning:

“[C]ounsel for the youth should also be invited to participate [in the final reentry planning process].” (page 187)

The *Delinquency Guidelines* have separate recommendations for youth at low and high risk to reoffend.

For youth at low risk to reoffend, there may or may not be a hearing:

- “For youth who are low risk to reoffend at the time of reentry, if the juvenile delinquency court judge or any legal parties or key participants have concerns regarding the reentry plan, the juvenile delinquency court judge should determine whether to set a hearing, case staffing, progress conference, or dispute resolution alternative to address the concerns.” (page 188)
- If there is a hearing, “[a]t the end of the hearing, the juvenile delinquency court judge generates written findings and orders that approve a final reentry plan, either as proposed or as modified, and distributes the findings and orders immediately to all legal parties and key participants.” (page 188)
- “If the plan is acceptable to everyone when distributed and no hearing is required, the juvenile delinquency

court judge should generate a copy of the written findings and orders that approve the proposed final reentry plan and immediately provide the findings and orders to all legal parties and key participants.” (page 188)

For youth at high risk to reoffend, there should always be a hearing:

- “At the time of plan approval, the juvenile delinquency court should set a hearing not later than the date of release to review the plan with all participants, to ensure that all components of the plan are in place and ready to begin, and to ensure that all persons involved in the reentry plan are aware of their responsibilities.” (page 189)

Probation & Parole Violations

Role of Counsel:

- “[C]ounsel should be involved at every hearing. The same attorney who represented the youth on the petition that resulted in the court order of probation or parole should represent the youth on a probation or parole violation.” (page 196)

Conduct of the Hearing:

- Present at the hearing (pages 196-97):
 - Youth
 - Counsel who represented the youth on the law violation that resulted in the order of probation or parole
 - Certified interpreters if youth or parent does not speak English or is hearing impaired
- “The juvenile delinquency court’s findings and orders should be set out in writing and made available to all legal parties and key participants at the conclusion of the hearing.” (page 198)

Information on the Alleged Violation:

- During the prosecution case:
 - “Sworn testimony is not required unless requested by counsel for the youth.” (page 197)
 - “Counsel for the youth has the opportunity to ask questions related to the information presented.” (page 197)
- “The youth’s counsel, if desired, should call on individuals to provide information that supports a finding that the youth did not commit the alleged violation.” (page 197)

Information on Progress and/or Sanction Recommendations:

- “The prosecutor and counsel for the youth have the opportunity to ask questions and present their recommendations if different from the probation or parole officer’s recommendation.” (page 197)
- “The juvenile delinquency court judge gives ... the youth [and other participants]... the opportunity to address the court with information, recommendations, and questions.” (page 197)

Resources

Juvenile Delinquency Guidelines

- Download in sections, for free, from <http://www.ncjfcj.org/content/view/411/411/>.
- Purchase a printed copy for \$20:
Contact NCJFCJ at JDG@ncjfcj.org or by phone at (775) 784-6012.
Order from the NCJFCJ online store at <http://www.ncjfcj.org/store/index.php>.

Many of the *Guidelines* recommendations are supported by other bodies of professional standards. You may also want:

American Council of Chief Defenders & National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems* (2005), available at www.njdc.info/pdf/10_Principles.pdf.

Institute of Judicial Administration & American Bar Association, *Juvenile Justice Standards* (1979). The text of the original 24 volumes of standards is available from online legal databases, and a condensed and annotated single-volume version can be purchased from the American Bar Association website at www.ababooks.org.

Endnotes

- 1 National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 25 (2005) [hereinafter *Guidelines*].
- 2 *Id.* at 78.
- 3 *Id.*
- 4 *Id.* at 25.
- 5 *Id.*
- 6 *Id.*
- 7 *Id.* at 25, 78.
- 8 *Id.* at 28.
- 9 *Id.* at 25.
- 10 *Id.* at 25, 78.
- 11 *Id.* at 30.
- 12 *Id.*
- 13 *Id.*
- 14 *Id.*
- 15 *Id.* at 30-31 (listing the duties of defense counsel), 122 (counsel's primary responsibility is to the child client); see also IJA-ABA *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties*, Standard 3.1.
- 16 *Guidelines, supra* note 1, at 30 (describing the role of counsel); see also Institute of Judicial Administration & American Bar Association, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties* 3.1 (1980), Kristin Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 255-59 (2005) (charting the emergence of a professional consensus regarding the role of counsel for the child and the persistence of contrary practice).
- 17 *Guidelines, supra* note 1, at 122 (duty to represent child's expressed interests at adjudication), 137 (duty to represent child's expressed interests at disposition), 161 (duty to represent child's expressed interests during appeals).
- 18 See also Henning, *supra* note 16, at 245 (considering competing models of attorney-client interaction and ultimately advocating for a collaborative approach to client counseling).
- 19 *Guidelines, supra* note 1, at 122.
- 20 *Id.* at 137.
- 21 See, e.g., National Juvenile Defender Center, *Maine: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 27-28 (2003); National Juvenile Defender Center, *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 41 (2003); National Juvenile Defender Center, *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 58-59 (2003); National Juvenile Defender Center, *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 31-32 (2001);

- 22 National Juvenile Defender Center, *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* 62 (2001).
- 23 *Guidelines*, *supra* note 1, at 123.
- 24 See, e.g., *id.* at 25 (a core principle is that all members of the court shall treat participants with respect, dignity, courtesy and cultural understanding).
- 25 *Id.* at 77, 90.
- 26 *Id.* at 90.
- 27 *Id.* at 67, 78-79, 222.
- 28 *Id.* at 78, 90-91.
- 29 *Id.* at 78, 92.
- 30 *Id.* at 92.
- 31 *Id.* at 91.
- 32 C.E. Frazier & J.C. Cochran, *Detention of Juveniles: Its Effects on Subsequent Juvenile Court Processing Decisions*, 17 *Youth & Soc’y* 286-305 (1986); C.E. Frazier & D.M. Bishop, *The Pretrial Detention of Juveniles and its Impact on Case Disposition*, 76(4) *J. Crim. L. & Criminology* 1132-1152 (1985).
- 33 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 56-58, 62-64 (2004) (summarizing research on the costs and effects of detention).
- 34 *Guidelines*, *supra* note 1, at 83.
- 35 Calvin, *supra* note 19, at 67 (analyzing data from the Office of Juvenile Justice and Delinquency Prevention, *Easy Access to Juvenile Court Statistics* data package, 1999).
- 36 *Guidelines*, *supra* note 1, at 81-84.
- 37 *Id.* at 81.
- 38 *Id.* at 75.
- 39 *Id.* at 97 (judges should make written findings about the need for detention).
- 40 *Id.* at 123.
- 41 *Id.* at 125.
- 42 *Id.*
- 43 *Id.* at 123.
- 44 *Id.*
- 45 *Id.* at 124.
- 46 *Id.* at 123.
- 47 *Id.* at 122.
- 48 *Id.*
- 49 *Id.*
- 50 *Id.* at 125.
- 51 *Id.* at 125-26.
- 52 *Id.* at 126.
- 53 *Id.*
- 54 *Guidelines*, *supra* note 1, at 137.
- 55 *Id.* at 138, 140.
- 56 *Id.* at 137, 142.
- 57 *Id.* at 137.
- 58 *Id.*
- 59 *Id.* at 142.
- 60 *Id.* at 137.
- 61 *Id.* at 161-62 (explaining the counsel is not required to explain appeal issues to parents, but should do so if necessary to represent the child).
- 62 *Id.* at 145.
- 63 *Id.*
- 64 *Id.* at 160-61.
- 65 *Id.* at 169, 181, 196.
- 66 *Id.* at 169 (in the home), 181 (outside the home).
- 67 *Id.* at 169 (in the home), 181 (outside the home).
- 68 *Id.* at 171 (in the home), 185 (outside the home).
- 69 *Id.* at 187.
- 70 *Id.* at 196.
- 71 *Id.* at 197.
- 72 *Id.*

The National Juvenile Defender Center (NJDC) is a non-profit organization that is dedicated to ensuring excellence in juvenile defense and promoting justice for all children. NJDC provides support to public defenders, appointed counsel, law school clinical programs and non-profit law centers to ensure quality representation in urban, suburban, rural and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination. To learn more about NJDC, please visit www.njdc.info.

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