

# WASHINGTON



## An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters

American Bar Association Juvenile Justice Center

*and the*

National Juvenile Defender Center

Northwest Juvenile Defender Center

*in collaboration with*

TeamChild Advocacy for Youth

Washington Defender Association

Washington State Bar Association

Washington State Governor's  
Juvenile Justice Advisory Committee

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# EXECUTIVE SUMMARY

*“I don’t feel like I have a chance to defend myself.  
Some attorneys try to help, some don’t.”*

Youth in detention

The role of counsel for a child is a unique one for an attorney. When defending a young person against the accusation of a crime, there is no question that the lawyer’s role is first that of criminal defense attorney. The attorney must know criminal law and procedure, and must follow the rules of professional conduct. But representing a young person stretches the role of the attorney. These clients are less able to defend themselves than the typical adult client. Their stage of development may not include effective tools for decision making. They are more likely than the general population to have learning disabilities and mental health problems, and are more likely to be the victims of neglect and abuse. They are, in a word, vulnerable.

The juvenile justice system has many components, but a key player, and arguably the person with the closest relationship to the children who enter juvenile court, is the attorney who represents them. Juvenile defenders are in a unique position not only to protect children’s rights, but also to create positive outcomes in their lives. This report examines the quality of representation of children in Washington state, with a specific focus on offender matters.

## ***Background***

The first systematic national assessment of the role of children’s counsel was conducted in 1995 by the American Bar Association Juvenile Justice Center (ABA) in collaboration with the Youth Law Center and Juvenile Law Center. The findings were published in *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. This report found that despite the high stakes involved in today’s juvenile court proceedings, many children still fail to receive effective legal representation. *A Call for Justice* encouraged individual states to assess their own indigent juvenile

*Juvenile defenders are in a unique position not only to protect children's rights, but also to create positive outcomes in their lives.*

defense systems. Since that time, assessments have been conducted in Georgia, Kentucky, Louisiana, Maine, Maryland, Montana, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington to analyze state-specific policies and practices. Several other states are in the preliminary stages of the assessment process.

*A Call for Justice* was, in part, what inspired Washington citizens to examine this state's juvenile indigent defense system. Juvenile justice leaders started this state's assessment in 2002, as a collaborative effort of the Governor's Juvenile Justice Advisory Committee, TeamChild, the Washington Defender Association, the Washington State Bar Association, and the Northwest Juvenile Defender Center in partnership with the ABA. Funding was provided by the Washington Defender Association, the Governor's Juvenile Justice Advisory Committee, the Northwest Juvenile Defender Center, and National Juvenile Defender Center of the ABA. The collaborative effort became known as the Washington Juvenile Justice Assessment Project (WJJAP).

### **Methodology**

The primary goal of this study is to evaluate the quality of counsel defending children in Washington's juvenile courts. Stakeholders from across the state were invited to participate in defining the objectives of WJJAP, including judges, prosecutors, defense attorneys, bar association leaders, university professors, social scientists, child welfare providers, civil legal service attorneys and others with experience in juvenile court.

Approximately 40 people attended the initial stakeholders meeting and discussed the goals of the project. Others provided input via email and telephone calls. The ABA set basic guidelines for the collection of data, and the stakeholders helped define the collection parameters. The decision was made to collect data in both face-to-face interviews and written surveys. With a goal of ensuring a representative mix of data, a variety of factors, including population size, income levels, racial statistics, geographic factors and diversity of types of public defense systems, were used to select six counties for site visits.

Over 200 in-person interviews of judges, commissioners, prosecutors, probation officers, detention staff, defense attorneys, court administrators, social workers, advocates, parents and youth were conducted across the state by experienced, investigative teams of juvenile justice professionals. In most cases, each team consisted of two professionals, one from Washington and one from outside the state.

The findings in this report were also based on written surveys mailed to 230 juvenile defenders in all 39 counties across the state. The 300 question survey was written by WJJAP staff, with input from both the WJJAP advisory committee and the ABA. A beta test of the survey was performed, and some questions were changed based on the feedback. Nearly 100 written surveys from 33 counties in the state were completed and returned, providing invaluable information for this report.

## *Key Findings*

- Most Washington counties have not adopted public defense standards, as required by state law. As a result, the quality of defense is inconsistent and unpredictable.
- Across the state, caseloads violate accepted standards of practice.
- High caseloads are reducing the quality of representation.
- There is no comprehensive and regular training or supervision of attorneys in most jurisdictions. In only a few locations do attorneys get regular performance reviews.
- Children with problems that should be treated elsewhere often end up in the juvenile court system, and defenders often fail to adequately help their clients with mental health concerns and other serious problems.
- In Washington state, children are represented by counsel at most juvenile court proceedings. However, some counties do not ever provide counsel at probable cause hearings, and, in some counties, young people go forward in a variety of hearings without the assistance of counsel.
- In direct conflict with national standards, Washington law permits children to waive their right to counsel.
- There is confusion and disagreement about the role of juvenile defenders and, as a result, important opportunities to effectively counsel and represent the interests of the child are lost.
- Although in some counties defenders are perceived by judges and others as well-prepared for court, in many counties, motions and trials are rarely brought, independent investigation of cases is rare and only takes place in more serious cases, and defenders are not fully prepared for disposition (sentencing) hearings.
- In Washington state, defenders seldom assist clients after the juvenile court case is concluded, even to make referrals for needed services.

## *Core Recommendations*

- Children should be represented by effective counsel at all court hearings, including probable cause hearings. Effective representation of children requires adequate time to meet with and counsel clients, and it requires support services, including investigation, access to independent experts, interpreters, evaluation and social work.
- Washington law should be changed to conform to national standards prohibiting children from waiving the right to counsel. Until the law is changed, the judicial colloquy with youth regarding their decisions to waive counsel should be thorough, comprehensive, and easily understood.

- Continuity of representation should continue to be supported and enforced throughout the state. Counsel should represent a child throughout a case, including probation violations. If the child has new offender matters, the same attorney should be assigned to represent the child.
- Every county should enact standards of practice as mandated by RCW 10.101.030. Standards should include attorney qualifications, caseload limits, supervision, training and regular performance reviews. The adequacy and implementation of county standards should be assessed by an independent body. The standards endorsed by the Washington State Bar Association, the Institute of Judicial Administration, and the American Bar Association should serve as guidelines for the enactment of such standards.
- A state ombudsman office should be created and funded to address complaints concerning delivery of public defense services.
- Attorneys should participate in comprehensive training before starting to represent any child and should have the opportunity to participate in ongoing training specific to the representation of children.
- Attorney caseload limits should be set by each county contracting for public defense services. Caseload limits should reflect the standards endorsed by the Washington State Bar Association.
- Law schools should develop focus areas in the representation of children. Washington should lead the nation in establishing LLM or other certificated programs for a child legal advocacy specialty.

# INTRODUCTION

*“When I approach a child, he inspires in me two sentiments; tenderness for what he is, and respect for what he may become.”*

Louis Pasteur

Despite the fact that Washington State juvenile arrest rates for violent crime are now at their lowest point since 1982, the public still appears to perceive juvenile crime to be a major problem. “Stop Juvenile Violence!” declare bumper stickers, implying juveniles are the main source of violence and crime in our society. There are currently a number of different efforts to look behind the crime and at our systems of justice to determine whether more can be done to lower the rate of crime. If we start with the idea that the juvenile justice system can be, in part, a place of opportunity to help children in trouble, we can look for ways to address the roots of delinquent behavior, instead of just responding to repeated offenses. The juvenile justice system has many components, but a key player, and arguably the person with the closest relationship to the children who enter juvenile court, is the attorney who represents them. Juvenile defenders are, therefore, in a unique position not only to protect children’s rights, but also to create positive outcomes in their lives. This report examines the quality of representation of children in Washington state, with a specific focus on offender matters.

In many ways, this report literally speaks for itself—the voices of youth, juvenile defenders, judges, probation officers and a range of other juvenile court personnel tell the story of Washington’s juvenile indigent defense system. The viewpoints are many, diverse, and insightful. A picture emerges of an uneven system with shortcomings that have a particularly devastating impact on children. It raises questions as to whether court-involved youth are being provided the legal services to which they are entitled. Yet, despite these failings, the findings also identify model and exemplary practices—lawyers who fully embrace their ethical obligation to zealously represent their child client.

## A. THE ORIGINS OF JUVENILE COURT

Before America's juvenile court system was established more than one hundred years ago, children accused of crimes were treated like adults. They faced the same adult penalties in the same adult prisons. They had virtually no opportunity for rehabilitation. In 1889, a group of visionary women in Chicago created a new court system just for children focused on rehabilitation. The U.S. Supreme Court described the founders of the first juvenile court as "profoundly convinced that society's duty [to a child accused of a crime] could not be confined to the concept of justice alone." They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."<sup>1</sup>

In the early part of the twentieth century, states established juvenile courts across the country. For nearly 70 years, a system of *parens patriae* prevailed in which the juvenile court took on the role of parent and made decisions based on the judge's view of the best interest of the child. Summarizing the first juvenile court, the U.S. Supreme Court noted that the child "was to be made 'to feel that he was the object of [the state's] care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were, therefore, altogether inapplicable...The idea of crime and punishment was to be abandoned."<sup>2</sup>

While juvenile courts purported to be caring and solicitous, children faced a real loss of liberty—just like adults in criminal court—but without the protections that limit the abuse of unbridled authority. Hence, a false dichotomy plagued the original juvenile court system. It was as if there were only two, mutually exclusive choices for a juvenile justice system: either one that addressed the needs and potential of young people or one that maintained constitutional safeguards of due process. Supreme Court Justice Stewart summed up the two perspectives, "The object of one is correction of a condition. The object of the other is conviction and punishment for a criminal act."<sup>3</sup>

The tide turned in 1967 when the U.S. Supreme Court reviewed the practices of juvenile delinquency proceedings in *In Re Gault*. The Court observed that, "Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."<sup>4</sup> The Court concluded that "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone. Under our Constitution the condition of being a boy does not justify a kangaroo court."<sup>5</sup> Explicitly extending federal constitutional protections to children in juvenile delinquency proceedings, *In re Gault* guaranteed children accused of crimes the right to counsel, notice of charges, confrontation, cross examination, appellate review, a transcript of proceedings, and the privilege against self-incrimination.

At the same time, the Supreme Court acknowledged the existence of the false rehabilitation-versus-rights dichotomy and set forth a new expectation that juvenile court encompass both ideals. In a system of justice for children, we need not choose between rehabilitation and due process rights. "[T]he observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace the substantive benefits of the juvenile justice system."<sup>6</sup> Yet, more than 36 years after this landmark decision,

*In a system of justice for children, we need not choose between rehabilitation and due process rights.*



this false dichotomy continues to insinuate itself into the workings of juvenile court, often blurring the goals of the juvenile justice system.<sup>7</sup>

## B. A CALL FOR JUSTICE

In the years following *In re Gault*, multiple efforts were made to set standards for the juvenile justice system, each having a particular emphasis on the role of counsel representing children in delinquency proceedings and the need to safeguard children's rights.<sup>8</sup> In 1974, Congress enacted the Juvenile Justice Delinquency Prevention Act (JJDP)<sup>9</sup> which authorized the creation of a National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC) to develop national juvenile justice standards. Published in 1974, the NAC's standards require that children be represented by counsel at all juvenile delinquency proceedings, beginning at the earliest stage of the decisional process.<sup>10</sup>

Beginning in 1971, over a ten year period, approximately 300 professionals throughout the nation, including prominent representatives of every discipline connected to the juvenile justice system: the law, the judiciary, medicine, social work, psychiatry, psychology, sociology, corrections, political science, law enforcement, education, and architecture, wrote a 23 volume set of juvenile justice standards. The work was done under the auspices of the Institute for Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards.<sup>11</sup> By 1981, 20 of these volumes had been adopted in full by the American Bar Association House of Delegates.

In 1992, Congress reauthorized the JJDP Act, again emphasizing the crucial role of lawyers for children in delinquency proceedings, particularly given the inadequacies of prosecutorial and public defender offices to provide individualized justice.

In 1993, the American Bar Association Juvenile Justice Center, in conjunction with the Youth Law Center and Juvenile Law Center, received funding from the federal Office of Juvenile Justice and Delinquency Prevention to initiate the Due Process Advocacy Project. The purpose of the project was to build the capacity and effectiveness of juvenile defenders through increasing access to lawyers for young people in delinquency proceedings and enhancing the quality of representation those lawyers provide. One result of this project was the release of *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation Proceedings* in 1995,<sup>12</sup> the first systematic national assessment of current practices of juvenile defense attorneys.

The report examined the gaps in the quality of legal representation for children. It noted that some attorneys vigorously and enthusiastically represent their clients, but also raised serious concerns that such representation is neither widespread, nor common. The centennial of the founding of the first juvenile court in 1999 prompted many people concerned about justice for children to re-examine the process by which legal services are provided to indigent children. A state-by-state assessment of juvenile defense systems has begun. At the time of this writing, juvenile defender assessments have been conducted in Georgia, Kentucky (an assessment and a re-assessment one year later), Louisiana, Maine, Maryland, Montana, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington to analyze state-specific policies and practices. Several other states are in the preliminary stages of the assessment process.

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### C. METHODOLOGY

In 2002, leaders in Washington state began an examination of their own. They formed the Washington Juvenile Justice Assessment Project (WJJAP) to assess the quality of representation for juveniles in their justice system. WJJAP's first step was to secure input from a wide group of stakeholders. Invitations to participate were sent to judges, prosecutors, defense attorneys, bar association leaders, university professors, social scientists, child welfare providers, civil legal service attorneys and others with experience in juvenile court. Approximately 40 people attended the initial stakeholders meeting and discussed the goals of the project. The ABA set basic guidelines for the collection of data, and the stakeholders helped define the collection parameters. The decision was made to conduct comprehensive site visits and to obtain additional data through interview and statewide surveys. With a goal of ensuring a representative mix of data, a variety of factors, including population size, income levels, racial statistics, geographic factors and diversity of types of public defender systems, were used to select six counties for site visits.<sup>13</sup>

Experienced, investigative teams of juvenile justice professionals were selected for each onsite visit. In most counties, the team consisted of one person from Washington (but not from the site where he or she would be interviewing) and another person from outside of the state. While many of the investigators were attorneys, there were also law professors, social workers, directors of non-profit agencies, a foundation administrator, and public defender supervisors. All were well-acquainted with the role of attorneys in juvenile court, having either practiced in juvenile court or having published on juvenile justice issues.

Having been briefed on basic background, demographics, and other general information about the county, investigators visited each site to conduct interviews (pursuant to standardized ABA protocols), observe judicial proceedings, and gather documentary evidence. After spending at least two full days at each site, investigators submitted reports with their findings.

Juvenile justice personnel and stakeholders interviewed included:

- Commissioners and Judges
- Court administrators
- Defense attorneys
- Detention staff
- Parents
- Probation Officers
- Prosecutors
- Youth

Several weeks prior to each site visit, those to be interviewed were given an overview of the project and opportunities to ask questions. Given the importance of candor to this report, interviewees were promised anonymity. Individual and county names were excluded, and other identifying factors, such as gender, population, or demographics, were purposely removed from the data in this report.



The findings in this report were also based on written surveys mailed to 230 juvenile defenders in all 39 counties across the state. The 300 question survey was written by WJJAP staff, with input from both the WJJAP advisory committee and the ABA. A beta test of the survey was performed, and some questions changed based on feedback.

Defenders in 33 of the state's 39 counties completed and returned the survey. With 30 letters returned for either incorrect address or some indication that the attorney did not practice in juvenile court, there was a final response rate of 46%—93 out of 200 completed the survey. Both status offender and juvenile offender surveys were sent to each attorney. The rate of return for the two surveys is as follows: 74 attorneys completed an offender survey; 39 attorneys completed a status offender survey; 20 attorneys having completed both a status offender and an offender survey.

The status offender data, much less comprehensive than that collected on the representation of offenders, is presented in the Appendix.

The data are summarized in Chapter Two. The findings were then reviewed by the stakeholder group, which devised recommendations for action presented in Chapter Five.



# CHAPTER ONE

## Understanding Juvenile Court

*“There can be no keener revelation of a society’s soul than the way in which it treats its children.”*

Nelson Mandela

### A. WASHINGTON’S UNIQUE JUVENILE JUSTICE SYSTEM

At the turn of the century, Washington state was an “early and enthusiastic convert to the rehabilitative ideal and indeterminacy,” and its criminal justice laws provided “wide and unconstrained discretion to judges and correctional officials.”<sup>14</sup> Washington first enacted a juvenile code in 1913 that was solidly within the *parens patriae* philosophy of rehabilitation through “benevolent coercion.”<sup>15</sup> That law remained in effect without major changes until 1977.<sup>16</sup>

In the period following *In re Gault*, Washington struggled to reform its juvenile justice system. Nearly a decade passed before the Washington State legislature enacted the Juvenile Justice Act of 1977 (JJA).<sup>17</sup> While Washington’s act was modeled after the federal Juvenile Justice Delinquency Prevention Act of 1974,<sup>18</sup> it was also influenced by adult sentencing trends across the country.<sup>19</sup> The JJA was a “complete overhaul of the juvenile justice system”<sup>20</sup> and has been called “the most substantial reform of a state juvenile code that has occurred anywhere in the United States.”<sup>21</sup> The act continues to be a work in progress, as the state legislature has amended it every year since its enactment.<sup>22</sup>

Washington’s juvenile justice system remains unique among the fifty states primarily because it is the only state with determinate sentencing for juveniles. The JJA sets out presumed standard sentences for each crime, in a manner very similar to the state adult system. Indeed, Washington’s juvenile justice system is remarkably similar to its adult criminal court in many respects. Children can be arrested, taken into custody, face charges, have a trial, and appeal the findings.

*The JJA was a “complete overhaul of the juvenile justice system” and has been called “the most substantial reform of a state juvenile code that has occurred anywhere in the United States.”*

All of the due process rights outlined in *In re Gault* by the Supreme Court were codified in the JJA. Like the adult criminal justice system, the JJA's purpose includes what are typical crime and punishment goals in this country:

- Protect the community from criminal behavior;
- Provide a process for determining guilt or innocence;
- Make the juvenile offender accountable for his or her criminal behavior;
- Provide for punishment commensurate with the age, crime, and the offender's criminal history;
- Provide due process for juveniles alleged to have committed an offense;
- Ensure restitution to victims; and
- Implement clear policies for sentencing.

Washington's juvenile justice system is also much more open than the vast majority of U.S. states' systems. Offender cases are held in courtrooms open to the public, a practice found only in twelve other states.<sup>23</sup> While judicial accountability may be enhanced when hearings can be observed, the general public, including the media, are privy to and can discuss the proceedings.<sup>24</sup> Not only are proceedings public, but Washington, along with only nine other states, allows the public release of juvenile records without restriction.<sup>25</sup> Before 1997, the JJA allowed for the sealing of a youth's juvenile court record, if he or she had no new convictions for two or three years (depending on the crime). As a result of the 1997 amendments, the juvenile code now mirrors the adult provisions for release of records: Class A felonies can never be sealed, Class B felonies require ten years with no new convictions, Class C felonies require five years, and misdemeanors require two or three years (depending on the crime) with no new convictions.

It appears that the 1997 amendments have had a deleterious effect on youth, reducing their chances to put delinquency behind them and move on to positive educational and employment opportunities. As one newspaper article put it when discussing young people who have not been able to seal past records, "old arrests leave a lasting mark on youths."<sup>26</sup> The Washington State Juvenile Rehabilitation Administration recently interviewed youth and found that their records made finding work very difficult. This was true even for youth who had been successful in treatment and school efforts—one had graduated from college with honors, and still had a difficult time getting employment because employers would not look beyond his juvenile record. Other anecdotal evidence includes the story of a youth who was accepted as an intern in one program where he had honestly discussed his juvenile history in the application process. However, when the criminal background check was completed, he was forced to leave the program.<sup>27</sup>

Despite the aforementioned similarities, Washington's juvenile court system differs from the adult system in that it maintains additional rehabilitation-oriented goals that are explicitly given equal importance within the traditional crime and punishment purposes of the JJA. These rehabilitation goals include:

- Provide necessary treatment, supervision, and custody for juvenile offenders;
- Encourage the parents or custodians of offenders to actively participate in the juvenile justice process;
- Take into consideration the age of the offender when determining the punishment; and
- Provide for the handling of juvenile offenders by the community (as opposed to incarceration in state facilities) whenever consistent with public safety.<sup>28</sup>

## B. HOW WASHINGTON'S JUVENILE JUSTICE SYSTEM WORKS

### 1. An Overview of Juvenile Court

Juvenile courts are a division of the Superior Court in Washington, and Superior Court Judges and Commissioners hear cases.<sup>29</sup> In counties where there is more than one Superior Court Judge, it is common for judges to rotate assignments, spending anywhere from a month to several years as a juvenile court judge, before returning to adult court. Although some smaller counties share juvenile courts, there are still several dozen juvenile courts in Washington's thirty-nine counties. While the JJA binds them all, practice and institutional culture differ widely from county to county.

Three types of cases are heard in juvenile court:

- Dependency cases (abuse and neglect);
- Status offenses (e.g. truancy, children in need of services and 'at-risk' petitions); and
- Offender matters (also known as delinquency).

The focus of this report is the representation of children in offender cases. Both offender cases and status offenses are matters in which children face loss of liberty, and for that reason alone, the role of an attorney is crucial.<sup>30</sup>

Juvenile court jurisdiction generally extends over children under the age of 18 for offender matters,<sup>31</sup> but it may be extended up to an offender's 21st birthday.<sup>32</sup> By law, children under the age of eight years are incapable of committing a crime and in no case may be charged in juvenile court.<sup>33</sup> A child at least eight years old and under twelve years of age is presumed to be incapable of committing a crime, but this presumption may be rebutted by the prosecution with clear and convincing evidence that, at the time of the alleged crime, the child was capable of forming the intent necessary to commit the crime charged. This "Capacity Hearing" must include an analysis of the child's maturity and capabilities.<sup>34</sup>

A child who is mentally incompetent cannot be tried for alleged crimes in juvenile court, regardless of his age. Washington juvenile court law, RCW 13, contains no statute relating to the competency of juveniles; hence, the laws regarding adult's mental incompetence also apply to children.<sup>35</sup> The Washington Court of Appeals has given some flexibility to juvenile courts in applying

the adult competency statute, however. In *State v. E.C.*, the Court found that the adult statute is “generally applicable” only if it is not inconsistent with the rules and statutes applying to juvenile offense proceedings.<sup>36</sup> Furthermore, the Court gave broad authority to the juvenile court to respond to the needs of a particular offender when there is a conflict between the adult statute and the JJA, holding that “[i]f the needs of a particular incompetent juvenile offender require early dismissal of the charges with prejudice, we hold the juvenile court retains the authority to do so.”<sup>37</sup>

## 2. Procedure in Washington’s Juvenile Courts

### *Arrest and Detention*

In Washington state, a juvenile may be arrested either by court order or, more commonly, by a law enforcement officer if “grounds exist for the arrest of an adult in identical circumstances.”<sup>38</sup> An arresting officer makes the initial decision to detain or release a youth pending charges being filed. If the officer decides to detain a youth, he or she is then taken to the county detention facility where “intake and risk assessment standards” are used to further analyze whether the youth should be detained. Some counties require a police officer to call and discuss the case with a detention screener at the county detention facility before taking a child to detention.<sup>39</sup>

If a juvenile is held in detention after arrest, there must be a court appearance by the end of the next court day. At this “First Appearance” or “Probable Cause” hearing, a judge must use a two-step decision-making process. First, the judge decides if there is probable cause that a crime occurred, and that this youth committed it. The judge typically reviews a brief sworn, signed statement from the arresting officers alleging the basic elements of a crime and the youth’s involvement. A judge may also hear live testimony.

Second, upon deciding there is probable cause that a crime was committed, the court must analyze anew whether the youth should be held. A young person can only be held in detention when there is probable cause to believe that he or she:

- is likely to fail to appear for further proceedings;
- needs protection;
- is a threat to community safety;
- will interfere with the administration of justice;
- committed a crime while another case was pending;
- is a fugitive;
- has had parole suspended; or
- is a material witness.<sup>40</sup>

Under certain circumstances, however, a juvenile may be released upon posting a probation bond set by the court, or by depositing cash or posting other collateral in lieu of a probation bond. The juvenile’s parent or guardian may sign for the probation bond, or deposit cash or collateral on behalf of the juvenile if approved by the court.<sup>41</sup>

## Charging

Police “refer” a case to the county prosecutor’s office for a charging decision. The JJA requires the prosecutor to screen the case for legal sufficiency and jurisdiction. If a case is legally sufficient, the prosecutor may file charges in the form of an “Information” with the juvenile court.<sup>42</sup> If a juvenile is held in detention, the Information must be filed by the county prosecutor within 72 hours.<sup>43</sup>

In 2001, 46,069 cases were referred to county prosecutors in Washington. Thirty-seven percent of the referred cases had charges filed, 38% were referred to diversion (see below), and, for 22% of cases referred to prosecutors, no action was taken.<sup>44</sup>

## Diversion

Although a case may be legally sufficient, the JJA requires that, under certain circumstances, the prosecutor may not file charges, but instead must “divert” the case out of court. The JJA recognizes that young, minor offenders are best dealt with outside of formal court settings and, thus, requires diversion of cases in which the “alleged offense is either a misdemeanor or gross misdemeanor, and the alleged offense is the offender’s first offense or violation.”<sup>45</sup> The law also provides prosecutors the discretion to divert a juvenile’s second misdemeanor and certain non-violent and property-related Class C felonies.

Diversion is based upon an agreement between a youth and a diversion unit (often composed of community-based boards). The youth must admit wrongdoing (although not necessarily admit to the elements of the crime alleged) and agree to do one or more of the following: perform community service of less than one hundred fifty hours; make restitution to the victim; attend up to ten hours of counseling; and/or up to twenty hours of educational or informational sessions at a community agency. A monetary fine of up to \$100 also may be imposed. Additionally, it is common for diversion agreements to include restrictions, such as curfew, hours to be spent in school or at home, as well as exclusion from specified places. At the request of a victim or witness, an agreement not to contact specified individuals also may be added.

A diversion agreement may last up to six months, but an extension for the purpose of paying restitution is permitted. If the youth successfully completes the diversion agreement, charges will not be filed in juvenile court. If the juvenile fails either to appear for the initial diversion meeting or fails to complete the diversion agreement, however, the case is sent back to the prosecutor for the filing of an information. In some jurisdictions, a juvenile may be given a ‘second chance’ at completing the diversion after the matter is filed in juvenile court.

Washington’s diversion system is considered a national model and has been emulated by other states. Despite its demonstrated effectiveness, however, the program has been used by Washington juvenile courts less frequently over the last decade. The percentage of cases referred to diversion decreased by 21% from 1991 to 2001, and the percentage of cases with charges filed increased by 19% in that same time period.<sup>46</sup>

*Washington’s diversion system is considered a national model and has been emulated by other states.*



### *Arraignment, Pre-trial Hearings, Fact Finding, and Adjudication*

In Washington, the evolution of a juvenile court case is procedurally comparable to that of an adult's case. Speedy trial requirements dictate that a detained youth shall have a trial within 30 days, and a youth out of custody within 60 days. At the arraignment hearing, the charges are read, and the youth enters a plea. A pretrial hearing is held during which hearings for motions and pleas can be argued by counsel. If a juvenile chooses to dispute the charges, the bench trial is called a "fact finding," with a judge or commissioner hearing the case. Youth in juvenile court do not have the right to a jury trial. Conviction is termed "adjudication"; a youth found guilty is an "adjudicated youth"; and sentencing is called "disposition." Despite the similarities of process in juvenile court to adult court, the different terms are evidence of what are, or at least originally were, very real differences in the two courts.

### *Sentencing: Disposition of the Case*

Washington's juvenile sentencing laws are like no other in the nation. It is the only juvenile justice system to use a presumptive, determinate sentencing scheme.<sup>47</sup> The JJA lays out a table through which one factors the seriousness of the current offense and a juvenile's prior criminal history to determine a sentence.

A goal of this determinate sentencing scheme is to ensure that those who commit similar crimes and who have similar criminal histories receive substantially consistent sentences across the state. While the discretion of judges is limited by the grid, many people argue that the power of the prosecutor is greatly increased, for it is the prosecutor's discretionary filing decision that in large part determines the presumptive sentence.

The vertical axis of the grid plots the ascending seriousness of a class of crime.<sup>48</sup> The horizontal axis represents the juvenile's criminal history. Prior felony adjudications count as one point, prior misdemeanors count as one quarter of a point. As the number of points increases, so does the number of months or years the youth may be incarcerated.

The sentences on the grid are divided into "local sanctions" and "commitment" time. The less serious the violation and the shorter the criminal history, the more likely a standard sentence will involve only local sanctions. Local sanctions may include: 0 to 30 days of confinement at the county detention facility, 0 to 12 months of community supervision (commonly referred to as probation), 0 to 150 hours of community service, and/or up to a \$500.00 fine. The more serious the current crime and the more prior adjudications (convictions), the more likely a juvenile is "committed" to a state detention facility, for a sentence with a specific range measured in weeks, not days.<sup>49</sup>

For example, a juvenile who is found guilty of Shoplifting and has an offender history of two diversions will face a sentence of local sanctions. If the judge determines the sanctions should include detention time, the sentence will specify the number of days (up to thirty) to be spent at the local detention facility, along with other sanctions the court deems appropriate, such as community service, probation, counseling and restitution. If that same juvenile is found guilty of the serious crime of Robbery in the First Degree, a Class A felony, the

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sentence will be from 103 to 129 weeks incarceration at a state facility, regardless of the juvenile's prior offense history. However, for a youth adjudicated guilty of Arson in the Second Degree, a Class B felony, the disposition will greatly depend on his or her criminal history. With no prior criminal history, the standard sentence would be local sanctions. With four or more criminal history points, the presumed range would be 52 to 65 weeks at a state Juvenile Rehabilitation Administration (JRA) facility.

### *Sentencing Outside the Grid*

The JJA provides for exceptions to the standard range sentences laid out in the grid. "Option A" is the presumed sentencing grid described above, and is commonly referred to as "the standard range."

"Option B" is the Suspended Disposition Alternative, a new law that went into effect in July 2003. Option B allows a court to impose the standard range and suspend the disposition on the condition that the offender complies with one or more local sanctions and any educational or researched-based "best practice" treatment programs. Some serious charges or offender history can make a youth ineligible for this option.

"Option C" is the Chemical Dependency Dispositional Alternative. Under certain limited circumstances, a court may impose the standard range and suspend it, imposing a disposition of treatment in lieu of incarceration.

A fourth alternative, "Option D," is most often referred to as "Manifest Injustice." The law allows the court to impose a sentence outside of the standard range if the court believes that a standard range sentence would result in a *manifest injustice* (M.I.). The youth, the prosecution, or the court itself may make an M.I. motion for a sentence above or below the standard range. The JJA lists mitigating factors that would permit a sentence below the standard range and aggravating factors that would allow a sentence above the range.<sup>50</sup> Mitigating factors include if the offender's conduct did not cause serious injury; whether he or she acted under "strong and immediate provocation;" whether he or she suffered from a mental or physical condition significantly reducing culpability; or whether, prior to detection, the youth made a good faith attempt to compensate the victim for the injury or loss. Aggravating factors include if the offender inflicted or attempted to inflict serious injury; if the offense was committed in an especially heinous manner; if the victim was particularly vulnerable; or if the offender is a leader of several people involved in a criminal enterprise, among others. The factors listed in the JJA are not all-inclusive. In fact, the list of aggravating factors concludes with an explicit "catch-all": if the standard range is "clearly too lenient considering the seriousness of the juvenile's prior adjudications," a sentence departure upwards may be made. At an M.I. hearing, the court must make findings on these factors based on clear and convincing evidence. Also, a sentence outside the standard range may be appealed to a higher court, but a sentence within the standard range may not.

In 2003, another sentencing alternative was added to the Juvenile Justice Act. The Mental Health Dispositional Alternative allows a court to order a comprehensive mental health evaluation and plan for offenders with psychiatric disorders. The availability of this alternative is limited by the offender's history and the current charges.

Washington case law clarifies the use of M.I.s, emphasizing the importance of “avoiding narrow, semantic interpretations [of the JJA] that defeat the purposes of the legislature” which include both rehabilitation and punishment.<sup>51</sup> The JJA “requires courts to take into consideration a host of factors that may not be relevant to the sentencing of adults.”<sup>52</sup> In addition to the aforementioned list of factors, other evidence may be considered in determining whether a standard sentence is needed to rehabilitate a juvenile offender and protect the public from criminal behavior. Factors, such as parent involvement, parental effectiveness, the child’s participation in treatment, and status in school can be the grounds upon which to base a manifest injustice finding.<sup>53</sup>

While the juvenile court is allowed to consider a variety of factors in sentencing youth, the JJA expressly forbids the consideration of factors such as race, gender, religion, and economic status, to determine punishment. Furthermore, the JJA prohibits a court from considering a youth’s status as a dependent child or the lack of facilities, including treatment facilities, in the community to determine punishment or impose commitment.

Although judges may dislike the lack of judicial discretion in determinate sentencing, few venture outside the sentencing box. In 2000, juvenile court judges sentenced offenders within the presumptive standard range 97% of the time. Of the 3% sentenced outside the range, 86% received a sentence that was higher than the standard sentence, and only 14% received a sentence below the standard range.<sup>54</sup>

### *Children in Adult Criminal Court*

Children may be tried in adult criminal court under two circumstances: a case may be either transferred (or “declined”) to adult court after a hearing before a juvenile court judge, or it may be automatically transferred with no judicial decision.

Discretionary transfer has existed since the creation of the Juvenile Justice Act. The law gives authority to juvenile court judges to transfer children charged with crimes to adult criminal court. A decline hearing must be held when there is either a motion to transfer jurisdiction,<sup>55</sup> or the age of the juvenile and the type of crime alleged render such a hearing mandatory by law.<sup>56</sup> Although the decline *hearing* is mandatory under certain circumstances, the *decision* to transfer remains discretionary. In a decline hearing, the judge reviews facts, examines records, listens to expert opinion, and hears arguments regarding whether it is appropriate to transfer the youth to criminal court.<sup>57</sup>

The importance of the decline hearing in juvenile proceedings can hardly be overstated. Decline hearings require precise, specific findings by the court. In *Kent v. U.S.*, the U.S. Supreme Court delineated eight factors to be considered by a juvenile court in a decline hearing.<sup>58</sup> Those factors, known as the “*Kent* Criteria,” require a close look at the youth and his or her “maturity, home, environmental situation, [and] emotional attitude.” A decision to transfer a child to adult court cannot be made solely on how serious the crime is or the need for judicial efficiency, but should take into close consideration the specific facts of the case and the youth’s prospects for rehabilitation.<sup>59</sup>

Until the mid-1990’s, juvenile court had original jurisdiction over all children committing crimes. However, after a historical peak in the rates of juvenile

arrests for violent crimes in the early 1990's, the state law was changed in 1994 and 1997.<sup>60</sup> Legislators were motivated by the prospect that increased penalties would reduce violent crimes committed by youth. As a result, Washington law now requires the automatic transfer of some juveniles to adult court.<sup>61</sup> Sixteen and seventeen-year-olds charged with certain violent felonies go straight to the adult criminal system, having had no individual review of the facts of the case or the youth's life circumstances.<sup>62</sup> However, not only serious violent crimes result in automatic transfer to adult court. Lesser offenses can also be a path to automatic adult court jurisdiction, depending on a young person's juvenile offender history.<sup>63</sup> As a result, 16 and 17-year-olds accused of certain crimes no longer benefit from the rehabilitation originally intended for them.

The debate on the costs and benefits of transferring Washington youth to adult court continues to be informed by emerging research. The Washington State Institute for Public Policy released a preliminary report in January 2003 examining the impact of these changes in jurisdiction. The report finds "...we cannot attribute the decrease in juvenile arrest rates for violent crimes in Washington State solely to the automatic transfer laws." The Institute found that the automatic transfer laws have resulted in a three hundred percent increase in the number of juvenile cases transferred to adult court since 1992. Despite the large increase in cases being transferred to criminal court, the report found on "very preliminary examination," that there was "no consistent evidence that sentencing youth to adult court either increases or decreases the likelihood of recidivism."<sup>64</sup>

## C. COUNSEL FOR CHILDREN IN JUVENILE COURT

### 1. The Importance of the Child's Attorney in Juvenile Court

In *Gideon v. Wainwright*, the United States Supreme Court secured an indigent adult's right to an attorney when accused of a felony. The Court stated, "[i]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."<sup>65</sup> Four years later in *In re Gault*, the Court extended the same protection to children in juvenile offender proceedings, recognizing that juveniles "facing the awesome prospect of incarceration" need counsel for the same reasons adults facing criminal charges do: "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."<sup>66</sup>

Washington law grants juveniles the right to be represented by counsel at all "critical stages" of juvenile court proceedings, and counsel must be provided to juveniles who are unable to secure counsel without causing financial hardship to the juvenile or family. The law states that the presence of counsel must be provided "in any proceeding where the juvenile may be subject to transfer for criminal prosecution or in any proceeding where the juvenile may be in danger of confinement."<sup>67</sup>

### 2. Public Defense in Washington State

Washington does not have a statewide public defense system. Counties fund public defense systems, and the method of providing counsel for people

*Washington does not have a statewide public defense system. Counties fund public defense systems, and the method of providing counsel for people who cannot afford an attorney is decided at the county level.*

who cannot afford an attorney is decided at the county level. Because each county has its own system, there are a variety of methods used throughout the state.<sup>68</sup> While differing methods for securing counsel can be effective, each approach requires both adequate funding, and knowledgeable and experienced attorneys. The methods include:

- **County-Based Public Defender:** Six counties in the state have salaried staff attorneys who provide criminal and juvenile indigent defense services as direct government employees: Whatcom, Pierce, Spokane, Skagit, Thurston, and Yakima.
- **Non-Profit Corporations:** Five counties contract directly with non-profit corporations to manage their public defense systems: King, Clallam, Jefferson, Snohomish, and San Juan.
- **Private Firms:** The majority of rural counties contract with individual defenders or private firms who handle all or a designated section of the criminal and juvenile cases.
- **Assigned Counsel Panels:** In a few counties, the court appoints attorneys from a list of private bar members who accept cases on an individual basis.<sup>69</sup>

#### D. THE CRITICAL LINK TO EFFECTIVE JUVENILE JUSTICE

The causes of juvenile delinquency and how our society deals with it is a multi-faceted and complex picture. The U.S. Supreme Court changed that picture dramatically with the framework laid out in *In re Gault*. A high level of due process protections is required of all juvenile courts. Not the least of those protections is the participation of counsel for children accused of crimes. The role of counsel for children is critically important. It is up to the child's attorney to speak on his or her behalf, to understand the needs of the child and argue that those needs be met, and to ensure that the system does not fall back into the abuses of unbridled authority. A child's attorney may be the only person the child trusts enough to reveal a history of abuse or neglect. In a very real sense, attorneys for children in the juvenile justice system are society's link to children who might otherwise be lost. Assessing that link is essential to creating an effective justice system.

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# CHAPTER TWO

## Findings

*“America is the only nation that is at war with its children. I think we are less tolerant of the behavior of our children because we have less contact with our children, do not understand everything that goes on in childhood, and lack the time and patience to deal with their misbehavior.”*

Judge David Mitchell, Executive Director of the National Counsel of Juvenile and Family Court Judges<sup>70</sup>

Most defense attorneys are passionate about working with young people and have chosen to work in juvenile court. Something inspires juvenile defenders to help children, and they believe that by working in juvenile court, they can make a difference in young people’s lives. One defender expressed, “I can’t tell you how much I enjoy my juvenile clients. So many of these kids have nothing, and you might be the first adult they can trust.” There are many motivated, compassionate people working with juvenile offenders across Washington state. However, even well-intentioned and caring people cannot always overcome institutional barriers and problems built into the juvenile justice system.

This chapter outlines the findings of the Washington Juvenile Justice Assessment Project. A description of the data and methodology can be found in the Introduction to this report. The findings are organized by topic area. Under each topic, the standard of practice, as set out by the Institute for Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards (hereinafter “IJA/ABA”) or the Washington State Bar Association, is delineated to give the reader a reference point from which to analyze the findings.

*“A lawyer shall abide by a client’s decisions concerning the objectives of representation.”*

RPC 1.2

## A. THE ATTORNEY/CLIENT RELATIONSHIP

THE CLIENT’S INTERESTS ARE PARAMOUNT. IT IS THE LAWYER’S PRINCIPAL DUTY TO REPRESENT THE LEGITIMATE INTERESTS OF THE CLIENT. THE CLIENT DEFINES HIS OR HER INTERESTS AFTER FULL CONSULTATION WITH THE LAWYER.<sup>71</sup>

There is confusion and disagreement about the role of juvenile defenders in Washington and, as a result, important opportunities to effectively counsel and represent the interest of the child are lost. Washington’s system of juvenile justice is based on a justice model, sometimes referred to as an adversarial or due process model. In this system, it is not the defense attorney’s role to decide what is in the best interest of the child-client. The attorney is not a guardian to the child, nor an advisor to the court, nor in the role of protector of the community. The foundation of the attorney/child-client relationship is the same as the foundation of an attorney/adult-client relationship: after advice from the attorney, the client determines what is in his or her own interest, and the attorney pursues that interest. The Washington State Rules of Professional Conduct state that, with very limited exceptions, “A lawyer shall abide by a client’s decisions concerning the objectives of representation.”<sup>72</sup> This premise is not well understood, and its application turns out to be difficult in the juvenile court setting.

Interviews with a broad spectrum of juvenile court professionals paint a clear picture that attorneys in juvenile court often do not represent their clients’ stated interest as required by the legal standard of practice and the lawyers’ ethical responsibilities. One judge explained, “the defense attorneys here look at the kid’s best interest, and they tell the court if they believe the child should [be committed] to the Juvenile Rehabilitation Administration.” Another judge highlighted the differing representation of adult and juvenile clients, “Defense lawyers here are looking out for the kid’s best interest. Whereas downtown [in adult court] they are doing what the client wants.”

Confusion or disagreement over the role of the defender stems from four sources: (1) the attorney/child-client relationship is more complex than the attorney/adult-client relationship; (2) attorneys feel they must balance seemingly disparate goals of the JJA; (3) defenders sometimes have ambivalent feelings about their role; and (4) attorneys do not clearly understand their ethical and legal obligations to their young clients.

1. The attorney/child-client relationship is in many ways more complex than the attorney/adult-client relationship. Juvenile defenders are not trained to deal with this complexity. Although the attorney/client role may be the same, there are aspects of child representation that make this relationship significantly more complex. Namely, in a juvenile court setting, child clients are:
  - Experiencing developmental stages that affect their ability to process information and make decisions;
  - Just learning how to make their own decisions with little experience in evaluating issues and making well-reasoned decisions;



- Feeling intimidated at times by adults in positions of power (such as their attorney);
- Often coming from difficult circumstances that may overwhelm their ability to make rational decisions;
- Suffering from learning disabilities, delays and mental health problems at a much higher rate than the general population, any of which impacts the decision-making process; and
- Often struggling with difficult problems without the guidance of a healthy adult.

All of these factors make advising the client, explaining options, strategizing about a case, and making decisions more complicated than a normal adult case. Most attorneys working with children in Washington have little training in adolescent development, disabilities, mental health problems, or even simple techniques for communication with young clients. Another important factor is that young people can be likely to defer to a powerful adult and may hide their lack of understanding as to what is happening in court and their lives. As one youth explained, young clients may not speak up when they don't understand:

Investigator: *Do you feel like you know what's going on in court?*

Youth: *Sometimes. But I don't want to sound stupid, so if the attorney or the judge doesn't ask me questions or tell me things, then I don't say anything.*

If an attorney is not aware of the power-imbalance between him or herself and the client, particularly given the client's developmental stage, the attorney may not even be aware of how much he or she, and not the client, is directing the case. Awareness of this imbalance is an additional charge for attorneys representing youth, as evidenced by one defender, "There is a greater responsibility as a juvenile defender. You must be more careful not to tell your clients what to do—although this is very tempting and this is what the lazy attorney tends to do. The responsibility is so much greater because your ability to influence a young client is so much greater."

2. There is confusion and disagreement over the role of attorneys in juvenile court proceedings given that attorneys representing children must balance seemingly disparate goals of the JJA, accountability and rehabilitation. It is difficult to apply the traditional attorney-client relationship in a juvenile court setting because, despite the fact that Washington's system is a justice model, the goals of the juvenile system include the best interest of the offender. Juvenile court judges often complicate this role with their own biases. One judge claimed, "I don't like the Juvenile Justice Act. [I'm in favor of] a more *parens patriae* model." Another revealed, "One systemic problem is the 'over-legalization' of juve-

*“The public defenders have to balance the black and white letter of the law with how they talk with the kid about what is best for the kid in their life. This is a real challenge, and only the good public defenders can balance it. These defenders do not work to get the kid off at all costs.”*

Juvenile Court  
Administrator

nile court. I believe that sometimes the best interests of the child take second place to due process concerns.”

Many times it is the defense attorney who knows the most about the juvenile offender’s life and is, therefore, in the best position to help a young person think through his or her options and make decisions. One juvenile court administrator acknowledged this difficult role for attorneys, “The public defenders have to balance the black and white letter of the law with how they talk with the kid about what is best for the kid in their life. This is a real challenge, and only the good public defenders can balance it. These defenders do not work to get the kid off at all costs.” A concerned detention supervisor observed, “We’ve lost track of the fact that we are dealing with kids. This is juvenile court, not adult court. Someone needs to be explaining things to them about life. Really, who should be doing that? The [public defenders], I guess, but they don’t have enough time.”

The foundation of the relationship between the client and the attorney must stem from the client’s trust that the attorney will take only client-directed action. Without adherence to this basic tenet of the system, the attorney-client relationship is destroyed, and the system is left without the presence of an important actor—the one on whose shoulders falls the important role of advocate.

3. Defenders themselves have ambivalent feelings about their role in a child’s life. This often affects the advice given to child clients. One defender expressed, “I am a little reluctant to speak out about this—but I feel that morally speaking, defense attorneys need to tell their juvenile clients to take responsibility for their actions and not just try to get off.”

The false dichotomy of due process versus rehabilitation can taint the attorney-client relationship. Attorneys feel their choice is either to act in the best interest of the child or aggressively pursue their client’s due process rights.<sup>73</sup> Attorneys across the state appear to know the ethical standard requires them to treat their child client in the same way as an adult client, but for many lawyers that standard is viewed in an over-simplified way: the right to due process becomes simply trying to “get a client off.” Conversely, the best interest becomes simply telling a child to “take responsibility.”

It is also not uncommon for defenders to find themselves representing a child client who has no other caring adult in his or her life. It’s easy to slip into the role of parent, even in a system that has rejected *parens patriae* as its guiding principle. As noted by one probation officer, “The defense attorneys fight pretty hard for the kids, but when they know a kid will get [access to addiction or mental health] treatment if he [doesn’t get out of] detention [right away], the [attorney] might not fight as hard to get the kid out. The attorneys don’t really [completely undermine a client’s case and] cave on a client, but they do act in the best interest of their client at times. Overall, they try to act in the best interests of their client.”



4. Reducing the choice to either ‘fighting hard’ or ‘getting a kid treatment,’ however, compromises the legal and ethical role of the attorney. To provide good advice to a client, an attorney needs training, enough time to understand the client and build a trusting relationship, and knowledge about available resources. If a juvenile attorney has these tools, then he or she will often be in the position of being able to “fight hard” for their clients *and* help them get the services they need. The Washington State Rules of Professional Conduct (RPC) 2.1, in fact, contemplate a rich diversity of factors shaping the attorney/client relationship: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

*“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”*

RPC 2.1

In Washington, many factors limit effective communication between juvenile clients and their attorneys. As a result, attorneys are not fully advising their clients. For a young person to define what their interest is, he or she must have the full benefit of information, advice and counsel from his or her attorney. This can only happen if the attorney has enough time to spend with the client and has the tools needed to effectively communicate with youth. One youth clearly described the problem, “I wish lawyers would sit down and really listen to me. Every time we have a visit, they are talking fast, and I don’t have time to ask questions because we are about to go into court, or sometimes we are already in court. I wish they would tell me stuff.” A commissioner made a similar observation that, “Right now defense lawyers don’t investigate the facts, they don’t get to know their client as a person, they don’t bring relevant information in to court and they don’t tailor sentences to meet the client’s specific needs.”

If an attorney does not get to know a juvenile client, if the attorney cannot communicate well with the client, he or she is not going to be able to fully counsel the client. Without fully counseling the client, the client cannot adequately define his or her interest in the direction of the case. An interview with one youth clearly illustrates the ramifications of this problem:

Investigator: *How long did you discuss your case with your attorney [before your hearing today]?*

Youth: *Like about two minutes.*

Investigator: *Did you know when you went to court today that you were going to plead guilty?*

Youth: *Yes, because I had talked with my probation officer who explained that if I didn’t plead guilty I would go to the adult system.*

Investigator: *What happened at the hearing?*

Youth: *My attorney asked for a sentence that was different than what I wanted. He had never even asked me what I wanted! I wanted the same thing my P.O. asked for [at the hearing].*

*“I wish lawyers would sit down and really listen to me. Every time we have a visit, they are talking fast, and I don’t have time to ask questions because we are about to go into court, or sometimes we are already in court. I wish they would tell me stuff.”*

Youth

The onsite interviews and surveys revealed that a number of key factors limit full communication with child clients:

- Heavy caseloads and lack of time to spend with clients;
- Lack of training in effective communication with youth;
- Lack of training on developmental issues;
- Lack of training on mental health and learning disabilities; and
- Lack of resources and lack of awareness of resources.

An additional factor limiting effective communication with child clients is the inconsistency and randomness of the assignment of attorneys to youth in the system. Hence, as one youth explains, a child may have a different attorney for different matters, "I've had too many different attorneys to count." If the county does not have a system for assigning cases that keeps the same attorney working with prior clients, it becomes only a matter of luck whether the child gets the same attorney for a new matter. This hampers the building of a trusting relationship, and important information about the young person may be lost. As this young person points out, "I've always had the same lawyer and that's a good thing. If you have more than one lawyer passing [your] file around, [it's] all hearsay about you, [and] this is not good." While defenders responding to the written survey indicated that 76% of the time they believe they are re-assigned to a former client with a new matter, youth reported getting a different attorney more often.

Investigator: *What advice would you give to defense attorneys representing young people?*

Youth: *Listen to our ideas and what we want and at least suggest them to the judge.*

## **B. PARTICIPATION OF COUNSEL IN JUVENILE COURT PROCEEDINGS**

THE PARTICIPATION OF COUNSEL ON BEHALF OF YOUTH IN JUVENILE COURT PROCEEDINGS IS ESSENTIAL TO THE ADMINISTRATION OF JUSTICE AND TO THE FAIR AND ACCURATE RESOLUTION OF ISSUES AT ALL STAGES OF THE PROCEEDINGS.<sup>74</sup> IN DELINQUENCY CASES JUVENILES SHOULD HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL AT ALL STAGES OF THE PROCEEDINGS.<sup>75</sup> JUVENILES' RIGHT TO COUNSEL SHOULD NOT BE WAIVED.<sup>76</sup>

In Washington state, children are represented by counsel at most juvenile court proceedings. State law provides the right to counsel for a juvenile any time there is a threat of confinement, and most counties appear to comply with that law. There is a widespread belief among Washington juvenile justice professionals that children should be represented by counsel in proceedings. One commissioner was quoted, "I want an attorney present with the child at every hearing." Another was adamant that, "children do not go unrepresented here."

*"I want an attorney present with the child at every hearing."*

Commissioner

Certain counties, however, do not ever provide counsel at First Appearance hearings, contrary to the IJA/ABA Standards and Washington law. In the written survey, defenders from only eleven counties responded that youth are always represented at First Appearance hearings.<sup>77</sup> In some counties, young people go forward in a variety of hearings without the assistance of counsel. While this practice varies widely from county to county and does not appear to be frequent in the majority of counties, the data indicate that in some counties, children appear without counsel up to 30% of the time.

It should be mentioned that the problem of children proceeding without counsel may be more widespread than juvenile court personnel acknowledge and the data reveal. While interviewees made statements like "Children do not go unrepresented here," they also went on to describe juvenile cases proceeding without counsel. Some seemed not to even notice that a child had gone through a hearing without an attorney:

Investigator: *How often does a child go unrepresented in court in this county?*

Prosecutor: *Virtually never. It really just does not happen.*

Investigator: *What about at a hearing to set a trial?*

Prosecutor: *It just wouldn't happen. The judge wouldn't let it.*

Investigator's Notes:

*Yesterday, I observed a trial setting hearing in this court, and no attorney was present representing the youth. This prosecutor was present at that hearing. There was no waiver of counsel by the youth. The youth looked very young—12 or 13 years old.*

Children proceed without counsel due to a variety of institutional, social, and financial constraints. Running a courtroom involves numerous people with extremely tight schedules. Participants often feel pressure to "keep things moving." (In the instance recounted above, the child's attorney was behind schedule, and holding up the court. The attorney was in the hallway interviewing another client when the judge made the decision to hold the hearing without counsel present. The hearing proceeded without an official waiver of counsel or any discussion with the juvenile about whether the attorney should be present or not. A trial date was set, and the youth left without speaking to the attorney.) The written survey found that 33% of defenders believe that children in their jurisdictions proceed without counsel either to plead guilty to a minor charge or to expedite the case for some other reason.

Juvenile courts in most locations comprise a small community of people who work together every day. Many people spoke of "knowing" how a judge would rule in a given situation. Hence, defense attorneys' input may not be seen as critical in situations where people believe they know the outcome in advance.

Furthermore, the data revealed a strong perception that some hearings are not as important as others and, therefore, the presence of a child's attorney is not perceived as important. A probation officer remarked that, "you only see kids in court without an attorney when the issue is not substantial." A commis-

*Washington law requires representation at “all critical stages of the proceedings” and “in any proceeding where the juvenile may be in danger of confinement.”*

RCW 13.40.140

sioner exemplified this perception, “It does happen that children are unrepresented in court. This is rare and usually only happens in probation violations.”

However, these types of hearings can have serious consequences. A probation hearing often involves risk of longer detention time than the original disposition. At a First Appearance or Probable Cause hearing, a juvenile may be more likely to make incriminating statements without the advice of counsel. At a trial setting hearing, opportunities to review final plea deals or ensure that witness lists are complete may be lost, if counsel is not present.

Defenders surveyed believe that in 43% of cases where a child proceeds without counsel, it is because parents insist on it. This is likely due to parents’ concerns over cost, since many counties charge a fee for public defense services. An alarming 38% of attorneys said that the waiver often occurs before a child has had a chance to consult with an attorney. If the right to counsel is waived before a juvenile ever has the chance to consult with an attorney, then no one is present to assert the child’s independent right to not be denied counsel because of the inability to pay.

Contrary to the IJA/ABA Standards, Washington law allows a juvenile to waive their right to counsel.<sup>78</sup> This is despite the aforementioned fact that juvenile justice professionals believe it is important for children to have counsel and that Washington law requires representation at “all critical stages of the proceedings” and “in any proceeding where the juvenile may be in danger of confinement.”<sup>79</sup> In over 40% of the counties defenders reported that children waive the right to counsel.

When children proceed without counsel, they may not have made a knowing and voluntary waiver of their right to counsel. When a waiver of the right to counsel takes place, it is up to the judge to ensure that a juvenile understands the consequences of his decision. In Washington, the colloquy between the judge and juvenile is often inadequate. Defense attorneys polled across the state reported that judges do not go over important issues with juveniles who are considering waiving the right to counsel. According to the WJJAP survey, when a waiver is taken by a judge, the judge fails to discuss:

- voluntary nature of waiver 69% of the time;
- right to counsel regardless of ability to pay 72% of the time;
- right to trial 79% of the time;
- right to present witnesses 69% of the time;
- right to cross-examine witnesses 66% of the time;
- right to appeal 59% of the time;
- child’s ability to understand legal concepts 24% of the time;
- parent’s ability to understand legal concepts 48% of the time; and
- possible consequences of an adjudication of guilt 72% of the time.

Immensely troubling is that the data show that at times, children proceed without counsel even though they have not waived the right to an attorney. Hearings may proceed for reasons of expediency, and no formal waiver is even attempted. While it is unclear how often this occurs, in the limited amount of time investigators spent observing one court, children were observed proceeding alone without a formal waiver at least two times.

## C. HEARINGS: THE ROLE OF COUNSEL

### *First Appearance and Arraignment*

MANY IMPORTANT RIGHTS OF CLIENTS INVOLVED IN JUVENILE COURT PROCEEDINGS CAN ONLY BE PROTECTED BY PROMPT ADVICE AND ACTION. ATTORNEYS SHOULD BE FAMILIAR WITH AND EXPLAIN TO THE CLIENT THE NATURE OF THE HEARINGS, THE PROCEDURES TO BE FOLLOWED, THE OPTIONS AVAILABLE AND THEIR PROBABLE CONSEQUENCES AND THE CLIENT'S RIGHTS. THE ATTORNEY SHOULD BE PREPARED TO MAKE FACTUAL AND LEGAL ARGUMENTS AGAINST A FINDING OF PROBABLE CAUSE. IF THE CLIENT IS DETAINED, THE LAWYER SHOULD BE PREPARED TO PRESENT EVIDENCE WITH REGARD TO THE NECESSITY FOR DETENTION AND A PLAN FOR PRETRIAL RELEASE OF THE JUVENILE.<sup>80</sup>

In some counties, counsel is never present, and in other counties counsel is rarely present for the First Appearance hearing. A commissioner explained the process, "No attorney for the child is present at the First Appearance. The judge reviews the probable cause information with the child and the prosecutor—kids ask to be released, and the detention screener makes a recommendation." A defender revealed that, "Counsel is appointed before the First Appearance hearing, but attorneys are not present for those hearings, except on rare occasions. The prosecutor is present. There is no one making release or probable cause arguments at this hearing."

As outlined in the section above on participation of counsel in proceedings, the practice of not having counsel present at First Appearance hearings directly contradicts accepted standards of practice. The result is that key opportunities to explain the court process, argue issues of probable cause, and fight for the release of the juvenile from detention are missed. Also missed is the opportunity to explain to a young person the importance of his constitutional rights, including the right to remain silent. Without counsel, the juvenile appears alone in a courtroom with the judge and prosecutor, in a situation where the juvenile will likely feel the necessity to defend him or herself with potentially incriminating statements, as he or she seeks to explain the circumstances of the alleged offense or secure release from detention.

In most counties across Washington, counsel is appointed at or before the arraignment hearing; however, it is common for attorneys to have no meaningful contact with clients prior to this hearing. A commissioner stated, "my perception is that the attorney client meetings happen only at court right before the hearing." It is usual for attorneys to meet their clients for the first time at court, immediately prior to the arraignment hearing, often in a courthouse hallway. Sometimes introductions will take place in the court's interview room or a holding cell. In some locations, an attorney speaks to clients in a group of all of the arraignees for the day. The attorney-client contact before arraignment is very brief, often just a few minutes, and clearly lacking the privacy and time needed to build a trusting relationship. The inadequacy of this contact was not lost on a

*"My perception is that the attorney-client meetings happen only at court right before the hearing."*

Commissioner



*"I frequently make pre-trial motions, including suppression motions, motions to dismiss and motions for speedy trial."*

Defender

court administrator who said, "the overwhelming majority of complaints [about defense counsel] concern lack of contact before court."

If an attorney does not have meaningful contact with a client before arraignment, important opportunities for assisting the child are lost. It is possible that an attorney will miss competency issues, might not learn of the existence of important witnesses, or will not hear about treatment and/or possible dependency issues. While the defender may later learn these pieces of information, the opportunity to take "prompt action" as envisioned by the IJA/ABA standards is lost. As a result, legal rights may have been waived, witnesses may be more difficult to find, and there may not be sufficient time to arrange treatment programs before disposition.

### *Investigation, Motions, and Trials*

IT IS THE DUTY OF THE LAWYER TO CONDUCT PROMPT INVESTIGATION OF THE CIRCUMSTANCES OF THE CASE, PROMPTLY MAKE ANY MOTIONS MATERIAL TO THE PROTECTION AND VINDICATION OF THE CLIENT'S RIGHTS, AND FULLY PREPARE FOR TRIAL.<sup>81</sup>

The data from defenders and the data from other sources conflict on the issue of pretrial motions. A majority of defenders (79%) in our written survey claimed they file pretrial motions "often" or "sometimes." Defenders expressed, "I frequently make pre-trial motions, including suppression motions, motions to dismiss and motions for speedy trial," and "I don't feel that children are pleading when they shouldn't. There is a healthy trial rate here." A youth corroborated this testimony in saying, "[My attorney] listens [to me.] She brought on other people to testify at the probable cause or suppression hearing, and she did a good job."

However, this view conflicts with the perceptions of many others in the juvenile court system that motions and trials are rarely brought. One judge claimed, "We need more aggressive attorneys, more of a motions practice. There are no briefs prepared for M.I.s or for anything else." A prosecutor said that, "Pre-trial motions are virtually never filed by a contract or in-house public defender—most [motions are brought] by [privately] retained counsel. If a defender sees an issue (pre-trial) [the attitude is] 'we'll deal with it informally—through discussion. We aren't [some large county] here—there's just a few of us.'"

*"We need more aggressive attorneys, more of a motions practice. There are no briefs prepared for M.I.s or for anything else."*

Judge

On certain issues, it appears that defenders are not bringing motions regularly even when they feel it is appropriate to do so. When asked, "Are you able to raise issues such as mental capacity, competency, low education level, low comprehension or literacy as often as you feel appropriate?" defenders answered: frequently 17%; sometimes 47%; and rarely 36%. Those who answered that they only "sometimes" or "rarely" bring motions when they feel it appropriate gave reasons for not bringing motions that included: insufficient resources to adequately explore the issue 22%; judges are not receptive to these arguments 23%; plea bargaining with reasonable prosecutors prevents the need 50%; and high caseload 12%.

Aggravating the pursuit of a trial is the fact that defenders in some locations feel they cannot win at trial or that there will be worse ramifications for a client who chooses to take a matter to trial. One defender said, "Trials here are rare. We call them a 'slow plea.'" Another defender explained, "You run the risk of a charge being amended up if you go to trial in our county. They charge the case fairly to begin with and then threaten to add or up the charge if you want to go to trial."

Notwithstanding the above concerns, in many counties defenders are perceived by judges and others as well-prepared for court. A commissioner stated "defense attorneys [in our county] are often far more prepared than the prosecutors." A probation officer described one defender as "pro-active and prepared. She knows what she is going to say when she gets to court."

Also affecting trials and motions is the fact that, in almost all counties, independent investigation of cases is rare and only takes place in more serious cases. Increasingly limited state and local funding is affecting the availability of investigation funding for juvenile cases. This limited availability of funds was underlined by a defender, "Whenever I had a Class A or a case with lots of witnesses I would ask for funding for an investigator and I used to always get it, but this has changed recently, the commissioner has gotten stingy with the funds," and a commissioner, "It is hard to get investigator funding for public defense."

For an indigent offender, funding for case investigation comes from the county. The process for a defender to obtain funding differs from county to county, but often requires a written petition to the juvenile court judge or commissioner. It can be time-consuming to prepare a request and, especially in small communities, attorneys feel like they need to be cautious, so they do not lose credibility with judges by asking for investigative funding too often. As a result, attorneys put themselves in the position of deciding which cases merit investigation, leaving their work on other cases below professional standards. One commissioner noted, "our public defender makes an effort, but he does not do any independent investigation of facts."

As reported by defenders, the data shows that on a county-by-county basis, the average percentage of juvenile defense attorneys "frequently" using investigators was 21%. Averaging numbers has its limitations, of course. For example, in one county, 90% of its defenders report using investigators on a "frequent" basis. Conversely, within three of the counties surveyed, all of the responding attorneys indicated that they "never" make use of investigative support help in their practice. For the remainder of the counties, none had more than 50% of its defenders report using investigators "frequently." Thus, it appears that investigation of cases by defense counsel is rare. A juvenile court administrator noted that "[I can not] remember a defense attorney in juvenile court requesting investigation funds."

Finally, in some counties, defenders do not set trials, bring motions, or push for investigation funds because they fear "rocking the boat" and being ostracized by the juvenile court community. Evidence of this comes from a commissioner who ties a low trial rate in his county to the idea that everyone gets along well, "The trial rate is low in our county, and this is a testament as to how well everyone here gets along. We do what we can to foster good relationships." If the inverse is true—a higher rate of trials would mean to this commissioner that there are not good relationships among juvenile justice professionals, then

*"Defense attorneys [in our county] are often far more prepared than the prosecutors."*

Commissioner

*"[I can not] remember a defense attorney in juvenile court requesting investigation funds."*

Juvenile Court  
Administrator

deciding whether to go to trial on a case becomes a question with many more complicated issues than the zealous representation of a particular client.

In many counties, those interviewed spoke of a “team” when describing the juvenile court setting and the way that probation, prosecution, defense, and judges worked together. Many interviewees valued congeniality, the ability to ‘get along,’ and the tendency not to push beyond the prescribed (and often unspoken) limits. The Rules of Professional Conduct require professional behavior of every lawyer in Washington State, and most people would agree that, particularly in the context of a small community such as juvenile court, civility is an important tool for an effective attorney.<sup>82</sup>

It is necessary to behave in a professional manner and still provide a zealous defense, but for many interviewed, the concept of “teamwork” goes beyond civility. In many locations, the value of ‘getting along’ with others in the court system hurts a juvenile’s prospects for a zealous defense. One investigator’s notes on an interview of a defense attorney revealed why some attorneys may decide it is necessary to be a ‘part of the team.’

*When asked whether [the defense attorney] had ever requested [an independent]... expert in a capacity hearing,[the attorney] said, “It’s suicidal to upset the apple cart.” This was a comment on the congenial culture of the court system and what happens to [defense attorneys] if they try to upset that. [The attorney told me of trying]... (filed briefs, fought capacity, took things to trial, etc.) and giving up [because of] being treated so poorly by the other players in the system. “I feel like a pawn in the system” was the attorney’s statement. —Investigator*

Other defenders described the pressure of being on the outside of the system: “the defense bar doesn’t go farther than what the judges would approve — there is a subtle form of pressure, and this pervades the system. You ask for a special sentence and you lose 9 or 10 times, and it makes it harder to ask again.”

While many defense attorneys feel the pressure to be a ‘team player,’ others in the system value the attorney’s role as zealous advocate, especially the children whose lives are at stake. One youth put the situation into painful context, “I have a Public Defender, but it isn’t quite the same as having a lawyer. He works with the judge, not like a real lawyer. If he were real, then he would not follow along with the judge.” Some judges interviewed expressed a desire for more aggressive representation by the defense, citing concerns that children are pleading to charges that have long-term serious consequences, and the defense attorneys are “rolling over.”

Having a ‘team’ that works on behalf of a youngster in trouble may be ideal, but a problem arises when a defense attorney becomes a part of team in a way that diminishes the role as advocate. The Supreme Court described a system where no one played the role of watchdog when it noted “[j]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”<sup>83</sup> If juvenile court lacks someone in the role of a persistent defender and advocate for the youth, then unbridled discretion, however benevolently motivated, will continue to exist.

*“The defense bar doesn’t go farther than what the judges would approve — there is a subtle form of pressure, and this pervades the system. You ask for a special sentence and you lose 9 or 10 times, and it makes it harder to ask again.”*

Defender



### *Capacity, Competency, and Transfer Hearings*<sup>84</sup>

ATTORNEYS MUST DILIGENTLY PURSUE ANY INVESTIGATORY OR PROCEDURAL STEPS NECESSARY TO THE PROTECTION OF THE CLIENT'S INTERESTS. ATTORNEYS SHOULD SEEK APPOINTMENT OF EXPERTS, PRESENT EVIDENCE AND MAKE ARGUMENTS ON BEHALF OF THE CLIENT.<sup>85</sup>

When capacity is at issue, the burden of proof is on the state to show that a young child should be prosecuted. A defender who decides to waive the hearing relieves the burden upon the prosecutor to prove their case. The ramifications of “rolling over” in a capacity case are severe: a child, statutorily too young to automatically be in juvenile court, will find him or herself in courtrooms, probation offices and, perhaps, detention cells with older children. He or she will be inserted into systems that are geared to address the needs of older children. The child may be adjudicated of a crime that creates a permanent criminal history or requires registration as a sex offender for the rest of his or her life.

Again, the data is mixed as to defenders' efforts to challenge capacity. In some counties, defense attorneys are careful to challenge the state's attempt to charge eight to eleven year olds with a crime in capacity hearings. One commissioner notes, “Defense attorneys very seldom waive capacity hearings [here]. [The] defense attorney always has [a] child examined by an expert—we always use the same doctor in this county—there is only one local one who is willing to take capacity cases.”

However, in many counties, capacity hearings are regularly “stipulated,” meaning that the defense attorney waives the right to a hearing and agrees that an eight, nine, ten or eleven year old client can be prosecuted in juvenile court. A commissioner discloses, “[The] defense waives capacity hearings, and only sometimes has an evaluation done. I haven't seen a contested capacity hearing here in four years.” A judge reveals that “[t]here is a lot of rolling over on competency and capacity.”

The decision to stipulate appears often to be made without a proper assessment of the case. One defender explained that “When I have a capacity issue, I just talk to the parent and the child. If the parent thinks their kid should be charged—if this is a situation where they've been told their whole life [that the thing they did is] wrong, then I stipulate. I have never used an expert [for a capacity matter].”

While parents may have important insights about the abilities of their child, most do not have the skills, training or objectivity needed to assess their child's developmental stage. Parents may also lack the information necessary to assess the long-term legal and social consequences of a juvenile court adjudication. In addition, parents may have competing interests that color their opinion as to whether a child should be in the juvenile justice system. For example, parents with children who are presenting behavioral problems often hope that the juvenile justice system will help with parenting.

In some locations where the state uses an expert in capacity cases, the defender essentially abandons his or her role as advocate in the case:

*“[The] defense waives capacity hearings, and only sometimes has an evaluation done. I haven't seen a contested capacity hearing here in four years.”*

Commissioner

*There is an evaluation done on each case [involving children charged under the age of 12]. The court does whatever the evaluation indicates. If the report comes back saying the kid has capacity, then [the parties] stipulate to that. If not, then the case is dismissed, so there are no contested hearings. I can only remember one case where defense attorney asked for a second evaluation—the commissioner granted, but it meant a long delay. —Prosecutor*

It is without question that defenders should be taking an active role in the capacity decision-making process. In some jurisdictions, it is a regular practice for experts to evaluate offenders and give an opinion. In this case, a defender can play an important advocacy role before the evaluation by working with the evaluator and insuring sufficient information is provided. Further, once the evaluation is completed, the defender should continue to advocate, not merely agree to the outcome, as in the practice described above by a prosecutor.

Juvenile court professionals, including defenders, may be confused about the legal standards for capacity and competency. One defender noted, “We lose a lot. The psychologist routinely finds that the kid knows the difference between right and wrong.” However, the issue in a capacity hearing is not simply whether the juvenile knows the difference between right and wrong. State case law has specifically stated, “...[A]fter-the-fact acknowledgment that a respondent understood that the conduct was wrong is insufficient, standing alone, to overcome a presumption of incapacity by clear and convincing evidence.”<sup>86</sup> The more accurate question is whether the child was, at the time of the alleged crime, capable of forming the intent necessary to commit the crime charged. That assessment must include an analysis of the child’s maturity and capabilities.

Beyond the problem of confusing the standards, many counties have few psychologists, so it can be difficult for defense attorneys to find someone to properly evaluate a client for capacity or competency. More than one county reported having just one psychologist available to evaluate juveniles. An interviewee expressed frustration with the fact that their county’s only psychologist does not understand the legal standard for capacity. A probation officer explained the difficulty in another county, “There are only [a few] expert evaluators we use, and all of them are [several] hours away by car.”

Given these difficulties, cases are often delayed:

*In competency hearings there are far too many continuances— certain cases stretch out for an eternity. In one case a child waited 6 months for a hearing. The defense attorney wanted to get an evaluator from another county, which was part of the delay. This is in contrast to other counties where cases are hurried through. —Probation Officer*

Delay in and of itself is not necessarily a bad thing. The IJA/ABA standards in fact encourage lawyers to seek continuances of hearings until evidence is available, if to do so would serve the client’s interest.<sup>87</sup> In these counties, defenders are doing what they can to make sure expert evaluations take place.

Because mental illness and developmental disabilities occur in the juvenile offender population at a considerably higher rate than the general population, it is vital for the defense attorney to be able to identify these issues with their

*“...[A]fter-the-fact acknowledgment that a respondent understood that the conduct was wrong is insufficient, standing alone, to overcome a presumption of incapacity by clear and convincing evidence.”*

State v. K.R.L.

67 Wn. App. 721, 725 (1992)

clients and advocate accordingly. In some counties, however, the issue of competency is not being raised as often as it should. This may be partially due to the inability of defense counsel to recognize issues of incompetency in children.

A judge or commissioner may catch the issue and require an evaluation, but the opportunities for a judge to observe and interact with a juvenile are quite limited. As reflected by one commissioner, "I have concerns over the competency of children in front of me for pleas. I routinely get evaluations. Defense attorneys are pretty good at this, and the probation department is generally pretty eager to get outside evaluations." Although the defense and probation officers are responsive and "eager" to get outside evaluations, plea hearings are very late in the process. As a result, a child with mental health problems or developmental delays may have spent harmful time in detention or been exposed to other negative influences in the juvenile justice system.

Discretionary transfer or "decline" hearings are rare in most counties and are vigorously fought by defense counsel. Seventy-two percent of defenders reported using a psychological or psychiatric evaluation in preparation for discretionary declines.

*Decline hearings are rare. Usually it is agreed to retain (the youth in juvenile court), and the kid pleads guilty. —Judge*

The decreased number of decline hearings is due in large part to changes in state law in 1994 and 1997, rendering automatic the transfer of many juveniles to adult court. Although there has been a reduction in the number of discretionary hearings, the rate at which juveniles are being transferred to adult court has tripled since 1992.<sup>88</sup>

### ***Guilty Pleas***

IF AFTER FULL INVESTIGATION AND PREPARATION, COUNSEL CONCLUDES THAT UNDER THE EVIDENCE AND THE LAW, THE CHARGES WILL PROBABLY BE SUSTAINED, COUNSEL SHOULD SO ADVISE THE CLIENT AND SEEK CONSENT TO ENGAGE IN PLEA NEGOTIATIONS. COUNSEL SHOULD KEEP THE CLIENT ADVISED OF ALL DEVELOPMENTS DURING PLEA NEGOTIATIONS.<sup>89</sup>

In at least one county, defenders rarely allow a child client to plead guilty without having spent sufficient time with the child to prepare for the proceeding. A defender in this county explained, "A kid can plead at arraignment but it is rare to do that because [at that point in the proceedings the] attorneys have not spent enough time with their clients."

In most counties, however, children often plead guilty before their defender has done a full investigation of the facts of the case. A defender described the process as, "Kids frequently plea at the arraignment hearing. We fill out the plea forms and go over them with our clients." A commissioner noted that, "Before pleas there is virtually no independent investigation except for the most serious cases."

In some counties, attorneys for children vigorously negotiate plea deals for their clients. Although for some, the term "plea deal" smacks of extra-judicial,

*"Before pleas there is virtually no independent investigation except for the most serious cases."*

Commissioner

behind-closed-doors resolution of public issues, the fact is that most criminal matters are resolved by a guilty plea. The role of the defense attorney in negotiating a resolution via a guilty plea is key to maintaining the integrity of the system. If prosecutors overcharge a case, either in the number of crimes or the seriousness of crimes, a defender can negotiate reductions. Through negotiation, a defender can raise issues that might not be a legal defense to the crime, but are relevant to the level of culpability. A good negotiation can also result in a recommendation for a sentence that addresses problems underlying the criminal behavior.

While plea negotiations may be a key to the process, negotiations are often done at the last minute, limiting the amount of time left to explain the process and plea deals with clients.

Further, negotiations in some counties routinely end in “binding” deals in which a defender agrees to agree with the other parties at sentencing, as was made clear by one judge, “Most of the time on a plea the recommendation is “binding” that is, the public defender has to agree [with the other parties].”

The IJA/ABA Standards state that “ordinarily the lawyer should not make or agree to a specific dispositional recommendation without the client’s consent.”<sup>90</sup> Particularly where plea deals are done at the last minute, it is likely that clients are not giving informed consent for binding agreements. The result is that in many cases, children are not fully advised and do not have a good understanding of what they are doing with a plea of guilty. The problems are clearly evident in the courtroom. One commissioner described, “It is common that a child cannot make a statement of fact to support the plea. ‘I was there so I am guilty’ is what I hear a lot.” A detention staff member criticized this process, “the kids here don’t understand much. It is hard to excuse the judges for accepting pleas from someone who couldn’t tell you the first thing about what is going on.”

*“The kids here don’t understand much. It is hard to excuse the judges for accepting pleas from someone who couldn’t tell you the first thing about what is going on.”*

Detention Staff

## Disposition

THE ATTORNEY SHOULD BE FAMILIAR WITH THE DISPOSITIONAL ALTERNATIVES AVAILABLE AND COMMUNITY SERVICES THAT MIGHT BE USED IN A DISPOSITION PLAN APPROPRIATE TO THE CLIENT’S CIRCUMSTANCES. THE ATTORNEY SHOULD PROMPTLY INVESTIGATE ALL SOURCES OF EVIDENCE, INCLUDING REPORTS, OTHER INFORMATION AND TESTIMONY THAT MAY BE BROUGHT TO THE COURT’S ATTENTION. WITNESSES SHOULD BE INTERVIEWED AND SOCIAL, PSYCHOLOGICAL OR OTHER REPORTS SHOULD BE OBTAINED WITH SUFFICIENT TIME FOR THE ATTORNEY TO STUDY THEM. THE ATTORNEY MUST INDEPENDENTLY INVESTIGATE THE CLIENT’S CIRCUMSTANCES, INCLUDING SUCH FACTORS AS PREVIOUS HISTORY, FAMILY RELATIONS, ECONOMIC CONDITION, AND ALL OTHER INFORMATION RELEVANT TO DISPOSITION.

THE ATTORNEY SHOULD SEEK THE ASSISTANCE OF PSYCHIATRIC, PSYCHOLOGICAL, MEDICAL OR OTHER EXPERT PERSON-

NEL NEEDED FOR PURPOSES OF EVALUATION, CONSULTATION OR TESTIMONY WITH RESPECT TO THE FORMATION OF A DISPOSITIONAL PLAN.

THE ATTORNEY SHOULD EXPLAIN TO THE CLIENT THE NATURE OF THE DISPOSITIONAL HEARING, THE ISSUES INVOLVED AND THE NATURE OF THE PROCEEDINGS.<sup>91</sup>

It would be hard to overstate the importance of the role of the child's attorney at disposition. The authors of the IJA/ABA Juvenile Justice Standards states that in many cases, *the lawyer's most valuable service to clients* will be rendered at this stage of the proceeding.<sup>92</sup>

The disposition hearing is where the rehabilitation and punishment intentions of any juvenile court case come into sharp focus and conflict, and it is the responsibility of the youth's attorney to insure that rehabilitative options remain available.

In some locations, defenders fight hard for good sentences for their clients. One investigator observed a contested disposition hearing that continued for several hours. Witnesses were called by the defense attorney and a viable alternative sentencing plan was presented to the court.

In several counties, significant pre-disposition hearing negotiation takes place regarding the sentence. Negotiating a case in juvenile court is a more complex process than in adult court, one reason being that the JJA envisions the involvement of the probation officer at many stages of a juvenile case. Probation officers play a key role when they make sentencing recommendations at disposition. For a defense counsel to be effective at sentencing, she or he should be able to negotiate with the probation officer, as well as the prosecutor.

However, defense attorneys in most places are not fully prepared for disposition hearings. In many locations, the defense attorney's role at disposition is not pro-active, but reactive—primarily responding to the recommendations of the probation officer. One probation officer revealed, "We usually develop the disposition details and programs, and the defense lawyers either agree or don't." Another explained what may be one reason for the lack of preparation, "Defense attorneys sometimes feel like it is hopeless to present a case at dispo[sition] because they are not going to win."

The data indicate that in most cases, defense counsel do not provide alternatives to the court. Rarely are witnesses examined or expert testimony provided. This means that important opportunities are lost for presenting treatment plans, addressing issues in the youth's home that may have contributed to the delinquent act in the first place, or simply examining the viability of community-based sanction rather than unnecessarily incarcerating a youth. Clearly, youth are interested in alternatives, as one expressed, "My attorney should try to get me [into] ...programs—all kind of programs and help—not just drug/alcohol ones." But judges are amenable, as well. One judge remarked, "If the attorneys have the time to put together a plan for their client, I would probably grant it, but if they present no plan, the child will probably be spending more time behind bars."

There is a general consensus among juvenile court personnel that the number of sentences higher than the Standard Range are increasing. This is despite

*"If the attorneys have the time to put together a plan for their client, I would probably grant it, but if they present no plan, the child will probably be spending more time behind bars."*

Judge



the fact that one of the co-equal purposes of the JJA is to “Provide for the handling of juvenile offenders by communities whenever consistent with public safety.”<sup>93</sup> This creates a legally-based preference for children to be kept in the community rather than state facilities. Opinions vary as to why there is an increase in longer sentences.

*Kids are getting longer and longer sentences here. —Defender*

*M.I.s up are usually granted, and the defense attorneys don’t usually fight that hard. —Prosecutor*

*Sometimes a defender will make a gesture to raise issues relevant to the criminal behavior like, “He’s got ADHD . . .” but then they will give no information on how that related to the case or even the kid’s behavior. —Commissioner*

*There are a lot of M.I.s up where defense and prosecutors agree. [The Probation Officer] is also involved in this process. Kids who enter the system younger are more apt to get M.I.s up later down the road. The defense attorney is outnumbered—[there is] pressure from all sides for M.I.s up. [K]ids who are dependent [even] have [their] DSHS caseworkers who join in on request for an M.I. up. —Probation Officer*

To impose a sentence outside the standard range, courts must find that it would be a “manifest injustice” to impose the standard. Sentences above the range are commonly referred to as “manifest injustice up’s” or “M.I.s.” An M.I. requires a hearing to determine whether there are aggravating factors making it appropriate to impose something other than the presumed, or standard sentence. Often the probation officer or prosecutor will seek a higher sentence because the offender has serious emotional, addiction or behavioral problems, and community-based resources have not been secured. Sometimes the child’s probation officer recommends a longer sentence because the child has nowhere to live. In several counties, dependent children or children with a history of running from placements have been given exceptionally long sentences for minor offenses because the parties see no other options. Judges feel incarceration is their only choice for obtaining supervision and treatment.

Choosing to incarcerate a child because of the lack of community-based resources directly violates the JJA: “A court may not commit a juvenile to a state institution solely because of the lack of facilities, including treatment facilities, existing in the community.”<sup>94</sup> Thus, it is the defender’s role in these circumstances to seek out and create a plan for a viable community-based alternative to incarceration and present those options to the court. In many locations across Washington, defenders are missing this vital opportunity to help their clients.

Some defenders explained that they agree to a prosecutor’s request for an M.I. up as a part of the plea bargain. One defender described the type of bargaining that may occur, “I agree fairly regularly to M.I.s [up] in a plea bargain [for example, I’ll get a dismissal on] one case for M.I. up on another.” Another “agree[s] to [recommendations for] M.I.s up with Probation Officers because

they are going to get it in court—but [I] get them to lower the M.I. request to not as much [incarceration] time. Or [I] negotiate with the prosecutor. For example one kid was looking at a Robbery, and I got him an Attempted Robbery and agreed to an M.I. up to a sentence that was what the kid would have gotten with original charge.”

Conversely, in many counties, defenders rarely request sentences for their clients that are below the standard range:

*It is not at all uncommon to see a request for an M.I. up—but it is very uncommon to see one for an M.I. down. —Judge*

*M.I.s up are not uncommon. M.I.s down—I never have seen one. —Probation Officer*

Just as a sentence can be higher than the standard range, a sentence below the standard range may be appropriate with mitigating factors. A defender may argue for an M.I. down and present a sentencing plan that includes treatment, supervision, and living circumstances that address problems underlying delinquency. In fact, recent Washington appellate court decisions have reinforced the necessity of sentences below the standard range.<sup>95</sup>

## *Appeals*

THE DECISION TO APPEAL IS THE CLIENT’S RESPONSIBILITY AFTER FULL CONSULTATION WITH COUNSEL.<sup>96</sup>

Juvenile cases are infrequently appealed. Defenders reported an average of 2.67 cases appealed in the last twelve months.<sup>97</sup> Thirty-five percent of defenders had filed no appeals in the last year. Defenders averaged 2.09 petitions in the last year to revise a commissioner’s decision, but 50% reported having filed none at all during that time period.

Some defenders hypothesized that the low appeal rate was the result of a financial risk to the offender’s family. One defender explained that “if a child files [an appeal] and loses, they will have to pay \$2,500.” Another agreed that “Money is an issue here. Parents know they will be billed, and so discourage [their children from] appeals.” There is currently no data showing whether defenders play a role in discouraging appeals in Washington state.

## *Post-Dispositional Advocacy*

THE LAWYER’S RESPONSIBILITY TO THE CLIENT DOES NOT NECESSARILY END WITH THE DISMISSAL OF THE CHARGES OR THE ENTRY OF A FINAL DISPOSITIONAL ORDER. THE ATTORNEY SHOULD BE PREPARED TO COUNSEL OR ASSIST IN SECURING APPROPRIATE LEGAL SERVICES IN MATTERS ARISING FROM THE ORIGINAL PROCEEDING. IF A SENTENCE IS IMPOSED, THE LAWYER SHOULD MAINTAIN CONTACT WITH THE CLIENT AND AGENCY TO ENSURE THAT THE CLIENT’S RIGHTS ARE



RESPECTED. REGARDLESS OF THE OUTCOME OF THE OFFENDER MATTER, IF THE LAWYER IS AWARE THAT THE CLIENT OR THE CLIENT'S FAMILY NEEDS COMMUNITY, MEDICAL, PSYCHOLOGICAL, SOCIAL OR LEGAL SERVICES, THE LAWYER SHOULD RENDER ALL POSSIBLE ASSISTANCE IN ARRANGING FOR SUCH SERVICES.<sup>98</sup>

*"The problems that led to a child getting criminally involved weren't created in a day—and aren't going to be fixed in a day either. I'm frustrated that our contract doesn't let me keep on working with clients after a criminal case is over—I've got a relationship with them and a lot of times have a good idea what kind of services they need."*

Defender

Defenders seldom assist clients after the juvenile court matter is finished, even to make referrals for needed services. Because Washington is unique in that its juvenile sentencing scheme is determinative, youth do not languish indefinitely in juvenile detention and, therefore, may not need the same level of post-dispositional advocacy. However, the defender must be a watchdog on conditions of confinement, how probation services are delivered, and how the other terms of the sentence are imposed.

The IJA/ABA standard requires defenders to help their juvenile clients with other matters in their lives. The youth's lawyer is in the right place at the right time to ensure that the problems underlying the youth's delinquent behavior are addressed. This is clearly a point of frustration for defenders and may have institutional origins, as one expressed, "The problems that led to a child getting criminally involved weren't created in a day—and aren't going to be fixed in a day either. I'm frustrated that our contract doesn't let me keep on working with clients after a criminal case is over—I've got a relationship with them and a lot of times have a good idea what kind of services they need." There are alternative structures that have allowed for a defender's continued assistance, "We're lucky in this county because we have a TeamChild office here. They work with the kids on education, access to mental health services and safe living situations. They help kids during their cases and then after the criminal case is over for as long as it takes to get them what they need."

#### D. CASELOADS AND ASSIGNMENT

THE CASELOAD OF AN ATTORNEY WORKING FULL-TIME SHOULD NOT EXCEED 250 JUVENILE OFFENDER CASES PER YEAR. IN JURISDICTIONS WHERE ASSIGNED OR CONTRACT COUNSEL ALSO MAINTAIN A PRIVATE PRACTICE, THE CASELOAD CEILING SHOULD BE BASED ON THE PERCENTAGE OF TIME THE LAWYER DEVOTES TO PUBLIC DEFENSE.

CASELOAD LIMITS SHOULD BE DETERMINED BY THE NUMBER AND TYPE OF CASES ACCEPTED. THE QUALIFICATIONS OF AN ATTORNEY SHOULD BE CONSIDERED IN THE DETERMINATION OF TYPES OF CASES ASSIGNED.<sup>99</sup>

*I believe that high caseloads are one of the biggest barriers to effective juvenile defense.*  
—Defender Supervisor

Across the state, caseloads routinely violate accepted standards of practice. Specific caseload limits, established by the Washington Defender Association in

1984 and updated in 1989, have been endorsed by the Washington State Bar Association and are referenced by Washington statute. Defenders interviewed cited caseloads ranging from 360 to 750 cases a year. Defenders working full-time reported in the written survey an average of close to 400 cases annually, roughly 62% more cases than the advised standard of practice. The data indicate that those working part-time may have a proportionately higher number of cases. Not insignificant is the fact that 86% of defenders responding to our survey reported they either do not have a cap on the number of cases they could be assigned, or they did not know whether there was a cap. It should also be noted that there is reason to suspect that some attorneys with even higher caseloads did not respond to the written survey, and, thus, the averages found in our data may be lower than actual numbers.

Defenders acknowledge that high caseloads are reducing the quality of representation. Defenders were quoted as saying, “There are a lot of cases and not much time to figure out what can be done for each kid,” and “the high number of cases means I don’t spend as much time on each case and can’t give each kid as many services as they need.” It is obvious that the more cases a defender has, the less time there is for each client. This former defender describes what may also be happening around the state:

*I had 30 arraignments a week...[I would get the cases and have no time to prepare.] The only way to do it is to create an assembly line. I can only survive if I plead out half of my cases at arraignment. A ‘good’ attorney can’t survive. My caseload was way too high to be able to do a decent job. I would have my secretary fill out a [guilty] plea form on every case right when we got the case. Then I’d have it ready for arraignment, a completed [guilty] plea form in every file. — Former Defender*

Juvenile justice professionals across the spectrum consistently perceive defense attorneys as “overwhelmed” by the number of cases in their caseloads. One detention supervisor could not “imagine how the PD’s could do decent work with the caseloads they carry.” A probation officer described defenders’ caseloads as “too big, and they are overwhelmed.” A judge remarked that “[I] would like to see smaller caseloads for defenders.”

Not only are defenders assigned too many cases, but, in most counties, case assignment is not determined by the qualifications of the attorney. Attorneys in most counties, whether on a panel of contract attorneys, members of a public defense firm or county employees, get cases assigned without a system that considers the experience level of the attorney, despite the fact that specific standards for case assignment were endorsed by the Washington State Bar Association. A review of the contracts of counties where onsite visits took place showed that most counties are not applying the standard in their contracts. Only one county specifies the experience level of a juvenile defender who is to be assigned a Class A felony, but it failed to include qualifications for assignment of Class B & C felonies. Another county’s contract required attorneys to have one year of experience in “the general practice of law.” Some of the contracts listed no qualifications for attorneys, or simply required that attorneys be “admitted to practice and in good standing.”

The result is that attorneys without any experience working with juveniles,

*“There are a lot of cases and not much time to figure out what can be done for each kid.”*

Defender

*“I cannot imagine how the PD’s could do decent work with the caseloads they carry.”*

Detention Staff

or without experience in criminal law at all, are given responsibility for serious criminal and delinquency cases.

The Washington standards require that before an attorney is allowed to represent a juvenile in a Class A felony, the attorney must have one year of experience in juvenile court or have been trial counsel in five juvenile Class B and C felony trials. Regardless of experience, the standards require that every attorney shall be accompanied at his or her first juvenile trial by a supervisor.<sup>100</sup> Most counties in Washington State do not have a juvenile court defense supervisor.

Making the situation worse is the fact that, in most places, there is no formalized system of case assignment that takes into consideration the seriousness of a case and how many serious cases a particular attorney is already carrying. Thus, by random assignment, an attorney could end up with the majority of a month's cases being easily resolved or with a caseload of serious felonies. Even an experienced attorney must spend more time on serious cases, thereby restricting the attorney's ability to give the necessary attention to each of his other cases. While class of crime may dictate its seriousness and the time required, high profile cases and sexual offense cases may also be extremely demanding of an attorney's time and attention.

## E. TRAINING AND PROFESSIONAL DEVELOPMENT

LAWYERS PRACTICING IN JUVENILE COURT CASES SHOULD BE SPECIALLY QUALIFIED THROUGH FORMAL TRAINING, ASSOCIATION WITH EXPERIENCED COUNSEL AND BY OTHER MEANS. SUITABLE UNDERGRADUATE AND POSTGRADUATE EDUCATIONAL CURRICULA CONCERNING LEGAL AND NON-LEGAL SUBJECTS RELEVANT TO REPRESENTATION IN JUVENILE COURTS SHOULD REGULARLY BE AVAILABLE.<sup>101</sup>

In a few counties, there is regular supervision and training. One defender described his supervision as "very good—they follow us around when we are new—accompany us to all court hearings. There are also so many attorneys around that I can ask any of them questions."

In the vast majority of places across the state, however, there is no comprehensive training available to juvenile defenders. As one defender described it, "my training consisted of one hour meeting with the...[former public defender]. Nothing else."

The Washington Defender Association, the Washington Bar Association, and the Northwest Juvenile Defender Center have intermittently provided continuing legal education trainings at different locations across the state, but this is clearly not sufficient. One defender explained, "I attend WDA's CLEs when I can, but there are not enough."

Juvenile defenders are not receiving enough training on legal procedure and ethics, nor on topics specific to juvenile practice. This lack of training is evident in defenders' low rates of motions and greater likelihood to waive the right to dispute matters, such as capacity. One defender noted that "not only are [defenders] completely untrained once they start, but even those who have been doing it for years get no direction or support from anyone. Several of them don't have the slightest clue about the most common procedures."

Defenders from across the state responded to questions about training. Defenders responding to the survey reported that only three counties have training for new attorneys, only four counties have training specific to juvenile defense, only seven counties have specialized materials available regarding issues specific to juvenile defense, and only three counties have an in-house training coordinator. One investigator saw first hand the results of this lack of training:

*We watched a defender, who turned out to have less than a year's worth of experience, no trial experience, no previous experience or observation of a decline hearing and no supervisor present, represent a client in a decline hearing on three Class A felonies. The defender knew it was a problem but had nowhere to turn. The youth was sent to the adult system.*

Juvenile defenders also need training in non-legal areas that are central to working with high-risk youth. As a population, young people accused of crimes have high rates of mental illness, learning disabilities, addiction and other problems.<sup>102</sup> In order to address these varying needs, an attorney must have more than just a good grasp of criminal law. To be an effective advocate for youth in the justice system, a number of juvenile court personnel interviewed stated that there needs to be substantive training for juvenile justice professionals in the areas of child development, substance abuse and addiction, mental health, special education, and learning disabilities. As one Juvenile Court Commissioner explained, “Juvenile defenders need training—we all could use it. Especially in the areas of child development, juvenile law and substance abuse.”

There is a large discrepancy in the provision of training across the state. The availability of training in Washington’s most populous county is much higher than in other counties. As shown by these data collected from defenders in cross the state, in most counties there are very low rates of training on topics crucial to developing sentences that include appropriate treatment. Some juvenile justice professionals suggested that there should be a training component built in to the contracts for defenders—a requirement that new juvenile defense attorneys spend a certain amount of time in training before they would be considered for the contract.

<b>Have you received training of any type on the topic of:</b>	<b>King County's Defenders</b>	<b>All Other Counties' Defenders</b>
• Arguments for detention alternatives	83%	28%
• Community alternatives to incarceration	83%	33%
• Showing amenability to treatment	58%	13%
• Pretrial motions practice	75%	31%
• Child development and issues of competency	67%	35%
• Special issues of female offenders	25%	4%
• Special education or learning disabilities	67%	26%
• Working with treatment professionals	42%	28%
• Working with disabled youth	58%	19%
• Transfer of juveniles into adult court	75%	31%

*“Attorneys have the tendency to talk down to their clients, this is how they are trained in law school — to get to the heart of the matter. It’s like they are thinking, You must not let the client tell you a [long] story [filled with unnecessary details they don’t have time for].”*

Probation Officer

Substantive topics are not the only areas in which attorneys need training. Defenders lack the communication skills necessary for effective representation of adolescents. Juvenile clients get treated like adults clients. A probation officer described the problem, “Attorneys have the tendency to talk down to their clients, this is how they are trained in law school — to get to the heart of the matter. It’s like they are thinking, ‘You must not let the client tell you a [long] story [filled with unnecessary details they don’t have time for].’” One youth pleaded for attorneys to “talk with kids. Understand us as people, not criminals. Learn about our lives.”

One manifestation of this inability to effectively communicate with youth is the tendency for the attorney not to make special efforts to be in contact with young clients, often waiting for their clients to contact them. While defenders expressed that their clients rarely contact them or they have never had an in custody client call them, the truth is that youth are often intimidated or inexperienced in making appointments and meeting with adults. Learning disabilities may often complicate this situation for the youth. Hence, given the unique characteristics of young clients, it necessary for the attorney to contact clients and set up meetings that allow for appropriate time to develop a relationship.

Another serious problem is the attorney’s inability to adequately explain to a young client procedure, legal rights, and the attorney-client relationship. While the concepts are the same in adult and juvenile court, explaining the concept of confidentiality to a 13-year-old is quite different than to an adult. A youth advocate succinctly illustrated these difficulties:

*They [youth] haven’t talked to their attorney in detention, [or if they have] they don’t understand what the [public defender] says to them because of a poor choice of language. They don’t understand what happened in court, and the PD’s don’t sit down with kids after court to explain what happened. It is partly a time issue, the PD’s don’t have enough. But the language [used] is an issue—kids don’t understand what attorneys and judges are saying to them. —Youth Advocate*

## F. INCONSISTENCY IN THE QUALITY OF COUNSEL

EACH COUNTY OR CITY IN WASHINGTON STATE MUST ADOPT STANDARDS FOR THE DELIVERY OF PUBLIC DEFENSE SERVICES, WHETHER THOSE SERVICES ARE PROVIDED BY CONTRACT, ASSIGNED COUNSEL, OR A PUBLIC DEFENDER OFFICE. THE STANDARDS SHALL INCLUDE THE FOLLOWING: COMPENSATION OF COUNSEL, DUTIES AND RESPONSIBILITIES OF COUNSEL, CASE LOAD LIMITS AND TYPES OF CASES, RESPONSIBILITY FOR EXPERT WITNESS FEES AND OTHER COSTS ASSOCIATED WITH REPRESENTATION, ADMINISTRATIVE EXPENSES, SUPPORT SERVICES, REPORTS OF ATTORNEY ACTIVITY AND VOUCHERS, TRAINING, SUPERVISION, MONITORING AND EVALUATION OF ATTORNEYS, SUBSTITUTION OF ATTORNEYS OR ASSIGNMENT OF CONTRACTS, LIMITATIONS ON PRIVATE PRACTICE OF CONTRACT ATTORNEYS, QUALIFICATIONS OF ATTORNEYS, DISPOSI-

*Washington State law requires counties to adopt standards for delivery of public defense. Most counties have failed to comply with the law.*



TION OF CLIENT COMPLAINTS, CAUSE FOR TERMINATION OF CONTRACT OR REMOVAL OF ATTORNEY, AND NONDISCRIMINATION.<sup>103</sup>

In Washington, the quality of counsel a child encounters depends significantly on where he or she lives. Although RCW 10.101.030 requires counties to adopt standards for the delivery of public defense, most counties have failed to do so, according to the preliminary findings of a Washington State ACLU survey.<sup>104</sup> The Washington State Office of Public Defense believes that some counties that have adopted standards may not actually implement or enforce them.<sup>105</sup> As a result, the quality of defense is inconsistent.

Interviewees repeatedly described individual defenders who, despite inadequate training and high caseloads, performed above and beyond expectations. However, interviewees also recounted stories of defenders who were not adequately performing. The data indicate that (1) supervision and evaluation of attorneys is inadequate, and (2) in jurisdictions where cases are handled by “contract” attorneys, quality control is even worse.

In a few locations, regular performance evaluation does occur. One supervising defender explained that their office evaluates its attorneys every year and gives specific feedback on performance in and outside of the courtroom. “[I believe] regular evaluation is essential to maintaining a good level of practice.” Another supervisor acknowledged that evaluating their staff attorneys is required by the county contract.

However, it is only in a few locations where attorneys get regular performance reviews. One particularly devastating anecdote illustrated the problems that may arise when there is inadequate, or even non-existent, quality control:

*We have one attorney [here]... who is a real problem. It is a sad case because [the attorney] used to be a brilliant litigator—still could be— but [the attorney] has slid downhill in a big way...[The attorney] does not prepare cases and never visits clients in detention—the situation has gotten really bad. I even had a [juvenile] client complain to me that this attorney smelled of alcohol...This highlights a major problem with our contract. ...[T]here are no safeguards built in to ensure the level of quality stays high. There needs to be a written procedure in the contract for removing someone who is not doing his or her job. —Defender*

The data indicate that private counsel who contract with counties for public defense cases often have private cases that compete for their time. A probation officer observed that “many defense attorneys have their own private practice, and I think that interferes [with the juvenile court practice]. They don’t spend enough time with their clients, maybe they wouldn’t financially survive, so they must have a private practice — not ideal.” A prosecutor gave this perspective on defenders juggling private cases with a defender caseload: “The contract attorneys aren’t well organized. They don’t pick up the discovery before the hearings. They just want to put in as little time as possible on the juvenile court cases so they have enough time for their private practice cases.”

Some contract attorneys must withdraw from their contracts, given the unmanageable caseloads. One particular attorney had signed a contract with

*“[I believe] regular evaluation is essential to maintaining a good level of practice.”*

Supervising Defender

*“The contract attorneys aren’t well organized. They don’t pick up the discovery before the hearings. They just want to put in as little time as possible on the juvenile court cases so they have enough time for their private practice cases.”*

Probation Officer

the understanding that it would be the equivalent of a half-time caseload. The pay was a flat rate each month for the part time work. But instead of half of a caseload, the attorney was overwhelmed with cases and scheduled for hearings 5 days a week. Thus, while some attorneys have good intentions, unrealistic demands may be crippling them.

## G. JUVENILE DEFENSE 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 TO THE EXTENT LOCAL CIRCUMSTANCES PERMIT.<sup>106</sup>

In Washington, 50% of defenders working in defender agencies reported that lawyers cannot remain indefinitely in the juvenile division of their office. The result is what one defender referred to as a “forced relocation” from one division to another.

The IJA/ABA standard recognizes that for training or other circumstances, staff attorneys may need to be moved from one division to another. However, the IJA/ABA standard also recognizes that work within the juvenile justice system is complex and specific enough that, if possible, attorneys should have the opportunity to specialize. A variety of juvenile court personnel and defenders agree:

*The only reason I even went to law school was to work with kids. To work at this office I have to be willing to rotate out of the juvenile division for a year or two and work in adult felonies or misdemeanors. It’s a forced relocation. I’m sure I learn from being in other divisions—but the fact is that when I come back to juvie, I’ve fallen behind on what I should know to be a good juvenile defender. —Defender*

*Having attorneys [be able to] stay at juvie long enough to get familiar with system, players, and kids is critical. The informal dialogue which results from professionals having the opportunity to know each other is important and advantageous to defense attorneys. —Probation Officer*

*I think attorneys in juvenile need to remain there as long as they thrive there and want to be there. The system of rotating attorneys [out and into a different division] pulls attorneys [away from juvenile court] too quickly. If attorneys are to be rotated [out], it should be between 3 to 5 years after coming to juvenile court. Pulling attorneys into other areas of practice too quickly is an area of big concern for us. —Defender*

## H. RACIAL DISPROPORTIONALITY

According to a 1993 University of Washington study by Dr. George Bridges, disproportionate numbers of racial and ethnic minorities are found at each stage of the process in the juvenile justice system—starting from police stops on the street all the way through to sentencing. Ten years later in 2003, a study ini-



tiated by the *Building Blocks Initiative* in King County and conducted by Christopher Murray & Associates concluded that “racial disproportionality starts with the telephone to the detention screeners.”<sup>107</sup>

In 1998, Dr. Bridges released a study on probation officers’ attitudes toward different racial groups. He found that, holding all other factors constant, probation pre-sentencing reports consistently portrayed African-American and white youth differently, resulting in harsher sentences for the African-American children. “What struck me was the profoundly different ways the reports described children who are seemingly different only by their race,” said Dr. Bridges in an interview. “The children would be charged with the same crime, be the same age and have the same criminal history, but different ways [the children] were described was just shocking.”<sup>108</sup>

While racial disproportionality has been identified at every stage in the process, it is unclear what role defenders themselves may play in this problem. They acknowledge that African-American, Asian, Hispanic, and Native American clients are over-represented in the system, however, it seems likely that the same prejudices and problems found in other juvenile justice personnel would occur among defenders. Bias could be affecting the quality of representation in a number of ways, including how hard a defender works on a case or what types of resolutions seem feasible to a defender. A social worker interviewed described how a review of her caseload and realized that it was disproportionately white, meaning that she was receiving a disproportionate number of referrals by defense attorneys for white youth. If a defender doesn’t refer a case for help from a social worker, it is less likely that case will have sentencing alternatives developed. These types of devastating consequences reinforce the need for defenders to receive training as to how to address their own and systemic biases in the justice system.

## I. THE JUVENILE SYSTEM AS A DUMPING GROUND

*There are way too many kids here who have no business being here but, nonetheless, end up pleading to some offense. Whose responsibility is it? It is a severe failing of the system. —Detention Staff*

Children with mental health problems, learning disabilities, behavioral problems, and addiction issues are not getting what they need in the community, so they often end up in the juvenile court system. In particular, kids with mental health problems are facing, as one youth advocate termed it “punishment in lieu of treatment.” A detention supervisor explained that kids with mental health problems end up pleading to some offense to get out, when they should never have been in detention initially. Other detention staff acknowledged that they see many kids in detention with serious mental health problems.

The numbers substantiate the anecdotal evidence. In 2000, Washington’s Juvenile Rehabilitation Administration found that 40% of kids incarcerated in its facilities met the criteria for “serious mental health disorder.” Less than three years later in February 2003, 58 percent of youth in residence met the same criteria.<sup>109</sup>

*Juveniles with mental health issues end up in the juvenile justice system ... because there are not enough community resources for them. Punishment is used in lieu of treatment.*

Youth Advocate

Defenders fail to adequately help their clients with mental health and other serious problems. Eighty-three percent of defenders surveyed reported only “sometimes” or “rarely” raising issues such as mental capacity, competency, low educational level, low comprehension level or literacy as often as they thought appropriate. Twenty-two percent said they did not raise the issues even when they felt the case merited it, because there were not enough resources to adequately explore the issue. Twenty-three percent explained they did not raise these important issues because judges are not receptive to the arguments. Significantly, an additional 50% said they did not raise these issues because “plea bargaining with reasonable prosecutors prevents the need.” This last reasoning reflects an unwillingness or inability to creatively address issues on sentencing, even when a good plea deal has been obtained.

# CHAPTER THREE

## Voices Rarely Heard: Insights From Youth

*“One of the most obvious facts about grownups to a child is that they have forgotten what it is like to be a child.”*

Randall Jarrell

Children involved in the juvenile justice system across the state were important contributors to this assessment. They were interviewed about many aspects of their experience with defenders. Two general questions “What do you like about your attorney?” and “What could your attorney do better?” brought amazingly consistent answers from youth throughout the state. Youth consistently answered that they want to be listened to, that they need time with their attorneys that they are not getting, and that they want their perspective to be understood.

### What do you like about your attorney?

*“He listens, I like him a lot, he’s pretty cool.”* 15-year-old boy

*“She has taken the time to get to know me before she defended me. She is trying to get my case dismissed. Other kids feel like their attorneys don’t get to know them, and they don’t come to see them.”* 17-year-old boy

*“He was honest to me and trusted me. He sticks with me during court, the whole way.”* 16-year-old boy

*“They can talk to the judge and explain why you did what you did.”* 17-year-old boy

*"He doesn't beat around the bush. He is cool with everything and tries to get me out of trouble. He is there when I need him. He explains things so that I can understand them."* 15-year-old boy

*"[My attorney] listens [to me.] She brought on other people to testify at the probable cause or suppression hearing, and she did a good job."* 17-year-old boy

### **What could your attorney do better?**

*"Get my trust, so I can talk with you."* 15-year-old girl

*"They could listen more."* 17-year-old girl

*"Talk with kids. Understand us as people, not criminals. Learn about our lives."* 16-year-old girl

*"I wish they would spend more time with me. And that they would look into things more instead of just believing the police and what they say."* 17-year-old boy

*"I wish lawyers worked hard to lower sentencing and to encourage kids not to do things by talking to them about long term consequences, effects of a permanent record. The attorney didn't listen to reason about my [probation violation]. He just let me tell the judge."* 16-year-old boy

*"Talk to me ahead of time so that I can know the facts and the possibilities. Try for the possibilities and don't just assume it's not going to happen."* 17-year-old girl

*"I wish lawyers would sit down and really listen to me. Every time we have a visit, they are talking fast, and I don't have time to ask questions because we are about to go into court, or sometimes we are already in court. I wish they would tell me stuff."* 17-year-old boy

*"Talk to me, I guess, about the crime. I don't really understand [what is going on in my case]. [My attorney] said 'you are going to plead guilty,' and I didn't want to. He was making me say something that wasn't true. He thought I was lying."* 13-year-old boy

*"I have a PD, but it isn't quite the same as having a lawyer. He works with the judge, not like a real lawyer. If he were real, then he would not follow along with the judge."* 13-year-old boy

*"I don't have time to ask questions or talk, so I don't know if [my attorney] listens to me or not. Everything is kind of rushed [when we meet]."*  
15-year-old boy

*"I wish she would at least return my message[s] and get back to me."*  
16-year-old boy

*"[I wish my attorney] fought harder [for me]. The police [in our town] are very disrespectful and are always hassling us. No one seems to care." Boy*

*"My attorney should try to get me [into]...programs— all kind of programs and help—not just drug/alcohol ones." 13-year-old boy*

*"I think [the attorneys] will do whatever they want. It's important to listen. They do not really understand me. They are all set on what THEY are going to say and do—instead of just listening to me." 16-year-old girl*

*"Listen to our ideas and what we want and at least suggest them to the judge." 16-year-old girl*

*"The attorney's job is to do what's best and what the client wants to do— if the attorney thinks I should do something, then explain it, but he should also listen to me." 17-year-old girl*

*"I want more information about what the attorney is thinking about. I want him to interview me and others about my case. I feel like the lawyer thinks that I am a bad kid, and I should be thrown away." 16-year-old boy*

*"Be in court for all hearings." 16-year-old boy*

*"Really fight for me, for what I want." 17-year-old boy*

*"I don't feel like I have a chance to defend myself. Some attorneys try to help, some don't." 17-year-old boy*



# CHAPTER FOUR

## Programs That Work

*“Vision is the art of seeing the invisible.”*

Jonathan Swift

Despite structural and systemic barriers that limit the quality of juvenile defense in Washington, across the state there are individuals and programs creating positive change. WJJAP’s investigators observed and heard of defenders who zealously represent their clients. Attorneys who are well-prepared for court, engaged with their young clients, and educated in a variety of child-specific issues were evident in several parts of the state. In addition to individual efforts, some defenders are helping to address systemic issues through efforts with state and local organizations. There are collaborative efforts across disciplines and creative projects to improve juvenile justice and the provision of defender services.

### 1. Effective Juvenile Defender Practices

WJJAP’s data showed that certain practices improve the quality of representation of children. Generally, effective juvenile defender practices include:

- Caseloads limits;
- Representation of a child as early as possible in the case;
- Consistent counsel throughout a case and on new matters that arise;
- Support and the flexibility to represent or refer a child in matters related to delinquency, such as special education, mental health treatment or housing;
- Provision of training when an attorney begins work in juvenile court;

*Despite structural and systemic barriers that limit the quality of juvenile defense in Washington, across the state there are individuals and programs creating positive change.*



- Access to ongoing training and resource materials;
- Adequate non-lawyer support and resources;
- Supervision and performance evaluation of attorneys; and
- A work environment that values the importance of a robust juvenile court practice.

## **2. Juvenile Programs in Washington Associated with Juvenile Defenders**

There are a number of organizations, programs, and efforts in Washington state that directly or indirectly improve the work of public defenders through training or supplementing services provided by defenders. Not only are formal programs missing from this list, but many efforts to improve defense and the juvenile justice system in general are not listed. In some counties, contract attorneys meet together on a regular basis to share legal knowledge and information about juvenile issues. In other counties, defenders arrange for speakers to address their communities on issues relevant to juvenile justice. Defenders participate in community organizations, sit on boards and are members of various task forces.

While not all efforts can be listed in this report, a list of some programs started by defenders across the state show not only innovative approaches that are working, but the commitment of defenders to change the system for the better.

### **Equal Justice Spokane County**

This project seeks to alleviate the disproportionate number of minority youth in the Spokane County juvenile justice system by providing public defenders and attorneys, the courts, and probation staff with information about the unique and individual needs of minority youth held in detention. The goal is to ensure that each youth understands how his or her case will move through the juvenile justice system, how it may impact his or her criminal records and future, to develop individualized plans for each youth that include alternatives to detention, and to advocate for the youth at sentencing hearings. The focus is on the pre-adjudication phase, with a specific effort to move minority youth out of detention and into an appropriate community placement. This program was started by public defenders.

### **Juvenile Justice and Special Education Clinic Seattle University School of Law King County**

This clinic-based program focuses on the link between the unmet educational needs of students and their entry into the juvenile justice system for truancy and other entry related offenses. Through classroom instruction, consultation, and practice, law students learn to advocate with school districts on behalf of children and parents, to assure that the school districts are responsive to the legal mandate to meet the educational needs of these students. Although not started by public defenders, the clinic works closely with defenders.

**Northwest Juvenile Defender Center  
Regional**

Associated with the ABA's National Juvenile Defender Center, the northwest regional center is a fairly new organization seeking to provide support and training to juvenile defenders in a seven state region (Alaska, Idaho, Montana, Nevada, Oregon, Washington and Wyoming). It was started by public defenders from throughout the region, but the leadership is based in Washington state.

**Raising Our Youth as Leaders (R.O.Y.A.L.)  
King County**

Recognizing that disproportionate numbers of African American youth spend time detained, ROYAL was started as a program to create detention alternatives for African American youth. It represents the combined effort of several community-based organizations to reduce the disproportionate number of incarcerated African Americans. This program was started by public defenders who sought out service providers, counseling, and religious organizations as partners.

**TeamChild—Advocacy for Youth  
King, Pierce, Spokane, Snohomish and Yakima Counties**

TeamChild works exclusively with juvenile offenders referred by defenders, judges, and probation officers. Providing civil legal representation on issues contributing to delinquency, it helps address problems in school, obtain medical and mental health benefits, and secure safe living situations. TeamChild seeks to develop alternatives to incarceration of children and ensure that problems underlying criminal behavior are addressed. Additionally, it provides training to defenders and other juvenile justice professionals across the state. This program has gained national recognition through awards and replication in other states. TeamChild was started through collaboration between civil legal services and public defender organizations.

**Washington Defender Association**

The Washington Defender Association is a statewide professional organization for public defenders. It provides training, resources, materials, and technical assistance for attorneys, and has initiated a number of pilot projects with innovative approaches to public defense. WDA also lobbies for changes to improve the quality of public defense and criminal law. WDA has been a leader on many juvenile offender issues. WDA was started by public defenders.



# CHAPTER FIVE

## Conclusion and Recommendations

*“If we don’t stand up for children, then we don’t stand for much.”*

Marian Wright Edelman

Children facing charges in Washington’s juvenile justice system often do so with representation that does not meet accepted standards. Whether those standards are the Institute of Judicial Administration and American Bar Association’s Juvenile Justice Standards, the standards produced by the Washington Defender Association and endorsed by the Washington State Bar Association, the Rules of Professional Conduct for Attorneys, or the Revised Code of Washington, there are critical gaps in the quality of representation provided Washington’s children.

This is certainly not to say the situation is dire or hopeless. Across the state there are many committed, talented people who work hard to protect the rights of children. Washington’s unique determinative sentencing structure lays a strong foundation for a good system of justice. The hundreds of people who committed time, resources and insights to improve the juvenile justice system by participating in and contributing to this assessment are further evidence of the commitment to children in Washington state.

Washington is obligated to ensure that the due process rights of children in its juvenile justice system are protected and that every child has meaningful access to effective assistance of counsel at all stages of the justice process. Just as important, though, is for Washington and its citizens to create a juvenile justice system that helps the state’s children fulfill their potential.

The fact is that it is fiscally responsible for the state to ensure the quality of counsel for its children. For example, if attorneys have the training and time to present sentencing alternatives to incarceration, the high cost of both local and state incarceration will be reduced. As one judge confirmed, “If the attorneys have the time to put together a plan for their client, I would probably grant it, but if they present no plan, the child will probably be spending more time

*Children facing charges in Washington’s juvenile justice system often do so with representation that does not meet accepted standards.*

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behind bars.” This has both immediate and long-term impacts on costs for counties and the state. Attorneys have the opportunity to develop important relationships with troubled children who are their clients. With training to identify problems in their clients’ lives, defenders can be an integral part of ensuring that factors contributing to children’s behavior are addressed earlier, thereby lowering recidivism rates and saving the state and all of its residents the high fiscal, social, and emotional costs engendered by lives of crime.

The following recommendations were formed by a group of stakeholders who carefully considered the data and findings compiled in this study. See the Introduction to this report for a description of the stakeholders and process. The recommendations are divided into “Core Recommendations” and “Points of Action.” The Core Recommendations are the key proposals with general application. They represent the principal areas in which work is needed to improve the quality of representation for children. The Points of Action flow from the Core Recommendations and provide more detailed suggestions to relevant populations.

### **Core Recommendations**

1. Children should be represented by effective counsel at all court hearings in juvenile cases, including probable cause hearings. Effective representation of children requires adequate time to meet with and counsel clients, and it requires support services, including investigation, access to independent experts, interpreters, evaluation and social work.
2. Washington law should be changed to conform to national standards prohibiting children from waiving the right to counsel. Until the law is changed, the judicial colloquy with youth regarding their decisions to waive counsel should be thorough, comprehensive, and easily understood.
3. Continuity of representation should continue to be supported and enforced throughout the state. Counsel should represent a child throughout a case, including probation violations. If the child has new offender matters, the same attorney should be assigned to represent the child.
4. Every county should enact standards of practice as mandated by RCW 10.101.030. Standards should include attorney qualifications, caseload limits, supervision, training, and regular performance reviews. The adequacy and implementation of county standards should be assessed by an independent body. The standards endorsed by the Washington State Bar Association and the Institute of Judicial Administration and the American Bar Association should serve as guidelines for the enactment of such standards.
5. A state ombudsman office should be created and funded to address complaints concerning delivery of juvenile public defense services.
6. Attorneys should participate in comprehensive training before starting practice in juvenile court and should have the opportunity

to participate in ongoing training specific to the representation of children.

7. Attorney caseload limits should be set by each county contracting for public defense services. Caseload limits should reflect the standards endorsed by the Washington State Bar Association.
8. Law schools should develop focus areas in the representation of children. Washington schools should establish LLM or other certified programs for a child legal advocacy specialty.

## **Points of Action**

### **Recommendations to Public Defense Organizations and Attorneys Representing Children**

1. Defenders should ensure that effective representation happens at the earliest possible stage in juvenile court proceedings and is zealous throughout the process.
2. Juvenile defenders should encourage development of expertise through initial and ongoing training on all of, but not limited to, the following topics: attorney/client relationship and the role of the defense attorney in Washington's juvenile justice system, the importance of investigation and how effectively to use an investigator, pre-trial motions practice, use of experts, capacity and competency hearings, legal standards, child development, mental health issues, learning disabilities, negotiations, time and case management, case planning, racial disproportionality, effective sentencing advocacy, child development, mental health problems, mental/emotional disabilities, and appropriate treatment options.
3. Defense contracts and public defender office budgets should include funds specifically allocated to investigation.
4. Effective social work advocacy can help to develop dispositional alternatives that are cost effective in preventing recidivism and helping a child client become a productive member of society. To increase the likelihood of these positive outcomes, defense contracts and public defender office budgets should include funds specifically allocated for social work advocacy.
5. Juvenile defenders should have the opportunity to work for periods of time sufficient to develop expertise in the representation of children. Defense programs and defense contracts should be organized in such a way as to encourage experienced attorneys to spend part of their career in juvenile defense.
6. Defenders should provide post-disposition advocacy whenever necessary and support changes in contracts and funding to enable them to do so. Further, defenders should collaborate with civil legal services organizations to improve services to clients.
7. Defenders should work with judges, prosecutors, law enforcement, policy makers and others working with children to develop alter-

native prosecution and dispositional approaches to reduce disproportionate prosecution and confinement of children of color. Defenders should support research efforts specifically examining the impact of juvenile defense practice on disproportional minority confinement and adjudication.

### **Recommendations to the Judiciary**

1. Until the law is changed, prior to allowing any child to appear unrepresented in her or his court at any hearing, judges should thoroughly inform and educate a child client of his right to counsel and the draw backs of appearing without counsel. Judges should ensure that children consult with an attorney before waiving their right to counsel.
2. Judges should consistently follow guidelines for the advisement of all rights to juvenile offenders, including but not limited to appellate rights, waiver of speedy trial, and waiver of counsel.
3. Judges should participate in training on competency, capacity, and child development issues.
4. Judges should intervene when necessary to ensure adequate representation by defense counsel.
5. Judges should work with defenders, prosecutors, law enforcement, policy makers and others to develop alternative prosecution and dispositional approaches to reduce disproportionate prosecution and confinement of children of color.

### **Recommendations to the Governor**

1. The Governor should mandate a review of counties to determine which counties have enacted standards for public defense services as required by RCW 10.101.030.
2. The Governor should appoint a blue-ribbon commission to review county standards to determine whether they are adequate and effectively implemented.
3. The Governor should support passage of a law prohibiting the waiver of counsel by children.
4. The Governor should appoint an ombudsman to be available to children for complaints about their counsel.
5. The Governor should work with defenders, judges, prosecutors, law enforcement, policy makers and others working with children to develop alternative prosecution and dispositional approaches to reduce disproportionate representation of children of color in the justice system. The Governor should support research that specifically examines the impact of juvenile defense practice on disproportional minority confinement and adjudication.



**Recommendations to State Legislators**

1. The Legislature should enact a law prohibiting the waiver of the right to counsel by a child.
2. The Legislature should enact a law setting caseload limits for defenders reflecting those endorsed by the Washington State Bar Association.
3. The Legislature should enact a law allowing for indigent appellate representation for all children with no cost to the child.
4. The Legislature should mandate research that specifically examines the impact of juvenile defense practice on disproportional minority confinement and adjudication.
5. The Legislature should enact a law that requires all juvenile justice professionals to receive training on child development, mental health problems, and mental/emotional disabilities prevalent in children.

**Recommendations to County Officials**

1. All counties should enact and implement public defense standards, using the standards endorsed by the Washington State Bar Association and the Institute of Judicial Administration and American Bar Association as guidelines.
2. Counties should ensure that standards that include caseload limits, attorney qualifications, supervision, training, and regular performance review are implemented. Counties should also develop a formalized system of case assignment in which experience of the attorney and type of case are taken into consideration.
3. Counties should implement policies supporting defense contracts that allow for comprehensive pre-dispositional advocacy and post-dispositional advocacy on issues, such as education, mental health and other factors contributing to delinquency.
4. Defense contracts and public defender office budgets should include funds specifically allocated to investigation.
5. Effective social work advocacy can help to develop dispositional alternatives that are cost effective in preventing recidivism and helping a child client become a productive member of society. To increase the likelihood of these positive outcomes, defense contracts and public defender office budgets should include funds specifically allocated for social work advocacy.
6. Counties should provide juvenile defenders with the opportunity to work for periods of time long enough to develop expertise in the representation of children. Defense programs and contracts should be organized in such a way as to encourage experienced attorneys to spend part of their career in juvenile defense.

7. Counties should help ensure that all juvenile justice professionals receive training on child development, mental health problems and mental/emotional disabilities prevalent in children.
8. Counties should only contract with private attorneys who demonstrate that they have participated in juvenile justice trainings and commit to on-going training specific to the representation of children. Contracts should be regularly renewed.

#### **Recommendations to Juvenile Court Administrators**

1. Juvenile Court Administrators should support the creation of a statewide ombudsman. Until that time, they should ensure that children have access to adults who can inform the appropriate party to take action when a defender is not effectively performing his or her duties.
2. Defense contracts and public defender office budgets should include funds specifically allocated to investigation.

#### **Recommendations to the Washington State Bar Association**

1. The Washington State Bar Association should create a standing committee to address juvenile justice issues.
2. The Washington State Bar Association should initiate a blue-ribbon commission to review county defense standards and assess their adequacy.

#### **Recommendations to Community Organizations, Faith-Based Organizations, and Neighborhood Groups**

1. Community members should participate in commissions referenced above to determine whether defenders are meeting the needs of their children.
2. Community members should partner with defenders to provide pre- and post-adjudication advocacy and services that will allow children to be kept safely in their communities.
3. Community members should report failures in juvenile defense systems to county administrators or other decision makers.
4. Community members should work with defenders, judges, prosecutors, law enforcement, policy makers and others working with children to develop alternative prosecution and dispositional approaches to reduce disproportionate prosecution and confinement of children of color.

**Recommendations to Law Schools**

1. Law schools should lead the nation in developing a child attorney specialty curriculum. A certificate or LLM program in Child Law, with cross-discipline training in child development, psychology, communication, and law should be initiated.
2. Law schools should help improve the quality of representation of children through offering continuing legal education seminars and other professional opportunities.

**Recommendations to Parents**

1. No parent shall advise or encourage their child to waive their right to defense counsel.

**Recommendations to Youth**

1. Youth should insist that their attorneys listen to them and should report to other adults when they feel their attorneys are not listening to them or representing their stated interest.
2. Youth should not waive counsel.



# APPENDIX

## Representation Of Status Offenders In Washington State Courts

Kim Ambrose, Esq.,  
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and  
Sarah Yatsko

Criminal offenses are not the only way a young person can end up in detention. In Washington state, children come under the jurisdiction of juvenile court for status offenses and can face incarceration as well as other restrictions. The Washington Juvenile Justice Assessment Project focused primarily on juvenile offender (delinquency) matters and the report reflects this focus. However, Washington defenders were also surveyed about their status offender practice and in-person interviews were conducted across the state. The resulting data, while not as comprehensive as the data on which the main report is based, does present a clear picture of serious concerns about the representation of children facing status offender charges. It calls into question whether the system has the guidelines, safeguards and oversight needed to effectively protect the children it seeks to serve.

Presented here is a brief overview of status offenses in Washington and a summary of the preliminary findings.

### A. The History of the Status Offenders in Washington State

Since 1891, Washington law has allowed for court involvement in the lives of those young people who are not delinquent or guilty of crimes, but rather worthy of the court's intervention because of other unacceptable behaviors like running away from home or not attending school. These behaviors are sometimes called "status offenses" because they are offensive due to the person's "status" as a minor; however, the terms "status offense" and "status offender" do not exist in Washington law. The original law authorized the commitment of "incorrigible," "mendicant," and "vagrant" children to state institutions.<sup>110</sup> The law was later expanded to include several other activities, such as knowingly visiting a house of ill repute, patronizing a public pool room or habitually using "vile, obscene, vulgar, profane or indecent language."<sup>111</sup> The legislature expanded and retracted the law over the years until the Juvenile Justice Act of 1977 re-vamped the entire juvenile justice system to comply with the federal Juvenile Justice and Delinquency Prevention Act (JJJPA). At that time, the national movement was toward the deinstitutionalization of status offenders. Pursuant to the 1977 Juvenile Justice Act, juvenile status offenses were clearly delineated from juvenile criminal offenses and new laws were set in place to supervise, rather than criminalize, status offender behavior.

In 1978, the Family Reconciliation Act (FRA) set forth the mechanisms by which the juvenile courts could intervene in the lives of non-offender juveniles who misbehaved. The FRA created "At Risk Youth," and "Alternative Residential Placements" (ARP) to address these issues.<sup>112</sup> In later legislation, the ARP was, in large part, replaced by a "Child in Need of Services Petition" or CHINS petition.

### B. The Becca Bill

In 1993, the deaths of three runaway children, the most high profile of which was the death of 13 year-old Rebecca Hedman, brought about drastic changes in Washington state's status offender laws. Rebecca "Becca" Hedman was a young girl whose life was wrought with trouble. As an

infant, Becca was sexually abused by her natural mother and at five years old was sexually abused by her older adopted brother. As a middle school student, Becca began to rebel and her parents eventually sent her to a Crisis Residential Center and later to a group home because they were unable to handle her. Becca ran away from the group home several times and during her last run episode was murdered by a 35 year old adult.<sup>113</sup>

In response to this tragic story, Senate Bill 5439, the Becca bill, became law in Washington in July 1995. It was the legislature's attempt to empower parents who had otherwise lost control over their runaway, disobedient, or truant children. The Becca bill amended RCW 13.32A, the "Family Reconciliation Act," as well as sections of RCW 71 and 28A, providing for strict enforcement of runaway and truancy laws by allowing the involuntary commitment of minors to drug, alcohol, and mental health treatment in "secure Crisis Residential Centers".<sup>114</sup> One of the Becca bill's most radical departures from the original Juvenile Justice Act of 1977 is the provision which gave the police the authority to take a juvenile into custody at the request of parents or agencies with custodial care of the child, or when a juvenile court judge or commissioner finds the child in "civil contempt" because of his or her violation of court ordered "conditions of supervision."<sup>115</sup>

Since originally passed, the Becca bill has been amended twice in order to clarify and restructure earlier laws. The first amendment, "Becca Too," granted the juvenile court the authority to issue an order directing law enforcement to pick up a child in civil contempt of a juvenile court order and take the child to detention.<sup>116</sup> The second amendment, "the Becca Act of 1998" was the legislature's response to case law<sup>117</sup> interpreting the contempt provisions of RCW 13.32A. The act declared the use of confinement for civil contempt orders against At Risk Youth, Children in Need of Services, and truant juveniles a remedial as opposed to punitive measure, but limited such confinement to a maximum of seven days.<sup>118</sup>

### C. Becca Proceedings

There are three types of juvenile court proceedings which are commonly referred to as Becca proceedings: At Risk Youth (ARY), Child in Need of Services (CHINS) and truancy proceedings.

#### *At Risk Youth Petitions*

At Risk Youth petitions are filed in juvenile court by parents who are seeking the court's assistance in controlling their child's behavior. To get this assistance the petitioning parent must prove to the court that their child meets the legal definition of an At Risk Youth,<sup>119</sup> which is that the youth is:

- Absent from home for at least 72 consecutive hours without parental consent;
- Beyond parental control such that the child's behavior endangers the health, safety, or welfare of the child or any other person; or
- Has a substance abuse problem for which there are no pending criminal charges related to the substance abuse.

The petitioning parent must also establish that:

- The petitioner has legal custody of the child;
- Court intervention and supervision are necessary to assist the parent to maintain the care, custody and control of the child; and
- Alternatives to court intervention have been attempted or there is good cause why such alternatives have not been attempted.<sup>120</sup>

The parents must have the child served with a copy of the ARY petition. The juvenile court will appoint counsel for the child and schedule a fact-finding hearing. Parents also may have counsel, although counsel is not provided to parents at public expense.

The ARY fact-finding hearing is a trial at which evidence is presented by the parents and the child. After hearing the evidence, which typically consists solely of the sworn testimony of the parents, a juvenile court judge or commissioner will make a finding as to whether the petition has been proven. The standard of proof is a preponderance of the evidence. If the court grants the

petition, a disposition hearing will take place to determine what conditions of supervision the court should impose for the child. These conditions may include regular school attendance; counseling; participation in a substance abuse or mental health outpatient treatment program; reporting on a regular basis to the Department of Social and Health Services (DSHS) or any other designated person or agency; and any other condition which the court deems appropriate, such as attendance at anger management classes, prohibitions of use of alcohol or drugs, obeying house rules, abiding by a curfew, etc.<sup>121</sup> The court may not order in-patient treatment of any kind pursuant to an ARY petition.

After an ARY petition is granted, the court must set a review hearing within three months of the entry of the disposition order. At the review hearing, the court will determine whether the parent and the child are complying with the dispositional plan and whether court supervision should continue. The court may also modify the dispositional plan. Court supervision may only continue for up to 180 days after the first review; however, an additional 90 days may be added if the court finds, and the parent agrees, that there are compelling reasons for an extension of supervision. The court may dismiss an ARY proceeding at any time if the court finds good cause to believe that continuation of court supervision would serve no useful purpose or that the parent is not cooperating with the court-ordered case plan.

If a child violates an ARY court order, he or she may be found in civil contempt and held in detention. A parent seeking to have the child held in detention must file a contempt motion, schedule a hearing in juvenile court and prove through sworn testimony that the child has violated the court's order. The court may then impose up to 7 days in detention or \$100 fine in order to coerce the child's compliance with the order. Since the purpose of detention time must be to coerce the child's compliance with the court's order not to punish the child for past non-compliance, the judge must give the child the opportunity to purge the contempt by doing something to ensure the court that the court's order will be followed in the future. Frequently, the court will require the child to write an essay related to how he or she will avoid future contemptuous behavior. When the essay is completed and reviewed by the court, the child may be released.

### *Child in Need of Services Petitions*

Where a serious conflict exists between the parent and child that cannot be resolved by delivery of services in the home and where reasonable efforts have been made to prevent the need for removal of the child from the parents' home, a CHINS petition may be filed to obtain a court order placing a child in a residence outside of the parents' home. The purpose of temporary placement under a CHINS is to allow time for services to be provided to reunify the family. A parent, a child, or DSHS may file a CHINS petition requesting out-of-home placement.

To meet the legal definition of "child in need of services" the child must:

- (1) Be beyond parental control such that the child's behavior endangers the health, safety, or welfare of the child or other person; or
- (2) Have been reported to law enforcement as absent without consent for at least 24 consecutive hours from the parent's home, a crisis residential center, an out-of-home placement, or a court-ordered placement on two or more separate occasions; and
  - a. exhibited a serious substance abuse problem; or
  - b. exhibited behaviors that create a serious risk of harm to the health, safety, or welfare of the child or any other person; or
- (3) Be in need of necessary services, including food, shelter, health care, clothing, educational, or services designed to maintain or reunite the family; AND lacks access to or has declined to utilize these services; AND has parents who have evidenced continuing but unsuccessful efforts to maintain the family structure or are unable or unwilling to continue efforts to maintain the family structure.<sup>122</sup>

After a CHINS petition is filed, a fact-finding hearing is scheduled in juvenile court. The court will appoint counsel for the child and for the parents, if the parents are indigent. As with ARY fact-findings, the parties will present evidence during the hearing and the juvenile court judge or



commissioner will determine whether to grant the petition. The court will grant the petition if the petitioner has proven by a preponderance of the evidence that the youth meets the definition of a Child in Need of Services and the following criteria:

- If the petitioner is a child, he or she has made a reasonable effort to resolve the conflict;
- Reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home; and
- A suitable out of home placement resource is determined to be available.

The court may not grant a petition filed by DSHS or the child if it is established that the petition is based only upon a dislike of reasonable rules or reasonable discipline established by the parent.<sup>123</sup> The court may not grant a CHINS petition for a child who is already dependent under RCW 13.34. In addition, the court may order DSHS to review a pending CHINS petition to determine whether the case is appropriate for a dependency petition.

If the court grants the CHINS petition, the child may be placed out of the home and a disposition hearing will be held within 14 days. At the disposition hearing, the court may order out of home placement and enter conditions of supervision similar to those in an ARY proceeding. If it is the child or DSHS seeking out of home placement, the standard for seeking out of home placement is higher than for a parent. The court may only order it if it finds by clear, cogent and convincing evidence that one of the following three situations exist:

- (1) The order is in the best interest of the family;
  - the parents have not requested an out-of-home placement;
  - the parents have not exercised any other right such as an ARY, a parent initiated involuntary treatment petition or a guardianship;
  - the child has made reasonable efforts to resolve the problems that led to the filing of the petition;
  - the problems cannot be resolved by delivery of services to the family during continued placement of the child in the parental home;
  - reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home; and
  - a suitable out-of-home placement resource is available;
- (2) The order is in the best interest of the child, and the parents are unavailable; or
- (3) The parent's actions cause an imminent threat to the child's health or safety.<sup>124</sup>

Similar to ARY proceedings, the court will schedule a review hearing within three months of the disposition hearing.<sup>125</sup> At that hearing, the court will determine whether out of home placement should continue and whether reasonable efforts have been made to reunify the family. If the court has reasonable grounds to believe that the parents have made reasonable efforts to resolve the conflict and the child's refusal to return home is capricious, the court may order the child to return home.<sup>126</sup> The court may also modify the disposition order at the review hearing. Out of home placement under a CHINS order may continue for 180 days past the initial review date. If additional out of home placement is required, a dependency petition may be filed.

As with ARY petitions, the contempt process may be utilized by the court to coerce the youth or parent's compliance with the court's order. Contempt sanctions are limited to 7 days.

### *Truancy Petitions*

Truancy petitions are filed in juvenile court by school districts when students have a certain number of unexcused absences from school. Both parents and children are required to appear at the initial hearing and neither have court-appointed counsel. At the initial hearing, the juvenile court judge or commissioner will determine whether the child is truant and enter an order requiring the student to go to school.

Children do not have a right to appointed counsel in truancy proceedings until they are subject to a finding of contempt and face possible detention time. As with ARY and CHINS proceedings, the purpose of contempt in truancy proceedings is to coerce compliance. Detention is limited to 7 days and the child must be given the opportunity to purge the contempt.

#### **D. Preliminary Indications from Collected Data Role of the Defense Attorney is Unclear**

For the defense attorney representing children in Child in Need of Services, At Risk Youth, and truancy petitions, there is significant confusion over the role of the attorney. In contrast to the laws governing the prosecution of juvenile offenders, the Becca statute is in its infancy. A uniform approach to these cases has yet to be developed. Data collected for this report reveal widely divergent defender practices in the scope, practice, and procedure. The work of defenders varies from county to county, and even varies from attorney to attorney within the same county. There is little guidance for attorneys representing children on Becca matters and the nature of the work makes it difficult for an individual attorney to know how to define their role. One defender explained, "This is not a kind of proceeding that attorneys feel real comfortable with. You are two-thirds social worker and a sixth substitute parent and the remainder legal. It's frustrating." For defense attorneys inheriting a Becca caseload for the first time, many described a long period of uncertainty before feeling like they had some understanding of their role as the child's counsel and advocate. One defender revealed, "It is not clear to me at all what you are supposed to be doing (as defense counsel in a Becca hearing). I know what the law, is but in reality you are dealing with parents, families, conflict and very little with the law." Several defenders described their position as someone who "wears many hats."

This confusion over the role of the attorney is in large part due to the very nature of the process itself. Once a child is determined to be "in need of services" or "at risk", the goal is not punishment or rehabilitation, although they may be part of the process. Rather the goal is family reconciliation. Some attorneys see their role as pure litigator, working to advise the child of his or her rights, present them with options, and ensure that court rules and statutes are followed. Other attorneys believe that in order to be successful as defense counsel in Becca cases, you must have some understanding of the client's social history and family dynamics before you can adequately represent them. Without this information, they argue, you are unable to advise the child how to proceed.

*"I start by getting a thorough background on the kid, including school, social history, family, offender history."—Defense Attorney*

Answers to these questions must guide the attorney's work. A child on probation with a pending criminal case should not become the subject of an ARY petition as they are already receiving services from a probation officer. Substance abuse issues may be the root of all conflict in the home and a defense attorney who is not aware of this may be setting their client up for contempt proceedings. Perhaps most critical is a child's mental health status. The statute presupposes that the child has the power to change his or her behavior. If a mental health condition is so severe that the child is unable to follow court directions or alter their behavior in order to avoid a contempt proceeding, the defense counsel must inform the court and move to have the case dismissed. Without the ability to spend time with the client, without the skills to interact with a child to gain their trust and without a basic knowledge of the signs of mental health or substance abuse issues, the defense attorney may not be providing the representation to which a child is entitled.

Part of this uncertainty concerning their role may stem from messages the attorney receives from others in the courtroom. The data collected in interviews in delinquency court indicate that the various juvenile court professionals can contribute to the confusion over the role of the attorney. Judges, prosecutors, and probation officers all carry with them their own ideas about how an attorney should represent a client. Especially in Becca proceedings, there are many who still adhere to the *parens patriae* model of juvenile court and see the professionals as members of a team guiding the child to make better choices and to accept responsibility for their actions. The commissioners and judges interviewed for this section of the report also provided conflicting opinions as to what the true role of the defense counsel is in Becca proceedings. Overt or subtle, these messages can create a conflict for the attorney who is often the only other professional in the

courtroom besides the commissioner. This problem can be resolved with more time on the bench in front of a well trained and experienced defense attorney but many do not get that chance. There can be significant turnover for commissioners in the Becca courtroom and new commissioners are not usually given much time to get up to speed. Data from the interviews with commissioners indicate that there is little agreement as to the role of the defense attorney appearing before them. Some commissioners see the attorney as part of a team of professionals trying to connect the child to services and help for the family, while others see the attorney's role as confined to legal advice and representation. One commissioner commented, "Defense counsel do not work to get kids services. It is not in the scope of their duties to get kids in counseling or any other type of service."

Many defenders doing Becca cases believe it is critical to take the time to form a relationship with their client that would allow them to guide the child towards choices that are in their best interests.

*"My job is to represent the child's stated interest and to tell them how the court will respond. I won't lie (to the court) rather, I try to persuade my client that what he or she is asking for is unrealistic, 'you should revise your expectations, let's try to do something that's more realistic.' In some ways I am acting much more like a counselor or a social worker than an attorney." — Defense Attorney*

As with any type of legal practice, there is a wide range of experiences and interests that draw attorneys to this type of representation. Depending on the size of the county, attorneys may share the Becca caseload with several other attorneys on a panel or they may be the only attorney to cover these cases. Their practice may consist entirely of Becca cases or they may represent only a small fraction of their caseload. Some are drawn to this work, while others dread it and do what they can to avoid it.

Many attorneys interviewed about their Becca practice were highly motivated to spend time with their client. They worked to form a relationship with the child that would allow him or her to share information key to the attorney's ability to represent them. However, just as common were attorneys who were unskilled in these areas and who were not interested in any part of their work that moved towards what they perceive as social work and away from law. Others find the work overwhelming and cannot sustain it. One defender said "For a period of time I was the only one that was willing to do these cases. Finally I said, either you get more people on the list — or I'm leaving entirely. I was burning out dealing with parents. You can't do this work all of the time, it's too difficult. After I threatened to leave they convinced two other attorneys to take ARYs and CHINS cases."

One attorney interviewed had represented children in Becca hearings for a number of years and had taken a leave for a break from the work. However, the attorney's motivation to return to the work was high, feeling that Becca clients need and deserve defense counsel that take time to listen to them. Despite extremely low compensation, high level of stress, and long hours, this attorney remained highly committed to doing Becca cases. For a number of attorneys, Becca cases invoke a feeling that they are helping children, as this defender described, "Sometimes I feel like I am the first person who has ever listened to them without shutting them down. They have a right to be heard."

#### *Children Appear in Becca Hearings without Counsel*

As described above, ARY, CHINS and truancy proceedings each have their own set of hearings. Common between the three is an initial fact-finding hearing to determine if the child is, "at risk," "in need of services," or truant; a review hearing; and a contempt hearing. All counties surveyed do provide representation for a contempt hearing and most had an attorney assigned to the child for the initial hearing as well as the subsequent review hearings in ARY and CHINS proceedings. However, this is not the case for truancy matters. Most counties do not provide representation for the initial fact-finding in a truancy petition or for review hearings. Counsel is only appointed when the child is facing a contempt motion and, thus, facing the prospect of incarceration, but not at the initial hearing where the determination of truancy is made. In each county visited for this report, children did not have access to counsel at the fact-finding stage of the truancy proceedings.

Most counties deal with all new truancy filings on one day of the week. On this day, children and their parents are instructed to appear at the court and the commissioner advises all the children together as a group. They are presented with two options. The first option is to agree they are truant and waive the fact-finding hearing and sign a boilerplate list of conditions, including regular school attendance. If they chose this option, they are able to leave the courthouse after about an hour. The second option is to contest the allegation that they are truant and ask for a fact-finding hearing. This usually takes many hours and, as explained earlier, in the counties visited, there is no attorney present to advise children how to proceed. During a fact-finding hearing, the school district must present evidence that the child has had the requisite number of unexcused absences and that the school district has taken steps to get the child back in school before the filing of the petition.

When a child waives his or her right to a hearing, the school district is presumed to have made all the necessary attempts at intervention prior to filing the petition. Without an attorney reviewing school district documents, a child may not know that the school district had to meet this burden before truancy can be found. Not only does a child give up the right to have the truancy allegation proven, but an opportunity is lost to make sure that the school district is attempting to address the problems underlying truancy.

*“My daughter has had serious medical problems and I have sent the school notes from her doctor. However, I don’t know that they got them and now we are here for truancy court. I would like to see her fight this, but she is agreeing to sign the papers and say that she has been truant. I worry about this hanging over her head for a year, but she says she wants to do this.”—Parent waiting for Truancy Court with daughter.*

In counties where a “Truancy Workshop” program is in place, the impact of an unrepresented child at this initial hearing is far less than in the counties where no such program exists. In an attempt to intervene prior to the filing of the truancy petition and thus cut down on expensive court time, some counties have instituted a “Truancy Workshop” for children and parents. A child who meets the criteria for a truancy petition is first sent to a one-day workshop or to a one-on-one meeting with a school counselor or truant officer, instead of being sent to court. This provides the child with one last chance to avoid going to court. Clear conditions are set and in some cases the child is offered services, such as a drug and alcohol evaluation or counseling to help address underlying depression interfering with school attendance. Through the use of this type of program, one county was able to avoid filing truancy petitions for over 50% of the children who would have otherwise ended up in juvenile court.

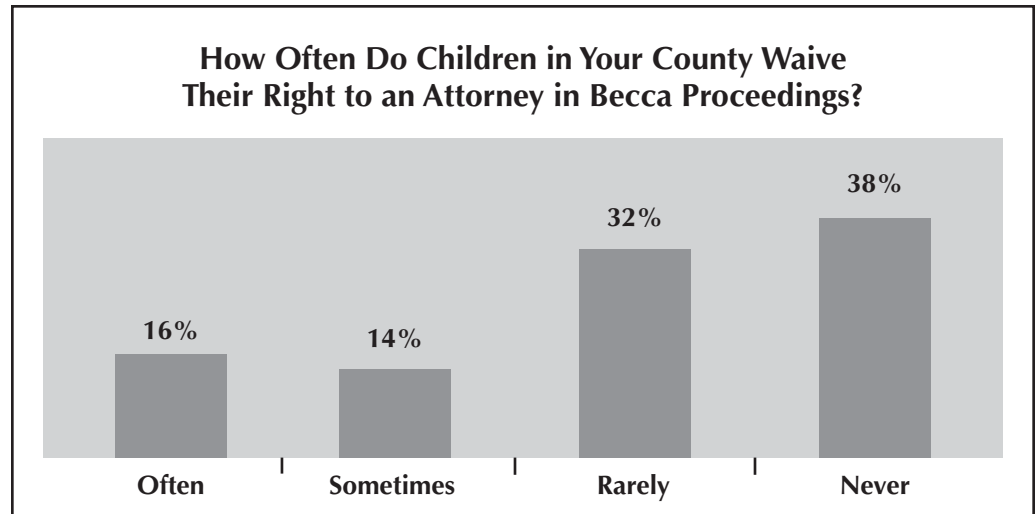
Conversely, in counties where there are no attempts made at pre-filing intervention, the truancy petition can end up being the first ‘wake-up’ call for a child missing school. During courtroom observation for this report, one child with a first grade reading level appeared before the court for a contempt motion. The defense attorney was able to prevent the child from being held in contempt with expert testimony from the school counselor. The child was functionally illiterate and severely cognitively delayed, yet had been allowed at an earlier hearing to sign a petition agreeing that she was truant and that she would abide by a list of conditions. No one read to her or even explained to her what she was signing. One of the conditions was to attend school. She did go to school regularly, but she did not go to class. She believed she was in compliance; no one took the time to explain that attending school also meant attending classes.

Parental involvement is required by the court for all three Becca petitions. The statute names parents as a party in a truancy petition and the court has the power to order the parent to perform certain tasks to help the child to attend school regularly. The same is true for an ARY and CHINS proceeding. Parents are not provided counsel for truancy hearings, and in some counties, they are not provided counsel for ARY or CHINS cases.

An additional issue is children waiving their right to counsel. Thirty percent of Becca defense attorneys surveyed indicated that children in their county waived their right to a defense attorney either “often” or “sometimes.”

### **Resources for Becca Courts Vary from County to County**

The success of any Becca petition often depends on what services the court is able to refer the



child. For a CHINS, the parent and child must engage in family counseling in order to begin to address the conflict that has motivated the parent (or the child) to file the petition. In many cases the reasons for filing have been building up for years and the level of familial dysfunction is extremely high. These cases demand the involvement of a skilled counselor who is able to provide an intense level of support for an extended period of time. Through budget priorities and grant funding some counties are able to provide this high level of intervention for children in Becca proceedings, while some counties are forced to rely on dwindling DSHS resources. Most counties provide a civil probation officer or a staff person from DSHS to advise the court. However, there is little consensus as to what their role is. In some counties this person works hard to find the child services, and placement and in others they serve only to report to the court on violations of the conditions.

*In our county the FRS worker works really hard to find kids placements. (The worker) is very creative and really cares about what (the worker) is doing. —Defense Attorney*

Counties visited for this report ranged from a county where the court employed a full-time case manager to counties where budget cuts prevented DSHS caseworkers from being present at CHINS hearings, despite the fact that DSHS is a party and the commissioner may need to order the Department to place a child or provide services to a child. In a county with a court-employed case manager, the parent is provided with some guidance and instruction when considering filing an ARY or CHINS petition (thus potentially avoiding hours of wasted court time on petitions that do not meet the filing criteria). In one county, the case manager was present for each ARY and truancy hearing, providing resource information to the court and to the family. They also carried a caseload from referrals received directly from the commissioner in the courtroom. Grant funding allowed one court to refer needy families to Functional Family Therapy (FFT) an expensive, highly researched, and proven method of addressing family conflict. In another county, CHINS families were provided with a limited number of hours of family counseling, that may or may not be provided in the home. Once the funding for these hours was exhausted, the family would be cut off from further counseling, despite what may continue to be an urgent need. A defender described the effect, “We used to have Homebuilders and now we only have FRS (Family Reconciliation) for 12 hours. It is practically impossible to get more hours. This is a big problem, as a lot of parents can’t afford medical coverage for counseling. The family just begins the work and then they are cut off.”

This lack of services can substantially affect the Becca defender’s ability to effectively advise, counsel, and represent their client. A child in need of services who is not afforded those services runs a much higher risk for violating the court order. For example, contempt motions are brought in front of the court for a child with a urine analysis testing positive for drug use, yet lack of funding or a waiting list for treatment can preclude their involvement.

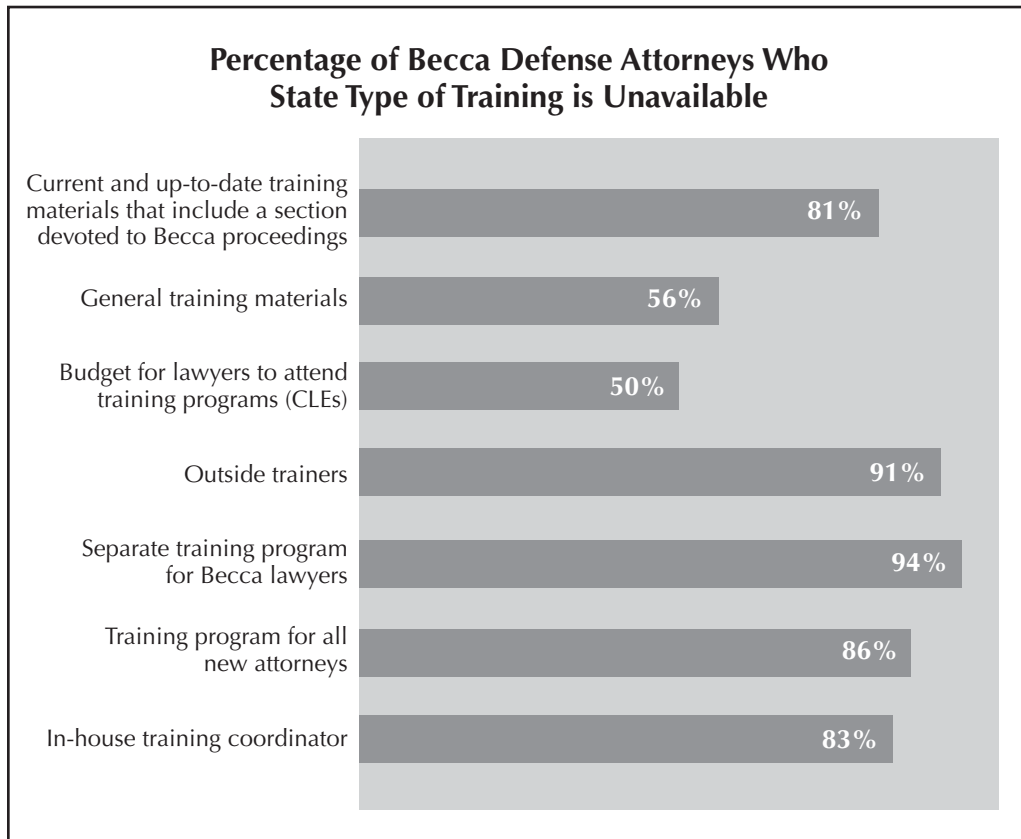
*“So many of these kids are in need some kind of counseling, some need an evaluation for depression but the resources aren’t there. I will say that the drug treatment resources are better than they were 8 years ago, but there is so much more use now. Kids are casually using drugs, they easily admit they are using, but don’t see connection with skipping school and with the other problems in their life. Many need help and we have nowhere to send them.” —Defense Attorney*

**Training for Becca Defense Counsel is Seriously Lacking**

In comparison to offender attorneys, attorneys practicing in Becca court are far less prepared and receive far less training than their offender court colleagues. With very rare exceptions, Becca attorneys begin practice in Becca court with no training whatsoever. This is true even where there is an organized public defender office. While all offices provide staff with a copy of the statute, most provide little or nothing more. In defender offices where there is a high enough caseload to warrant a full time staff person to cover Becca cases, at best, training consists of a week or so overlap with the old attorney. Several of the attorneys interviewed for this report were practicing fresh out of law school. Their offices saw Becca work as a training ground for other types of practice. As a defender put it, “Training to do Becca work? (Chuckles) Nada, nothing. They just started handing me these cases. I read the statute, but that was it.”

The Washington Defender Association put on the first Continuing Legal Education (CLE) training for Becca defense attorneys in June of 2003. It was well attended with approximately 60% of the attorneys practicing in Becca court in Washington state in attendance. During the interviews for this report, defenders were asked their opinion of the CLE. The response was overwhelmingly consistent. Attorneys were thrilled to have the opportunity to attend a training specifically addressing these issues.

While there is hope this CLE will be the first of several supplementary Becca trainings, there is clearly still a long way to go. The chart above represents data collected in the written defender





survey concerning unavailability of training for attorneys in Becca proceedings. While over half of the attorneys surveyed have access to general training materials, only 19% have materials available to them that are specifically related to their work in Becca court. Only 6% claimed to have received a separate training to prepare them specifically for Becca court. Given the complex nature of the law as well as the difficult task of making meaningful connections with the client that this work demands, the need for training in this area is severe.

Particularly critical for the Becca attorney is ethics training. Difficult ethical dilemmas can arise in the representation of children in Becca proceedings on a regular basis. Many children come before the court for high-risk type behaviors and the court sees its role as the child's protector. However, the defense attorney is obligated to also ensure the protection of the child's rights, and many are unsure how to proceed when these rights are in direct conflict with the child's safety.

*"Sometimes the parents haven't tried enough intervention and sometimes the court dismisses the petition, but most parents have tried everything imaginable. However, sometimes a kid is out of control—like girls who are sexually acting out. In these cases, even if the parent hasn't done enough, the judge won't wait around for the parents to get it together, (the judge) won't dismiss if the kid is in real danger."* — Defense Attorney

Just as is true in offender court, there are defense attorneys who can effectively represent their child-client's interest as well as counsel them regarding realistic outcomes in court and some safer or wiser choices. However, this takes time and it seems only to come with training and with an understanding of adolescents and a strong interest in working with this population.

*"There is a lot of social work involved, the work is not truly legal. These are quasi legal and it gets subjective fast. You have to be willing to deal with that part of it to be effective."* — Defense Attorney

### **Becca Defender Caseloads are Sometimes Excessively High**

County budgets and policies drive the filing of Becca cases. This creates widely divergent county case rates that only loosely correspond to youth populations within a county. Because there are no standards governing caseload (see following section) and no language in contracts concerning caseload numbers—there are no limits to caseloads. For attorneys in smaller counties who contract to provide representation for all children subjected to a Becca petition, an increase in filings can result in an unmanageable caseload.

*"This is a half time position, but even years ago when I started it really was three quarters time. Now to do a reasonable job and be fair to the kids, I need to work 60 to 70 hours a week. The pay is such that I have to do something to supplement, but there is no time."* — Defense Attorney

### **No Standards of Practice Govern Becca Representation**

Beginning in 1971, over a ten year period, approximately 300 professionals throughout the nation, including prominent representatives of every discipline connected to the juvenile justice system: the law, the judiciary, medicine, social work, psychiatry, psychology, sociology, corrections, political science, law enforcement, education, and architecture, wrote a 23 volume set of juvenile justice standards. The work was done under the auspices of the Institute for Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards.<sup>127</sup> By 1981, 20 of these volumes had been adopted in full by the American Bar Association House of Delegates. The American Bar Association has compiled a comprehensive set of standards governing the administration of juvenile court. Included is an extensive set of standards for the defense attorney representing delinquent children. Two of the volumes not ratified dealt with non-criminal matters. However, no standards addressing the representation of status offenders were adopted by the ABA, the belief being that status offenders should be handled outside of juvenile court. As a result, there exists no widely-accepted standards of practice for attorneys representing status offenders.

This creates a serious void for the defense attorney practicing in Becca court. Standards of practice provide a tool for assessing competent assistance of counsel. There is no standard set for caseload limits, no definition of attorney qualifications, no description of the basic requirements of a



status offender practice. In most cases, county contracts for public defense services have no language regarding standards for status offender representation.

### E. Conclusion

The main focus of the Washington Juvenile Justice Assessment Project was to research quality of defense and access to counsel for children appearing before the court for offender matters. However, children also face serious consequences in Becca proceedings and the attorneys who are representing these children need to be well trained and supported in their work. The researchers working on this project recognized an opportunity to do some preliminary investigation of the quality of representation and access to counsel for children facing a Becca petition. Data was gathered through a comprehensive written survey of Becca defense attorneys as well as on-site and telephone interviews of judges and commissioners, Becca court coordinators and case managers, Becca defense attorneys, school district personnel, youth and parents.

Interviewers learned from talking to Becca defense counsel in counties across the state that the function of the attorney representing the child in Becca court is neither clear nor uniform. Becca attorneys consistently complained of confusion over what their role as attorney was both inside and outside the Becca courtroom. Some believed they must occasionally wear the hat of a social worker and a counselor, while others confined their work to the legal representation alone. In conversations with judges and commissioners, interviewers encountered a similar lack of consensus on this issue.

Questions also arose concerning the appointment of counsel. As was true for the research on juvenile offender court, careful attention was paid to the instances when children appeared in front of a judge or commissioner without the benefit of counsel. Investigators heard of and witnessed how children proceeding unrepresented on a regular basis across the state, in all stages of each of the three types of Becca proceedings. Neighboring counties disagreed on when counsel must be appointed and at what point it is permissible to allow the child to appear unrepresented.

When children were represented in court and when defenders defined their role as helping to access services, many expressed frustration in the scarcity of those services needed to help avoid contempt filings. In several counties where on-site interviewing took place, as well as counties described in returned written surveys, resources were seriously lacking. Defenders complained of disappearing services and felt as though their client had no where to turn. However, other counties visited had access to well funded and high-quality programs. Their existence was not always driven by county size or funding, but rather by a decision by policy makers to expend resources in these areas.

With all these areas of uncertainty and inconsistency, a comprehensive training could serve to prepare the Becca defender with tools to deal with the informality of Becca court. However, in several of the counties studied, Becca attorneys received no training whatsoever. Some small private trainings have tried to fill in these gaps, but as of this writing, the vast majority of Becca defenders have had no formal or informal training and many were hungry for it.

Lastly, the absence of standards to govern and guide the work of the defense attorney in Becca court may lead to many of the above mentioned failings. Whether or not a child is represented in a certain hearing and whether or not services exist to which the court can refer the child depends entirely on where the child happens to reside and not on any recognized set of standards. The new Becca attorney has nowhere to turn for a clear definition of their role as counsel for the child. Caseload numbers can also be alarmingly high, as defense counsel has no standards to guide the drafting of their contract with the county for Becca representation.

This appendix begins the important work of shedding light on the areas in need of attention and improvement for this separate but very much connected system of juvenile defense. Many of the children who are arrested for offender matters have been the subject of a Becca petition and in small counties many of the defense attorneys who are representing children in offender hearings also carry a caseload of Becca clients. This may help create a scenario where policy makers and juvenile court professionals pay less attention to this area of practice. However, children who are the subject of a Becca petition, like their offender counterparts, are also at risk of losing their liberty. Many of the same concerns facing the representation of juvenile offenders are relevant to

Becca defenders. Although no specific recommendations were produced for improving the representation of children in status offender matters, those recommendations listed in the main body of this report could be used as a guide for improving Becca representation. These areas of concern, as they apply to the delivery of public defense services for Becca clients, could include the development of standards of practice for the Becca attorney, including caseload limits, the availability of comprehensive training to prepare for practice in Becca court, the creation of high-quality and regularly available referral resources for children who are facing a Becca petition, and a consistent policy from county to county for when it is, if ever, acceptable for children to appear in a Becca hearing without the benefit of counsel.

## ENDNOTES

- <sup>1</sup> *In re Gault*, 387 U.S. 1, 15 (1967).
- <sup>2</sup> *Ibid.*
- <sup>3</sup> *Ibid.*, Justice Stewart dissenting at 79.
- <sup>4</sup> *Ibid.*, at 18.
- <sup>5</sup> *Ibid.*, at 13 and 28.
- <sup>6</sup> *Ibid.*, at 21.
- <sup>7</sup> Stated or not, this dichotomy is often a foundational assumption in the analysis of the effectiveness of the juvenile system. For example, in a recent report on youth transfer decisions, an author introduced her topic with this statement, "Given the punitive and 'just desserts' philosophy of the criminal justice system when processing serious violent offenders, the juvenile justice system must choose between abolishing the 'rehabilitative ideal' under which the system originated or affirming the distinctions between adult and juvenile courts." Rodriguez, N. "Youth Transfer Decisions: Exploring County Variations." *Juvenile and Family Court Journal*, Winter 2003.
- <sup>8</sup> With the author's permission, this section borrows from the ABA Juvenile Justice Center, *A Call for Justice*, December 1995.
- <sup>9</sup> Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. 93-415, 88 Stat. 1141 (codified in sections 5, 18 & 42 U.S.C.).
- <sup>10</sup> National Advisory Committee for Juvenile Justice and Delinquency Prevention. *Standards for the Administration of Juvenile Justice*. Washington, DC: Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, 1980.
- <sup>11</sup> IJA/ABA JUVENILE JUSTICE STANDARDS, 1980.
- <sup>12</sup> Puritz, Burrell, Schwartz, Soler, and Warboys. *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. American Bar Association Juvenile Justice Center, December 1995.
- <sup>13</sup> Due to financial restraints, interviews were not done in all 39 Washington counties. The same is true of all of the ABA state assessments. Taking data from a representative sample is not an atypical method of research.
- <sup>14</sup> Boerner, D. and Lieb, R. "Sentencing Reform in the Other Washington" in Tonry, M. ed. *Crime and Justice: A Review of Research*, Vol. 28 at 73. Chicago: University of Chicago Press, 2001.
- <sup>15</sup> Becker, M. K. "Washington State's New Juvenile Justice Code: An Introduction." 14 GONZ. L. REV. 289, 307-08. (1979). The author, State Representative Mary Kay Becker, was one of the principal sponsors of the Juvenile Justice Act of 1977 bill.
- <sup>16</sup> Governor's Juvenile Justice Advisory Committee, Washington State, *Juvenile Justice Report 2002*, April 2003.
- <sup>17</sup> Revised Code of Washington (RCW) Title13 chapter 40.
- <sup>18</sup> Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. 93-415, 88 Stat. 1141 (codified in sections 5, 18 & 42 U.S.C.).
- <sup>19</sup> See note 14.
- <sup>20</sup> Ainsworth, J. "Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing Juvenile Court." 69 N.C.L. REV. 1038, 1106. (1991.)
- <sup>21</sup> *Ibid.*, at 1106, citing Schneider, S. & Schram, D. "Responses of Professionals to the Washington (State) Law" in Corrado, R., LeBlanc, M & Trepanier, J. eds. *Current Issues in Juvenile Justice*, 1983.

<sup>22</sup> See note 16.

<sup>23</sup> Szymanski, L. "Confidentiality of Juvenile Delinquency Hearings." *NCJJ Snapshot* 5(9). Pittsburgh, PA: National Center for Juvenile Justice, 2000.

<sup>24</sup> Washington appears to have an abiding preference for open courtrooms. Nationally, dependency matters are typically in closed court settings. In July 2003, Washington State changed its practice so that now even dependency cases will, in many circumstances, be held in an open courtroom

<sup>25</sup> Szymanski, L. "Public Juvenile Court Records." *NCJJ Snapshot* 5(10). Pittsburgh, PA: National Center for Juvenile Justice, 2000.

<sup>26</sup> Latour, F. "Old Arrests Leave Lasting Mark on Youths." *Boston Globe*, 4/18/03.

<sup>27</sup> Washington State Juvenile Rehabilitation Administration. "Impacts on Juveniles who have Felony Records." Undated memo.

<sup>28</sup> "...[T]he legislature declares the following to be equally important purposes of this chapter:

- (a) Protect the citizenry from criminal behavior;
- (b) Provide for determining whether accused juveniles have committed offenses as defined by this chapter;
- (c) Make the juvenile offender accountable for his or her criminal behavior;
- (d) Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender;
- (e) Provide due process for juveniles alleged to have committed an offense;
- (f) Provide necessary treatment, supervision, and custody for juvenile offenders;
- (g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety;
- (h) Provide for restitution to victims of crime;
- (i) Develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile justice system and related services at the state and local levels;
- (j) Provide for a clear policy to determine what types of offenders shall receive punishment, treatment, or both, and to determine the jurisdictional limitations of the courts, institutions, and community services; and
- (k) Encourage the parents, guardian, or custodian of the juvenile to actively participate in the juvenile justice process." RCW 13.40.010(2).

<sup>29</sup> RCW 13.04.030.

<sup>30</sup> For a look at one aspect of Washington's dependency representation see "Costs of Defense and Children's Representation in Dependency and Termination Cases." Washington State Office of Public Defense, 1999.

<sup>31</sup> This definition excludes offenders who have been previously transferred to or are otherwise under the jurisdiction of adult court. RCW 13.40.010, 020(14).

<sup>32</sup> Proceedings must be pending and an order of the court extending jurisdiction must be entered. For purposes of enforcing an order of restitution or a penalty assessment, jurisdiction extends for ten years after the offender's 18th birthday, and can be extended an additional ten years during the initial ten year period. RCW 13.40.190 and RCW 13.40.300.

<sup>33</sup> RCW 9A.040.050.

<sup>34</sup> For Washington case law related to the issue of capacity: *State v. K.R.L.*, 67 Wn. App. 721, 725 (1992); *State v. J.P.S.*, 135 Wn. 2d 34 (1998); *State v. J.F.*, 87 Wn. App. 787 (1997); *State v. E.D.W.*, 85 Wn. App. 601 (1997); *State v. T.E.H.*, 91 Wn. App. 908 (1998).

- <sup>35</sup> RCW 10.77.050.
- <sup>36</sup> *State v. E.C.*, 83 Wn. App. 523 (1996).
- <sup>37</sup> *Ibid.*, at 530.
- <sup>38</sup> RCW 13.40.040.
- <sup>39</sup> RCW 13.40.038.
- <sup>40</sup> RCW 13.40.040(2).
- <sup>41</sup> RCW 13.40.040(5).
- <sup>42</sup> RCW 13.40.070.
- <sup>43</sup> The 72 hour time period excludes weekends and holidays. As a result, a juvenile could be arrested on a Thursday and if the following Monday is a holiday, not be guaranteed release until Wednesday of the next week. RCW 13.40.050(1).
- <sup>44</sup> See note 16.
- <sup>45</sup> RCW 13.40.070(6) & (7).
- <sup>46</sup> See note 16.
- <sup>47</sup> RCW 13.40.0357.
- <sup>48</sup> The classification of crimes for juvenile offenders, in large part, is the same as that for adults. For example, a Robbery in the First Degree is a Class A. A shoplifting, which is simply a gross misdemeanor in the adult system, is classified as a “D” crime in the juvenile scheme.
- <sup>49</sup> The state facilities are run by the Juvenile Rehabilitation Administration (JRA).
- <sup>50</sup> RCW 13.40.150.
- <sup>51</sup> *State v. Crabtree*, Slip Opinion 20786-2-III (2003).
- <sup>52</sup> RCW 13.40.0357.
- <sup>53</sup> *State v. K.E.*, 97 Wn. App.273 (1999); *State v. S.S.*, 67 Wn. App. 800 (1992); *State v. Grewe*, 117 Wn.2d 211 (1991).
- <sup>54</sup> Washington State Institute for Public Policy. “The 1997 Revisions to Washington’s Juvenile Offender Sentencing Laws: An Evaluation of the Effect of Local Detention on Crime Rates.” July 2002. (Citing data from the Governor’s Juvenile Justice Advisory Committee, 2001.)
- <sup>55</sup> A motion to transfer a juvenile case for adult criminal prosecution can be made by the prosecuting attorney, the respondent, or the court itself.
- <sup>56</sup> A decline hearing is mandatory when “(a) The respondent is fifteen, sixteen, or seventeen years of age and the information alleges a class A felony or an attempt, solicitation, or conspiracy to commit a class A felony; (b) The respondent is seventeen years of age and the information alleges assault in the second degree, extortion in the first degree, indecent liberties, child molestation in the second degree, kidnapping in the second degree, or robbery in the second degree; or (c) The information alleges an escape by the respondent and the respondent is serving a minimum juvenile sentence to age twenty-one.” RCW 13.40.110.
- <sup>57</sup> Note that a mandatory decline hearing can be waived through agreement by the court, the parties, and their counsel. An order of the court must still be entered.
- <sup>58</sup> The factors to be considered by a judge in deciding whether to decline juvenile court’s jurisdiction are: 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver. 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner. 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted. 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by

consultation with the [prosecuting attorney]). 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in [criminal court]. 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living. 7. The record and previous history of the juvenile, including previous contacts with [social service agencies], other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to [the court], or prior commitments to juvenile institutions. 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if she or he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court. *Kent v. U.S.*, 16 L.Ed.2d 84 (1966).

<sup>59</sup> For recent look at discretionary transfer decisions in Washington State see: Rodriguez, N., "Youth Transfer Decisions: Exploring County Variations." *Juvenile and Family Court Journal*, Winter 2003.

<sup>60</sup> The highest rate of juvenile arrest in Washington state occurred in 1994 when the annual arrest rate was nearly 95 per 1000 youth. The rates have dropped dramatically since then—in 2001, there were 62.3 arrests per 1000 youth, the lowest rate since at least 1982. Washington State Governor's Juvenile Justice Advisory Committee, *Juvenile Justice Report 2002*, at 131, April 2003.

<sup>61</sup> Automatic transfer results when:

"(v) The juvenile is sixteen or seventeen years old and the alleged offense is:

- (A) A serious violent offense as defined in RCW 9.94A.030;
- (B) A violent offense as defined in RCW 9.94A.030 and the juvenile has a criminal history consisting of:
  - (I) One or more prior serious violent offenses;
  - (II) two or more prior violent offenses; or
  - (III) three or more of any combination of the following offenses: Any class A felony, any class B felony, vehicular assault, or manslaughter in the second degree, all of which must have been committed after the juvenile's thirteenth birthday and prosecuted separately;
- (C) Robbery in the first degree, rape of a child in the first degree, or drive-by shooting, committed on or after July 1, 1997;
- (D) Burglary in the first degree committed on or after July 1, 1997, and the juvenile has a criminal history consisting of one or more prior felony or misdemeanor offenses; or
- (E) Any violent offense as defined in RCW 9.94A.030 committed on or after July 1, 1997, and the juvenile is alleged to have been armed with a firearm.

In such a case the adult criminal court shall have exclusive original jurisdiction." RCW 13.04.030.

<sup>62</sup> These offenses are the "serious violent" offenses defined at RCW 9.94A.030(37). They include crimes such as murder, rape and kidnapping.

<sup>63</sup> The list of less serious offenses and other requirements for automatic transfer is found at RCW 9.94A.030(45) and 13.04.030(1)(e)(v). The author of this report does not intend to understate the seriousness of crimes against persons. However, several of the crimes that are not in the "serious violent offense" category, but by this law can lead to automatic transfer, are not of a most serious nature. For some crimes in this category the result of the crime or the intent/culpability of the offender is much less than what should be required to warrant the extreme measure of removing a youth from the jurisdiction of juvenile court and, thereby, denying that individual any real opportunity for rehabilitation. For example, Robbery in the Second Degree is defined as the unlawful taking of "personal property from the person of another against his will by the use or threatened use of immediate force...". RCW 9A.56.190. A scenario fitting that definition, and one not uncommon to adolescent criminal proclivities, is a purse snatching where the victim is shoved, or the perpetrator just even says "I'll punch you if you come after me...."

Although a single current charge of Robbery 2 cannot be the basis for automatic transfer, the right combination of criminal history and a current charge of Robbery 2 could be. A charge of Manslaughter in the Second Degree, while resulting in one of the most serious and dire criminal effects, the level of culpability is low: merely engaging in an act that is negligent (i.e., one *should have known* that a risk of harm existed—not even that one did in fact know that a risk existed) is the mental state required for a conviction. As a result, a judge is not allowed any discretion to assess complex factual patterns or the needs of the community or youth as was carefully set out by the U.S. Supreme Court in *Kent*. See note 58 above.

<sup>64</sup> Barnoski, R. “Changes in Washington State’s Jurisdiction of Juvenile Offenders: Examining the Impact.” *Washington State Institute for Public Policy*, January 2003.

<sup>65</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>66</sup> See note 1.

<sup>67</sup> RCW 13.40.140.

<sup>68</sup> Onsite visits to collect data for this report included visiting at least one county where each of the four types of juvenile public defense delivery was practiced.

<sup>69</sup> This information was provided by the Washington Defender Association.

<sup>70</sup> Mattingly, M. “Executive Director of NCJFCJ Looks at Future of Juvenile Justice: An Interview with Judge David Mitchell.” *Juvenile Justice Update*, June/July 2002.

<sup>71</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of 3.1. (1996).

<sup>72</sup> Washington State Rules of Professional Conduct. Rule 1.2, *Scope of Representation*.

<sup>73</sup> In many situations involving juvenile offenders, what is actually in the child’s “best interest” is not a clear-cut answer. When discussed openly, different perspectives can be aired and considered. However, if the defense attorney decides to act in his or her view of the child’s ‘best interest’ then it is likely that the child’s perspective will not be heard or given credence. A child’s perspective on his or her own life is important, and should be considered. Not only is the child’s perspective likely to have important information that cannot be from others, the child’s commitment to the outcome of the case, including directives for treatment, etc., will be stronger if the child has fully participated in the process. Ultimately the judge will make a decision in each case, but if one of the parties is filtering or leaving out information, then not all perspectives will be considered by the judge.

<sup>74</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of 1.1. (1996).

<sup>75</sup> *Ibid.*, *Standards Relating to Pretrial Court Proceedings*, summary of part 5.1. (1996).

<sup>76</sup> *Ibid.*, summary of 6.1. (1996).

<sup>77</sup> The reality may be even worse. In the process of compiling survey results, it became apparent that some respondents to the written survey may have possibly been confused by the term “First Appearance” because some counties refer to that hearing as a “Probable Cause” hearing. Survey respondents may have read the question as whether there is an attorney present at a youth’s *first time in court*, which for in-custody cases would be the probable cause determination, but for out-of-custody case, it would be the arraignment.

<sup>78</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of 1.1. (1996).

<sup>79</sup> “A juvenile has a right to be represented by counsel at all critical stages of juvenile court proceedings. *Unless waived by the juvenile*, counsel shall be provided to a juvenile who is financially unable to obtain counsel without causing financial hardship to himself or herself or the juvenile’s family, in any proceeding where the juvenile may be subject to transfer for criminal prosecution or in any proceeding where the juvenile may be in danger of confinement.” RCW 13.40.140 (emphasis added).



- <sup>80</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of parts 4.1, 6.2 and 6.4. (1996).
- <sup>81</sup> *Ibid.*, summary of parts 4.2 and 7.3.
- <sup>82</sup> Civility is emphasized in the lawyer's Rules of Professional Conduct, for example: Rule 3.1, Meritorious Claims and Contentions; Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; Rule 3.5, Impartiality and Decorum of the Tribunal; Rule 4.1, Truthfulness in Statements to Others; Rule 4.4, Respect for the Rights of Third Persons.
- <sup>83</sup> See note 1.
- <sup>84</sup> A *capacity hearing* is required when the State seeks to charge a child under the age of eleven. A *competency hearing* is held when a party raises the issue of whether a juvenile, regardless of age, is too mentally incompetent to be charged. A *transfer hearing* is held when, because the age of a juvenile, the class of crime charged, and/or the juvenile's criminal history, a judge is required to make a decision about whether to transfer jurisdiction of the case to adult court. A more in-depth description of these hearings is given in Chapter One of this report.
- <sup>85</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of parts 4.2 and 7.3. (1996).
- <sup>86</sup> *State v. K.R.L.*, 67 Wn. App. 721, 725 (1992).
- <sup>87</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of part 9.4. (1996).
- <sup>88</sup> See note 64.
- <sup>89</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of part 7.1. (1996).
- <sup>90</sup> *Ibid.*, 9.3
- <sup>91</sup> *Ibid.*, summary of parts 9.2, 9.3 and 9.4. (1996).
- <sup>92</sup> *Ibid.*, summary of part 9.1. (Emphasis added.) (1996).
- <sup>93</sup> RCW 13.40.010(g). See Chapter One for further discussion of the purposes of the JJA.
- <sup>94</sup> RCW 13.40.150.
- <sup>95</sup> *State v. K.E.*, 97 Wn. App.273 (1999).
- <sup>96</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of part 10.1. (1996).
- <sup>97</sup> Comparing the average annual number of appeals to the number of cases (360 to 750 per year) reported, it is indeed astounding that so few cases are filed. See the section titled "*Caseloads*."
- <sup>98</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of 10.1. (1996).
- <sup>99</sup> Washington Defender Association. *Standards for Public Defense Service*. Standard Three: Caseload Limits and Types, Standard Fourteen: Qualifications of Attorneys. (Oct. 1989). These standards were endorsed by the Washington State Bar Association in 1990 and also referenced in Washington State law as a guide for the determination of county-by-county contracting standards for public defense services. See RCW 10.101.030.
- <sup>100</sup> "E. Juvenile Cases — Class A — Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:
- i. Minimum requirements set forth in section 1, and
  - ii. Either:
    - a. has served one year as a prosecutor; or
    - b. has served one year as a public defender; or

- c. has been trial counsel alone of record in five juvenile Class B and C felony trials; and
  - iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.
- F. Juvenile Cases - Classes B and C. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:
- i. Minimum requirements set forth in Section 1; and
  - ii. Either
    - a. has served one year as a prosecutor; or
    - b. has served one year as a public defender; or
    - c. has been trial counsel alone in five misdemeanor cases brought to a final resolution; and
  - iii. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.”

Washington Defender Association, *Standards for Public Defense Services*, Standard Fourteen: Qualifications of Attorneys. (Oct. 1989).

<sup>101</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of 2.1. (1996).

<sup>102</sup> “...[S]tudies typically suggest that approximately 10 percent of general population youth have a special education disability, compared with between 30 and 50 percent of incarcerated youth. Prevalence estimates vary considerably because of differences in how disability is defined and measured, poor screening and assessment processes both in schools and in the juvenile justice system, and inconsistent to nominal transfer of school records to juvenile court and correctional facilities. National Council on Disability, “Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current Status of Evidence-Based Research.” May 2003.

<sup>103</sup> Standards for Public Defense Services. RCW 10.101.030. The law concludes by stating: “The standards endorsed by the Washington State Bar association for the provision of public defense services may serve as guidelines to contracting authorities.” See also: Washington Defender Association, *Standards for Public Defense Services*, Standard Eleven: Monitoring and Evaluation of Attorneys. (Oct. 1989).

<sup>104</sup> Information provided by the Washington State ACLU. Its final report is expected in late 2003.

<sup>105</sup> No agency in Washington State appears to be keeping track of whether counties do in fact comply with the law and adopt standards, nor does there seem to be any government-led effort to assess standards that are set or ensure that counties are following standards.

<sup>106</sup> IJA/ABA *Juvenile Justice Standards*. Standards Relating to Counsel for Private Parties, summary of 2.1. (1996).

<sup>107</sup> *Building Blocks for Youth* describes itself as an alliance of children’s advocates, researchers, law enforcement professionals and community organizers that seeks to protect minority youth in the justice system and promote rational and effective justice policies. Its website can be found at [www.buildingblocksforyouth.org](http://www.buildingblocksforyouth.org).

<sup>108</sup> Schwarz, J. “Court Reports Often Blame Black Juvenile Offenders More Than White Offenders.” *University Week*. University of Washington, Feb. 25, 1999.

<sup>109</sup> See note 16.

<sup>110</sup> Act of March 7, 1891, ch. 103, 1891 Wash. Laws 195. (No longer in effect.)

<sup>111</sup> Act of Feb. 15, 1905, ch. 18, s 1, 1905 Wash. Laws 34. (Repealed 1909.)

<sup>112</sup> RCW 13.32A.

<sup>113</sup> Ivey, A. “Washington’s BECCA Bill: The Costs of Empowering Parents.” *Seattle University Law Review*, 1996.

<sup>114</sup> RCW 13.32A.060(b); 13.32A.030(7), (15); RCW 13.34.130.

<sup>115</sup> RCW 13.32A.050.

<sup>116</sup> RCW 13.32A.050.

<sup>117</sup> *In re the Welfare of K.L.*, 87 Wn. App. 574 (Div. II 1997) and *In re the Interest of A.D.F.*, 88 Wn. App. 21 (Div. I 1997).

<sup>118</sup> RCW 13.32A.250(3); See also *In re M.B.* 101 Wn. App. 425 (Div. I 2000).

<sup>119</sup> RCW 13.32A.030(3).

<sup>120</sup> RCW 13.32A.191.

<sup>121</sup> RCW 13.32A.196.

<sup>122</sup> RCW 13.32A.030(5).

<sup>123</sup> RCW 13.32A.170.

<sup>124</sup> RCW 13.32A.179(3).

<sup>125</sup> RCW 13.32A.190(1).

<sup>126</sup> RCW 13.32A.190(2).

<sup>127</sup> IJA/ABA JUVENILE JUSTICE STANDARDS. (1980).







