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# SELLING JUSTICE SHORT

## JUVENILE INDIGENT DEFENSE IN TEXAS



*A Report by the Texas Appleseed Fair Defense  
Project On Indigent Defense Practices in Texas—  
Juvenile Chapter*

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**With the generous support of the Southern Poverty Law Center**



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*Texas Juvenile Court Judge*

# INTRODUCTION

**T**here is a growing concern nationwide about the quality of legal representation afforded indigent defendants. Citizens are uneasy when they hear about a lawyer falling asleep at counsel’s table during a capital case, lawyers who do not fully investigate a case or talk to witnesses, or lawyers who make no attempt to consult with an expert to sort out complex mental health issues. Concepts of fairness and justice are deeply rooted and fundamental to our democracy. People are troubled when presented with evidence that poor people don’t get their fair and full day in court; they are shocked by the increasing reports of innocent people being incarcerated or sentenced to death. Equal access to justice is an important American value. Ensuring due process to all citizens, regardless of financial status, race, or age, requires constant assessment of our criminal and juvenile justice systems.

Concerns about indigent defense are greatly heightened when we examine the way in which children are processed through the justice system. In 1967, the United States Supreme Court held in the seminal case *In re Gault*<sup>i</sup> that children are guaranteed important due process rights under the United States Constitution. These due process rights include the right to a full and fair hearing in delinquency proceedings and the right to be represented by counsel. Recognizing the critical role that counsel plays for a child accused of a crime, the United States Supreme Court noted: “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of proceedings, and to ascertain whether he has a defense and to prepare and submit it.”<sup>ii</sup>

Since *Gault*, the states, to varying degrees, began to address the concerns expressed in that opinion and numerous studies addressing the treatment of youth in the criminal justice system. On the national level, Congress, citing concerns about increases in juvenile delinquency and the need to safeguard children's rights, passed the Juvenile Justice and Delinquency Prevention (JJDP) Act in 1974. This Act created the National Advisory Committee for Juvenile Justice and Delinquency Prevention, whose charge included development of national juvenile justice standards. These standards, published in 1980, require that children are represented by counsel in all proceedings arising from a delinquency action, beginning at the earliest stage of the decision process.<sup>iii</sup> The Institute for Judicial Administration American Bar Association Joint Commission on Juvenile Justice Standards developed similar standards that same year.<sup>iv</sup>

Studies concerning the legal representation of juveniles have found that, despite the constitutional requirements set forth in *Gault*, and the juvenile justice standards, juveniles in many regions of the country are receiving inadequate assistance of counsel in delinquency proceedings. When the JJDP Act was reauthorized in 1992, it re-emphasized the importance of lawyers in juvenile delinquency proceedings, specifically noting the inadequacy of publicly funded defenders to provide individualized justice. In that same year, in *America's Children at Risk: A National Agenda for Legal Action*, the ABA's Presidential Working Group on the Unmet Legal Needs of Children and Their Families also called for the juvenile justice system to fulfill children's right to competent counsel.

In 1995, the American Bar Association released a report that examines the severe gaps in the accessibility and quality of legal representation for children across the nation.<sup>v</sup> This was the first systematic national assessment of current practices of juvenile defense attorneys. While the report notes that some attorneys vigorously and enthusiastically represent their clients, it also concludes that such representation is not widespread, or even common. Some of the problems facing juvenile defenders include: (1) excessive caseloads; (2) lack of resources for independent evaluations, expert witnesses, and investigatory support; (3) lack of computers, telephones, files, and adequate office space; (4) inexperience, lack of training, low morale, and salaries lower than those of their counterparts who defend adults or serve as prosecutors; and (5) inability to keep up with rapidly changing juvenile codes. The report raises serious concerns that the interests of many young people in the justice system are significantly compromised.<sup>vi</sup>

The year 1999 marked the centennial of the Juvenile Court, inspiring judges, advocates and other stakeholders nationwide to reflect on the changes and challenges faced by the Juvenile Court over the past century. Stakeholders began taking a renewed look at the way in which legal services are provided to indigent children. For example, Colorado, Georgia, Illinois, Kentucky, Louisiana and Oklahoma have completed, or are in the process of conducting, statewide assessments of indigent defense services for juveniles. Preliminary reports reveal serious deficiencies and major systemic barriers that impede the delivery of justice for children.

Continued examination of the provision of legal services for children is especially urgent as states continue to emphasize punishment by incarceration rather than prevention and rehabilitation. Over the last few years, 47 states and the District of Columbia have amended their juvenile codes to enact more punitive sanctions, lengthen sentences and expand the requirements to send children to adult courts and prisons. Today in this country, it is not unheard of for children to receive life — and even death — sentences for acts committed while they were under the age of 18. Although children face higher stakes today in the justice system than ever before, sufficient resources have not been devoted to providing defense attorneys with the necessary tools to respond to the complexities of the cases before them and the changing

landscape of juvenile law. This inequity has severe consequences for youth in the justice system and society as a whole.

One consequence of the systemic flaws is the pervasive disproportionate representation of non-white youth in the juvenile justice system. A recently released study reveals that the justice system responds more punitively to minority youth than to white youth charged with similar offenses.<sup>vii</sup> This occurs at every stage of the system, including the filing of charges, detention before trial, transfer to adult criminal court, commitment to juvenile facilities, and incarceration in adult prisons. The report further states that when racial/ethnic differences are found, they tend to aggregate as youth are processed through the justice system, so that minority youth have an enormous “cumulative disadvantage” when it comes to justice in this country.<sup>viii</sup>

Another consequence of these systemic failures is that children are often treated like little adults, abandoning what we know about the universal principles of child and adolescent development. Adolescents think differently from adults.<sup>ix</sup> Research demonstrates that adolescents develop gradually and unevenly and that chronological age and physical maturity are unreliable indicators of development.<sup>x</sup> Adolescence is a period of dramatic cognitive, emotional, physical and social development. The average teenager can exhibit mature and independent behavior one minute and an instant later behave in an emotionally childish and impulsive manner.<sup>xi</sup> When it comes to cooperating with authority figures, children, unlike adults, are especially vulnerable, suggestible, irrational, and eager to please. Children are very susceptible, for example, to high-powered police interrogations, which can result in false confessions.<sup>xii</sup> The challenges faced by children in the justice system are frequently compounded by mental health problems, disabilities and special education needs which often go untreated.

The juvenile defender plays an essential and expansive role in assuring justice for children. In addition to the responsibilities of presenting a defense to the delinquency charge, juvenile defenders must gather information regarding their clients’ individual histories, families, schooling, and community ties in order to assist courts in diverting appropriate cases out of court, preventing unnecessary pre-trial detention, avoiding unnecessary transfers to adult court, and ordering individualized dispositions. Juvenile defenders have a critical role in protecting their clients’ interests at every stage of the proceedings, from arrest and detention to pretrial proceedings, from adjudication and disposition to post-disposition matters.

The provision of competent counsel and adequate defense services necessary to ensure fair treatment for children is essential to a fair and balanced justice system. There is currently a nationwide crisis in indigent defense for juveniles. Too many young people are churned through the system and are often left literally defenseless. More often than not, these youngsters are low income, children of color. The first step in remedying this crisis is to identify with specificity some of the institutional and systemic barriers that prevent children from receiving equal access to justice. We have an obligation to protect children from the harm caused by a defective system. Otherwise, we are selling justice short.





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*Texas Juvenile Court Judge*

# TEXAS APPLESEED FAIR DEFENSE PROJECT

**T**exas, unlike many other states, has no uniform system for the appointment of counsel for children in the justice system. The state, which consists of 254 counties, leaves to each county the burden of funding indigent juvenile defense systems. Although the state mandates the appointment of attorneys for children at certain stages of delinquency proceedings, the state does not provide regulation, oversight, or funding for indigent juvenile defense systems.

While some people contend that the Texas criminal justice is the least fair and most inefficient in the country, others argue that such criticisms are unjustified and anecdotal. The one point on which everyone agrees, however, is that there is not enough comprehensive, systemic information available to fully and fairly evaluate the delivery of indigent defense services in Texas. This study was designed to begin the process of filling the information vacuum on issues pertaining to the legal representation of indigent children in Texas. Specifically, the purpose of this report is to:

- Identify the ways in which the state of Texas provides legal representation to poor children in the justice system;
- Determine how this legal representation is funded;
- Pinpoint the characteristics of the system which encourage or impede lawyers’ abilities to serve their juvenile clients; and
- Gauge the access children have to competent legal representation.

Texas Appleseed, a not-for-profit non-partisan law center based in Austin, developed its overall Fair Defense Project to conduct the first comprehensive

on-site study of the many different procedures under which indigent defendants receive counsel throughout Texas.

The ultimate objective of the Texas Applesseed Fair Defense Project is to ensure that our adversarial system of criminal justice fairly and efficiently enforces the law without being skewed to disadvantage the poor. Our entire society benefits when a defendant who cannot afford a lawyer is provided counsel who assures adequate participation in the criminal justice system. Not only does this safeguard society's collective ideal of equal justice, it also ensures that both the verdict and any sentence are just, definitive and respected.

Recently, the question of the adequacy of indigent defense in Texas has been raised in several contexts in the state. In 1999, a legislative effort to address the timing and method of appointing counsel failed to make it into law. In September 2000, a report issued by the State Bar of Texas Committee on Indigent Legal Services to the Poor in Criminal Matters concluded that statewide, indigent defendants in Texas are not receiving adequate representation.<sup>xiii</sup> The report identifies several barriers to effective representation of adult indigent defendants. These barriers include inadequate compensation, widespread pressure to plead cases quickly, and a failure to impose or enforce standards for representation. Like everywhere else in the country, the Texas juvenile justice system operates in the shadow of the overall criminal justice system. Failures in the adult criminal system are foreshadowed and even exacerbated in the juvenile justice system.

The juvenile justice system is our first and best line of defense to divert children away from a pattern of adult crime. In recognition of this, Texas Applesseed secured the collaboration of the American Bar Association Juvenile Justice Center and other child advocacy organizations to assist in this project. The need for a child-focused assessment was reinforced, in part, by the alarming number of complaints made to national legal and child advocacy organizations concerning the unfair treatment of children and abusive practices in the Texas justice system. Calls for help came from parents, children, relatives, juvenile and criminal justice professionals, teachers, corrections officers, mental health professionals, media, citizen advocates, clergy, medical doctors, and many others. Stories abound of children who never speak to, or even see, their lawyers save for moments immediately before a court hearing and of judges who prevent counsel from filing motions on behalf of children because it takes up too much court time.

An unfortunate, but concomitant fact to consider is that Texas leads the nation in imprisoning its citizens. According to a United States Department of Justice report, Texas now has the nation's largest incarcerated population under the jurisdiction of its prison system.<sup>xiv</sup> Texas' penal system likewise leads the nation with an annual average growth rate of 11.8%, approximately twice the annual average growth rate of 6.1% documented for all state prison systems.<sup>xv</sup> Today there are more individuals in Texas under criminal justice control than the entire populations of Vermont, Wyoming, Alaska, or Washington, D.C. A recent article in the *Washington Post* noted, "If Texas were a separate nation, it would have the world's highest incarceration rate — well above the United States at 662 per 100,000 or Russia's 685."<sup>xvi</sup>

Juvenile incarceration rates are also high. In 1997, with 6,936 children committed to residential placements, Texas was second only to California for the number of children incarcerated in juvenile facilities.<sup>xvii</sup> California, Florida, and Texas collectively account for over 30% of juveniles committed or detained.<sup>xviii</sup> Over 75% percent of the children incarcerated in Texas in 1997 were children of color.<sup>xix</sup> More recent figures reflect similar patterns: of the 5,524<sup>xx</sup> children in Texas Youth Commission facilities in 1999, 75% were either Hispanic or black.<sup>xxi</sup> Over 30% of all juvenile offenders on death row in the United States are in Texas.<sup>xxii</sup> In 1999, the number of Texas juveniles in TYC facilities exceeded the adult prison populations of over a dozen states.<sup>xxiii</sup> Most of the incarcerated youth in Texas are serving sentences for non-violent offenses.

Additional data of grave concern reflect an increase in incarceration of children due to probation violations or parole revocations. In 1999, there were 38,996 children under the supervision of probation departments in Texas.<sup>xxiv</sup> According to the Texas Criminal Justice Policy Council, parole revocations resulting in commitment to TYC increased by 161% from 1994-1999.<sup>xxv</sup> Fifteen percent of the youth committed to TYC in 1999 were committed due to a parole revocation. Of those, 88% were due to technical violations or the commission of a misdemeanor offense.<sup>xxvi</sup> TYC recently reported that 70% of children incarcerated in secure facilities are committed after probation violations.<sup>xxvii</sup>

Given the high stakes that children in Texas face today, access to counsel and quality of representation is more crucial than ever before. This study hopes to provide a starting point for new reforms and initiatives that will improve the quality of juvenile indigent defense.





# METHODOLOGY

**T**exas Appleseed and the American Bar Association Juvenile Justice Center, with support from the Southern Poverty Law Center, convened a team of national experts to conduct an investigation of juvenile indigent defense in the state of Texas. The Juvenile Team consisted of practitioners, academics, clinicians, advocates, former public defenders, and managers of defender organizations.

The overall Texas Appleseed Fair Defense study is based on extensive on-site interviews, courtroom observations, comprehensive review of relevant literature, and an analysis of material data in a representative sample of 23 Texas counties. The 23 county sample, which covers over 60% of the state's population, was constructed to include a representative cross-section of large, medium and small counties, and a cross-section of the state's geographic regions. The juvenile investigative team concentrated its on-site work in a sub-sample of 14 of these 23 counties, with supplemental inquiry in the remaining 9. The 14 juvenile on-site counties include over 54% of the state's population and account for 60% of TYC commitments made in 1999.<sup>xxviii</sup> The 23 counties (including the 14 juvenile on-site counties) are listed in the table below.

At each site, Juvenile Team members observed court proceedings, toured court and detention facilities and conducted interviews with juvenile defense attorneys, prosecutors, judges, probation officers, court coordinators, court administrators, court auditors, and court clerks. Juvenile Team members also interviewed children, parents, child

advocates, detention center staff, social workers and juvenile board members. In some instances, there was follow-up through telephone interviews. The Texas Appleseed Fair Defense study is designed to examine the basic structure of Texas' wide variety of indigent defense systems rather than focus on specific individuals or counties. The ultimate goal is to identify systemic barriers to fair defense, describe consequences of those barriers and report ways in which judges, attorneys and counties have attempted to overcome them. All the information gathered has been compiled, synthesized and analyzed to produce the following findings and recommendations.

### Texas Appleseed Fair Defense Project 23 County Sample

County	Population (1999)	Principal City
Harris*	3,229,026	Houston
Dallas*	2,069,094	Dallas
Tarrant*	1,368,734	Fort Worth
Bexar*	1,359,993	San Antonio
Travis*	717,925	Austin
El Paso*	694,666	El Paso
Hidalgo	527,726	McAllen
Denton*	400,878	Denton, sub.-DFW
Nueces*	311,978	Corpus Christi
Jefferson*	247,354	Beaumont
Lubbock	234,689	Lubbock
Brazoria*	228,166	Lk. Jackson
McLennan	204,589	Waco
Smith*	168,888	Tyler
Tom Green	105,648	San Angelo
Comal	74,308	New Braunfels
Hunt	70,265	Greenville
Bastrop	52,516	Bastrop
Brown	37,187	Brownwood
Titus*	26,703	Mount Pleasant
Shelby*	22,528	Center
Grimes*	22,434	Navasota
Terry	13,406	Brownfield

\* Counties in Juvenile sub-sample



# FINDINGS

**C**ase study: *the entire room was chaos. At about 9:15 a.m., the probation officer began calling out names and asked if the responding child had a lawyer. If not, he'd place the child's case folder in one of several stacks. The jury box was full of lawyers waiting to be appointed and the district attorney and several other lawyers milled around a large table in front of the bench. Once the probation officer finished the call, he and another man stood at the bench and reviewed each case with the judge; the judge then called a lawyer from the jury box. The lawyer picked up the file and reviewed it. About 5 or 10 minutes later, the appointed lawyer would yell out the child's name and go talk to him – usually in the hallway, but sometimes right in the courtroom. The lawyer would then return with his client and approach the far left side of the bench. There, a clerk would swear in the child, inform him of his rights and the child would enter a plea. The child would then move toward the right to another clerk and sign a form. The child would then move further right, stopping in front of the judge, at which time the judge would ask a few questions to determine whether he thought the child understood his rights; the judge would sometimes ask about the facts of the offense before accepting the plea. Lastly, the judge would sentence the child. Most "hearings" lasted between 2-10 minutes. A court appointed attorney came up to me at one point and said, "It may look like chaos in here but it's really a well-oiled machine."* - Court observer in an urban county

## Significant Stages of Juvenile Justice Process

The Texas Family Code<sup>xxix</sup> provides that children must be represented at most stages of delinquency proceedings. The following is a partial listing of significant stages of the juvenile justice process where representation by counsel is an issue.

**Arrest:** A child is not entitled to, nor does he receive, counsel when detained by police.

**Detention:** Following arrest, some children are taken to a probation officer who is charged with making the initial determination of whether the child should be detained. During this interview, the child is not represented by counsel.

**Detention and Probable Cause Hearing:** Texas law requires that a hearing be held within 48 hours if a child is detained and taken into custody. The law does not require representation at this hearing, however a minority of jurisdictions provides counsel at this hearing.

**Review Hearing:** If a child's custody is continued following the detention and probable cause hearing, the court is required to conduct a continued custody review hearing within ten days of the initial hearing. Children are entitled to a lawyer at this time. Judges in many of the counties visited made sure that every child was represented at the review hearing, even if it meant temporarily appointing an attorney other than the one assigned to the case. Team members observed review hearings in three courts at which children appeared without counsel. Attorneys in two additional jurisdictions stated that children are not always provided attorneys for these hearings.

The court must hold review hearings every ten days, unless the child and his attorney waive this judicial review. In at least two jurisdictions, probation officers routinely obtain waivers of these hearings from the children.

**Filing of the Petition:** The petition is the formal charge against the child. In some jurisdictions, the court waits until the prosecutor has filed a petition before assigning counsel. However, judges may impose pre-trial conditions, such as detention, curfew, counseling, assessments and drug tests before the petition has been filed.

**Adjudicatory Hearing:** **A child is entitled to an adjudicatory hearing within ten days of the filing of the petition. Counsel can waive the ten-day requirement, but if there is a hearing, the child must be represented by counsel at that time. A child has a right to a jury trial.**

**Disposition:** Dispositional (sentencing) hearings may occur on the same day as the adjudication. Children must be represented by counsel at this hearing. Waiver of counsel is not allowed.

**Post-Disposition:** Children are not entitled to an attorney post-disposition. A child has a right to an appellate lawyer if he has a "bona fide" claim on appeal.

## **A. THE ROLE OF COUNSEL**

### **1. Arrest**

Although children are issued warnings by a magistrate before police may take a formal statement from them, these warnings are routinely phrased in adult language that is difficult for a child to understand. Interviews confirm that few magistrates and Justices of the Peace (who are not required to be, and usually are not, lawyers) engage in any meaningful process to ensure that a child is aware of his right to counsel and right to remain silent. Most attorneys and some judges agree that the presence of a lawyer at this critical stage would better protect the children in the system.

### **2. Detention**

An officer from the department of probation makes the initial detention determination. A probation officer, who then decides if the child should be released to the custody of his parents or guardians or held in the detention facility pending a detention and probable cause hearing before a magistrate or judge, interviews children and sometimes their parents.

### **3. Detention and Probable Cause Hearing**

The detention and probable cause hearing is the first instance where a judge or magistrate reviews the decision of the probation officer. The initial detention decision can have significant consequences. A detained child is more likely to be placed out of home at disposition, in part because he is less able to assist in his defense, he may be viewed by successor judges as “troublesome” and he is denied the opportunity to demonstrate positive behavior in his home environment.<sup>xxx</sup>

In at least two jurisdictions the judge regularly asks the child to speak at the initial detention hearing, although an attorney is not appointed to counsel the child. In many instances the children make inculpatory admissions to the court. Un-counseled statements are generally avoided in the jurisdictions visited that have public defender systems; in these counties, all children are represented at the initial detention hearing. In another county, an ‘attorney of the day’ is appointed to represent all children in detention hearings on a given day or in a given week.

### **4. Review Hearing**

The review hearing provides the judge an opportunity to revisit the initial detention decision, although continued custody is typically the ruling of the court. To obtain release of his client, counsel must provide the court with information that demonstrates that release at this stage is in the interests of the child and the community. To meet this burden, the attorney must conduct an investigation into the child’s background and home life and advocate for release. As discussed later in this Report, attorneys are generally not compensated for such an investigation. Researchers conducting this study rarely witnessed the release of a detained child. However, it was reported in one county that the presiding judge almost uniformly orders the release of detained minors at either the first or second review hearing.

Even when an attorney has filed an appearance, children sometimes appear at detention review hearings without an attorney present. In one jurisdiction where this is reported to be a common occurrence, the reasons given for this lack of counsel included, “the kid isn’t going to get out anyway” and “it’s not worth the fifty bucks to go all the way out there.”

### **5. Waiver of Hearings**

A child and his attorney are permitted to waive the detention review hearings. A few counties make it a practice to hold review hearings every ten days, however it is common for the child and his attorney to waive these hearings. In some counties, probation officers routinely obtain waivers from children. The child is thus deprived the benefit of consulting with the lawyer at the time he is being asked or instructed to waive this important right. Sometimes the attorney actually requests that the probation officer obtain the waiver. Other times, the probation officer takes it upon himself to get the waiver and then forward it to the attorney for his signature.

In those counties where waiver is common, there usually is not in place a procedure to alert the judge when a

child has been in custody for a long time. Thus a child can remain in custody for extended periods of time, without a petition on file, unbeknownst to the judge. In one county, the presiding juvenile judge avoids this by requiring the department of probation to give status reports on the children, informing him of how long a child has been in detention and the status of his case.

## 6. Filing of the Petition

It is difficult to discern the average length of time it takes for a petition to be filed. There are a few counties in which the court requires that the petition be filed within a certain number of days, however most do not have such a rule. The lack of a uniform, reasoned policy results in the imposition of pre-trial conditions—some of which can be quite onerous—for lengthy periods of time before a child is ever charged. Moreover, attorneys in at least two counties complained of children being held in custody indefinitely awaiting charges. One attorney commented, “Weeks can pass between the time that the kid gets detained and a petition is filed. The kids have no recourse because the attorneys that are purportedly appointed don’t show up at the review hearings and the kids don’t know that they can request release.” One child interviewed, who had not been charged, reported that he was told that he was being held for investigation. At the time of his interview, he had been in detention for forty-two days and had not been appointed an attorney, despite his repeated requests for one.

## 7. Adjudication

Guilt or innocence is determined at the adjudication hearing or trial. In an overwhelming majority of jurisdictions visited, attorneys report that they rarely, if ever, take a case to trial. Instead, the vast majority result in guilty pleas. One jurisdiction even reports that it has not had a juvenile trial in the county in two years. Unfortunately, it is not possible to determine the exact number or rates of guilty pleas in Texas juvenile courts, because there is no standardized official source that reliably collects or records that information. In the counties examined, estimates offered by judges, lawyers, and probation officers of the guilty plea rates ranged from 91% - 99%. The plea rate in one county was estimated to be considerably lower. These estimates are especially troubling because such guilty pleas are often entered into after little consultation with the client and minimal, if any, investigation or other representation. In many of the jurisdictions visited, judges, lawyers and probation officers estimate that more than 75% of cases ended in guilty pleas at the first setting, often after the attorney had just met the child client that same morning.

## 8. Disposition

At the dispositional hearing, the judge is charged with making a determination as to whether public safety or the child’s need for rehabilitation requires the imposition of a disposition (sentence). The judge has the option of forgoing disposition and dismissing the child from the court’s jurisdiction, however few attorneys ever make such a request of the judge. In making a dispositional decision, the judge is supposed to consider a number of factors, including the needs of the child, his particular circumstances and characteristics, and the nature of the offense. Possible dispositions include fines, community service, probation with various conditions, incarceration, and out-of-home placement. In a majority of jurisdictions, the dispositional hearing is held on the same day as the acceptance of the plea. Very few attorneys present additional evidence at this hearing, but instead the majority report that they rely on the recommendations of the probation officer. Cited reasons for this reliance include: 1) attorneys are not usually paid for work on dispositional issues; 2) attorneys believe that the probation officers know better than they do what is appropriate for the child; and 3) attorneys complain that there are not enough dispositional alternatives available.

## 9. Post Disposition

Attorney appointments generally end at disposition. In contrast with prosecutors, defense attorneys rarely file Motions to Modify Disposition or Conditions of Probation. Attorneys have no incentive to track the progress of their former clients, as they are not paid for follow-up work. Attorneys readily agree to probation for a child, yet rarely participate when the conditions are set or monitor the child’s progress to determine whether his needs are actually being met. Many attorneys report that they have never been to a juvenile prison or boot camp.<sup>xxxii</sup> Juvenile investigators were disturbed by the conditions they witnessed in three detention centers. The failure of attorneys to visit children in secured facilities increases the likelihood that such facilities are operated in an illegal manner.

**A probation officer** picked up a case file from a stack of “new” cases on his desk. “The child was arrested on May 16, the petition was filed on June 29, the supervising probation officer received the file on July 24 and a hearing date was set for September 29<sup>th</sup>.”

## 10. Judges and magistrates

Depending on the county, the judge of the juvenile court may be a district judge, a county court at law judge or a constitutional county judge. In addition, magistrates, referees, and masters may also preside over certain juvenile proceedings. Justices of the Peace are typically not licensed attorneys, but are charged with the responsibility of admonishing a child of his rights before he gives a statement to the police, as well as making a determination that the child has made a knowing and intelligent waiver of those rights. Constitutional county judges are not required to be licensed attorneys, but are permitted to make legal decisions in delinquency proceedings. In some counties, lawyers that accept appointments sometimes serve as referees in detention hearings.

While a child has a right to have a district judge preside over most hearings, those rights are uniformly waived. A child cannot, however, waive his right to have a judge preside over hearings that can potentially result in incarceration in adult facilities. Juveniles are entitled to jury trials in Texas.

## B. THE APPOINTMENT OF COUNSEL IN JUVENILE CASES

### 1. Overview

The state of Texas does not have a uniform system for the appointment of counsel for children in the justice system. Each of its 254 counties essentially has unrestricted authority to develop and implement its own procedures for the appointment of counsel. There does not appear to be any state oversight - nor in most cases even local oversight - of the process. Different juvenile courts within a single county often have different appointment procedures in place. In fact, some judges are unaware of how their colleagues in nearby courtrooms select attorneys for assignment. Juvenile judges reported that they rarely consult one another on the process they employ or the attorneys they select. More often than not, the specifics of the appointment systems are not recorded and changes are made without notice. Perhaps the single most common characteristic among the varying procedures is that each judge has seemingly unlimited discretion in how he chooses and compensates counsel. Each judge has his own selection criteria, appointment procedures, and compensation rates and structures.

### 2. Qualifications

No county in the sample has established or imposed uniform qualifications for attorneys to represent juveniles in delinquency court; nor has any county set minimum performance standards for juvenile attorneys. Only a few of the counties demand a minimum level of experience as a prerequisite to appointment. In the overwhelming majority of jurisdictions, there is only one criterion to be placed on the appointment list: an active attorney's license. Although some judges purport to have additional requirements that ensure competence, little evidence was found to support this claim.

Of the counties studied, two jurisdictions have confirmed procedures by which the appointing judge interviews attorneys in depth to determine their competency and character. In one of these counties, the judge requires attorneys that are new to the jurisdiction to submit a resume, then appear for an interview that generally last forty-five minutes. At that time, the judge attempts to learn about the lawyer and outline to the attorney the expectations. The judge reports that she rarely, if ever, declines an application. However, she also reports that she first assigns attorneys to minor cases so as to have an opportunity to evaluate their advocacy skills.

The second county with a confirmed application procedure employs an attorney of the month to represent all non-detained children. The judge solicits attorneys to apply to serve as attorney of the month for a fixed sum. Attorneys are considered either because of their reputation as excellent defense lawyers or upon recommendation by another judge or attorney. The judge then interviews the attorney. Once an attorney is selected, the judge monitors his performance. These attorneys report much lower plea rates than the remainder of the counties. It was confirmed that one attorney was removed from the appointments list due to an excessive plea rate. Some of the attorneys that serve as the attorney of the month are capital litigators - their experience with issues relating to mitigation provides them with insight into dispositional issues, which is viewed by some as the most critical aspect of representation of a child.

Many judges state that an interview or formal selection process is unnecessary because they are able to assess an attorney's performance in court. Many judges and attorneys tend to view juvenile law as "easy law." One judge observed, "after all, it's not like these are capital cases or anything." Many see juvenile appointments as a way for new attorneys to "cut their teeth" and get some business. In numerous counties, juvenile court appointments are used as the training ground prior to criminal court appointments. However, not a single jurisdiction has either a training or formal mentoring program established to assist inexperienced lawyers.

One county requires all of its attorneys to be available for juvenile as well as adult appointments. Attorneys may avoid appointment by either paying a fee to a county fund or assigning the case to another attorney. Given this system, it is not uncommon for attorneys appointed from this general list to fail to appear in court when assigned to juvenile cases. For the most part, court coordinators simply use their own abbreviated list of the attorneys they believe want the appointments.

In at least two counties, many attorneys stated that making campaign contributions or attending judicial fundraisers is one of the 'requirements' for getting appointments from the judge.<sup>xxxix</sup> One attorney noted, "Giving to the campaign is a necessary part of the process," while another stated, "If you want the appointment, you better make a contribution." A third explained that the way to get on the appointment list is to "contribute to the judge's campaign, go to fundraisers and schmooze the court coordinator—it's a form of marketing yourself." A former judge told of another judge running for reelection whose court coordinator took appointment attorneys to lunch to let them know how large a donation the judge expected, the implicit message being that continued appointments depended upon the attorney's willingness to make the donation. One judge predicted that Texas judges would "never agree to relinquish their appointment powers," in large part because, "it is kind of a way to build campaign support."

**One attorney explained** how the process works in his urban county: "I would introduce you to the coordinator and she would make an appointment for us with the judge. The judge would interview you, then maybe assign you one case. He would watch how you handled the case. Then you would be contacted regarding the judge's next fundraiser. If you give money, then you would begin to receive appointments. You have to contribute to the judge's election campaigns. That's it. I scratch his back, he scratches mine. Really, it works well. We all know what the judge expects and how to move the cases along."

### 3. Judicial Expectations

Although most juvenile judges do not have any discernible performance standards, they do appear to have certain expectations about the level of advocacy they want in their courtrooms. Some judges report that they will remove attorneys from the appointment list who are chronically late, absent from court, or do a bad job, but state that this is extremely uncommon. The view among many practitioners is that an attorney who "rocks the boat" risks losing appointments. Specifically, the investigation revealed the following:

- Several attorneys state that there is pressure exerted on them to get their clients to plead guilty.
- Lawyers who set too many cases for trial or who file too many motions are seen as "overly aggressive" or "overly adversarial" and may be removed from the appointment list.
- Some judges express impatience with attorneys who ask for continuances to prepare for trial or who fail to enter into plea agreements. One judge typically refuses these requests and forces the defense attorney to go to trial, ready or not.
- Exercising a client's statutory right to have his case heard by a district judge instead of a magistrate can subject an attorney to removal from the appointment list.

Many judges in Texas appear to be overly concerned with keeping control of their budgets and their dockets. Many feel pressured by the county to minimize their expenditures for appointed counsel. As a result, with some



few notable exceptions, there is a scarce amount of vigorous defense advocacy going on in the juvenile courts across the state. All too frequently, attorneys appointed in this system represent children for one court appearance and with one purpose: to facilitate a plea. This is reflected in the high rate of guilty pleas entered into on the first or second setting after very little consultation or investigation by the attorney.

#### **4. Methods of Appointments**

There are currently three principal systems for the delivery of defense services to children in Texas: appointment lists, contract services, and public defender programs. Under each system, the judge exercises control over who is appointed to the cases.

The most commonly used system is the appointment lists, whereby each judge maintains a list of attorneys from which he makes his appointments. The judges, and sometimes the court coordinators, control inclusion on and removal from these lists. The lists are not always printed or otherwise recorded and are rarely made public. However, in some counties, clerks provided a handwritten list of appointment attorneys on request. In addition, an effort was made to obtain reports from county auditors and clerks that listed the attorneys that received appointments, along with the amounts paid to each one. In addition to the composition of the appointment list, judges ultimately control the frequency with which an attorney receives appointments.

A second, less frequently used system is contract services. An attorney or group of attorneys receive a flat fee to handle either all or a percentage of the cases in a courtroom. The attorneys are not paid benefits. Again, there is no uniform method for selection or compensation.

Finally, the state legislature has authorized the establishment of public defender programs in some select counties. Chief public defenders are county employees selected by the county commissioners to handle all or a percentage of the cases in a particular jurisdiction. These lawyers are salaried and receive benefits. The chief public defender may hire assistant public defenders to work full or part time. Frequently, the public defenders are appointed to represent detained youth because their offices are most accessible to the detention facilities. None of the jurisdictions rely solely upon the public defender for all representation, although one jurisdiction uses appointed private attorneys only in cases where a conflict precludes the appointment of a public defender.

The vast majority of counties use the system of appointment lists, with some jurisdictions using a hybrid of two of these three systems. Under all three models, the judge ultimately exercises almost exclusive control over which an attorney is appointed in an individual case.

#### **5. Determining Indigency**

A child's right to appointed counsel is not guaranteed in every county. Each county approaches the issue of indigency differently, with no apparent guiding principle common from one jurisdiction to the next. Some counties presume indigency based on the fact that the defendants are children and thus do not generally have income. Some judges instruct the parents to secure a lawyer, then appoint one if the parents are unsuccessful. Others make the indigency determination based on the financial status of the child's parents. While some courts use the federal poverty guidelines as a standard, others have developed their own criteria. Frequently, the indigency determination is performed by the probation department and in at least two counties the probation department is responsible for informing the court when a child needs an attorney appointed.

Even when a lawyer is appointed, the child or his parents are not necessarily relieved of the obligation to pay for defender services. In a number of counties, parents are assessed attorneys fees and other court costs at the conclusion of the case. One county even has a contempt call for parents who are delinquent in their payments to the court, which, according to a court administrator, "really brings in money for the court; sometimes we even have to put parents in jail."

#### **6. Making the Appointment**

Once indigency is determined, the court coordinator or clerk typically makes the 'official' appointment from the judge's list. Judges and court coordinators in several jurisdictions report that the judge hand-picks each attorney according to the nature of the case and the characteristics of the client, however, this investigation

found that such individualized attention occurs infrequently (typically in high profile or obviously complicated cases). The majority of coordinators and clerks maintain that the appointments are made randomly. Techniques employed include selecting attorneys from an alphabetical list by order, blindly pulling labels with names printed on them, and spinning a Rolodex. However, many lawyers report that it is common practice for a handful of attorneys to get most of the appointments, calling into question the actual randomness of the process. On site observations and a review of county Auditor Reports that list the fees paid in a given period confirm that in many counties a relatively small number of attorneys receive the bulk of the appointments.

Attorneys also receive appointments simply by being present in court. In several jurisdictions, attorneys sit in the jury box or gallery in the morning in hopes of being assigned cases. A few courts have a structured system whereby an attorney is selected in advance to be the “attorney of the day” and receives the bulk of appointments on that day. One county employs an “attorney of the month.” In that jurisdiction, as well as a few others, the public defender is usually appointed to represent the detained children, while the panel attorneys typically represent those that are not in custody.

At least one county has a policy of reappointing the same attorney each time a child is charged with a new offense or probation violation. This benefits the child in a number of ways. First, it gives the child familiarity with his advocate, which can enhance the representation. Second, it avoids duplication of efforts to learn important information about a child and his family. Third, the attorney is better able to explore, understand, and explain the child’s history, background and needs to the court.

The majority of counties do not make any effort to establish continuity of representation. One county previously had a policy of keeping the same attorney for the child, but stopped with no explanation. In fact, some jurisdictions appoint different attorneys for different stages of the proceedings.

There are some jurisdictions in which the probation officer makes the appointment and notifies the court and the client of the appointment. In at least two of the surveyed jurisdictions, the prosecutor is sometimes consulted on attorney selection.

## **7. Timing of Appointment**

Timing of appointments varies significantly across jurisdictions. Some children get counsel at the very first court appearance, however many have to wait several days or weeks before an attorney is provided. Only one jurisdiction consistently appoints attorneys before the first court appearance, however, the attorneys do not generally appear in the case until the second hearing.

Few jurisdictions have in place a procedure that allows for consistent, timely notification of an attorney appointment. The child and his parents are rarely informed of the identity of the child’s lawyer before the court date. Except in those instances where the attorney is appointed in court, an attorney generally receives notification of appointment via mail or a phone call. Many attorneys complain that appointment letters are often sent late or are lost. One court attaches to the appointment letter a copy of the petition; however, in most counties, these letters fail to contain any information other than the child’s name, petition number, and next court date. Significant attorney time is required to locate a child given this paucity of information, thereby making a meeting before the court date unlikely. In the vast majority of cases, the client and his attorney meet for the first time only minutes before they appear before the judge for the first time on the delinquency petition. This practice is most problematic in those jurisdictions in which it is common to enter a plea at this first court appearance. A few attorneys report that they often seek a second court date so as to allow them time to become familiar with the child and the facts of the case.

## **C. DISINCENTIVES TO LEGAL ADVOCACY**

The appointment process in Texas is fraught with numerous disincentives to conscientious attorney advocacy. In addition to the expectations of judges that attorneys will help “move the docket along,” compensation rate structures encourage the quick disposition of cases. Fee structures are not uniform, consistent, or predictable. Most attorneys are not compensated for client visits, witness interviews, case reviews, or any other out-of-court consultation or preparation. Coupled with a lack of support services, defenders are systematically discouraged from providing adequate representation. While there are a number

of judges and lawyers committed to providing quality counsel to children, there are several systemic barriers to realizing this goal.

## 1. Attorney compensation

Payment procedures for appointed counsel fall into two main categories: set or “flat” fees and hourly rates. Flat fees are based on the type of hearing or case handled. Hourly rates vary, depending upon the type and venue of the work performed. While the rate structures found in the state vary depending on the jurisdiction, they all share two pervasive characteristics: 1) the compensation is inadequate and 2) remuneration of out-of-court time is very limited. Too often, defense attorneys are placed in the position of having to make an untenable decision between failing to perform some of the most basic functions necessary to provide competent representation (i.e., meeting with a client or witness) and essentially subsidizing the system of representation. While there are a number of attorneys who professed a willingness to perform the necessary work, albeit uncompensated, many also expressed discomfort with a system that is dependant upon the good will of defense lawyers.

Flat fees are either based on the nature of the offense, the type of the hearing or the outcome of the case. An attorney may be paid a flat fee based on the charge filed (misdemeanor, felony, aggravated felony). The flat fee is intended to compensate the attorney for all client interviews, fact and dispositional investigation, legal research, and court appearances. The attorney is paid the same amount whether he spends one hour or twenty hours on a case, thus providing a clear disincentive to perform more than a minimal amount of work on a particular case. This structure also fails to take into account the unique characteristics and circumstances of a case, independent of the charges filed, and fails to consider the unique needs of the child being represented. Under this system, there is no additional compensation for work on dispositional or post-dispositional issues. Such a payment system creates a tension between the stated goals of the juvenile court and an attorney’s ability to pursue those goals.

**“A court appointed attorney gets paid either way – if they win, if they lose. They don’t care about the case because they don’t feel for you. You’re not their children. They get the money anyway that it goes. They look at it like, ‘plead guilty, go to jail, I get my paycheck.’”** Child in a detention facility.

An attorney may also be paid a flat fee based on the type of hearing he attends. The attorney receives a set sum regardless of what he does to prepare the case for the hearing. This also provides a disincentive to conduct any work outside the courtroom. Moreover, some jurisdictions progressively reduce the fees for the hearings, the stated purpose of this being to minimize the amount of time a child spends in the system (“if you penalize a lawyer for keeping a case in the system by reducing his fees, he’ll process the case more quickly.”). The most commonly cited drawback of this structure is that it frustrates attorneys’ efforts to conduct full investigations and encourages a “hurry-up” defense. Some jurisdictions allow attorneys to double up on fees for hearings, as such, an attorney who pleads a case out at a detention hearing is paid for two hearings in one court appearance.

Some courts pay a flat fee based on outcome, meaning that the attorney receives a fixed amount depending on whether the case is dismissed, a plea is entered to the charge, or a trial is conducted. One judge actually has a practice of refusing to pay the attorney if the case is dismissed. An attorney in that jurisdiction admitted “You can bet that there are times when I have put a lot of work into getting the state to dismiss a case but am tempted to stop pushing so hard for dismissal so I can get paid.” However, most judges compensate attorneys for work performed on cases that result in a dismissal.

Several counties prefer to pay attorneys hourly fees that distinguish between in-court and out-of-court time. The range of fees is \$20-80 an hour for out-of-court time (with an average of \$30) and \$40-100 an hour for in-court time (with an average of \$50). Most jurisdictions that pay hourly rates have restrictively low caps—the average being \$300—which does not reflect the number of hours necessary to properly handle a case.

**Two experienced and well-respected lawyers** worked extensive hours on a complicated case in which a teenage girl was accused of a highly publicized, violent crime. The jury's verdict was not guilty. When the attorneys submitted their billing documentation, the judge reduced the bills by half without a word. When asked why he did not pay the full amount, the judge told the attorneys that they had spent too much time on the case. Neither attorney now accepts appointments.

Many judges that have hourly fee schedules simply do not adhere to them. Despite the schedule, most judges have a standard fee they approve for particular types of cases or hearings – indeed, in two such jurisdictions, the attorneys do not even bother to submit fee applications. In those instances where the attorney does submit the fee petition outlining the number of hours spent on particular tasks, many judges will reduce the fees without explanation. Attorneys complain that this has a chilling effect on their out-of-court preparation.

The study also found that many judges have multiple payment systems in place. For example, one judge pays attorneys \$125 for the first court appearance if the attorney concludes the case that day. Attorneys are then paid progressively less for each subsequent court appearance. The attorneys in that county can opt for an hourly schedule of \$30 an hour out-of-court and \$50 an hour in-court, with a maximum of 10 hours total. The judge in that county reports that he has had attorneys turn in fee requests for more than 10 hours, but he will not, as a rule, pay the request. “Attorneys don’t really expect to get paid for all of their hours.” One of this judge’s “regular”

attorneys confirmed this, “I don’t remember what the hourly fees are. I know there is a ten-hour max. I don’t remember because I rarely charge – you have to limit what you charge, be conscious that the court is on a budget.” Several other attorneys in that jurisdiction confirm that they never charge for more than 10 hours, because they know they won’t get it, “it’s just part of the deal,” says one attorney that receives approximately 100 appointments a year. Attorneys in one major urban area stated that although the cap is “recommended” the court has never paid more than the cap.

A former prosecutor stated that she frequently saw the same attorneys provide better representation when they were retained than when they were appointed. Said one appointed attorney, “the more money I get, the more dedication I have.”

## 2. Culture of the Courthouse

In every Texas county, lawyers (list attorneys, as well as public defenders) are ultimately dependent upon the local judges for appointments. This single fact has a tremendous impact on the actions of lawyers both in and out of the courtroom. Attorneys run the risk of making decisions based not on the client’s desires or needs, but on how their actions will affect re-appointment. One prosecutor commented that “it is obvious that the contract attorneys are beholden to the judge.”

A judge’s authority can either promote or prevent effective advocacy. Judges can and do use the power of appointment to control the behavior of the attorneys. The judge can use the power of appointment to the juvenile’s benefit, such as removing from the list those attorneys who are not performing well, however, this study revealed this to be a rare occurrence. More common are stories of attorneys being punished (either deliberately or unintentionally) for zealous advocacy, challenging a ruling, or spending what the judge perceives as too much time on a case. One court coordinator that makes the appointments in a large county noted, “If an attorney is charging a lot of money we can’t keep using him.” In one county, if a judge thinks that an attorney is taking too much time or intends to take a case to trial that the judge thinks should be pleaded, the judge will change the appointment from the appointed counsel to a public defender, with the expectation that the public defender (who also has to lobby to get cases) will resolve the case quickly.

Numerous attorneys report feeling great pressure to plead cases quickly. While some attorneys believe this constrains them somewhat, others find this to be appropriate because ‘most of them are guilty anyway.’ In a typical Texas juvenile court there is an established routine with which many attorneys are comfortable: Attorneys look at the court or prosecutor’s file containing the petition and possibly a police report, talk to the prosecutor, talk to the probation officer, then talk to the children and parents.

Because “most kids get probation anyway” the common perception in some counties is that a second court date is rarely needed. While some counties build two to three court dates into the process, the norm is for a case to be disposed of within one to two court dates.

**“I don’t like the lawyers** that like to do dog and pony shows at the detention hearing. They drive me crazy....I get really impatient with private attorneys because they argue more and produce witnesses even though they know that they can’t get the kid out. The PD’s [public defender’s] know better than to show up and argue if there is nothing that they can do to change things; the court appointed attorneys only come when they think they have a chance.”

Associate Juvenile Judge

Retained attorneys and parents who resist a guilty plea are sometimes viewed as being “contrary,” “interfering,” “incompetent,” or “show offs.” Said one prosecutor, “the problem with retained counsel is that they don’t know how things work here. They file all sorts of motions and get all sorts of dates. They just don’t get how we operate. Appointed counsel is much more cooperative.” Some judges view retained attorneys with a jaundiced eye. One commented that “retained attorneys try to justify the fees to parents by talking a lot and filing a lot of motions.”

One appointed attorney stated that, “it is the culture of the courthouse not to file pre-trial motions.” Another attorney in that same jurisdiction confirmed this statement and added, “there is an unwritten rule that you don’t request a jury except in murder or sexual assault cases. Some attorneys won’t ask for juries at all because they are worried that they won’t get appointments.” In another jurisdiction, a judge gave an excessively high sentence to a child after he lost a jury trial. The attorneys in that jurisdiction agreed that the judge’s imposition of the sentence was intended to drive home earlier admonitions to the lawyers not to request jury trials. Jury trials in that county are reportedly rare.

In some jurisdictions, there is a widespread belief that the primary purpose of advocacy is to “get the child services,” regardless of his guilt or innocence. Accordingly, there is little expectation by any of the court actors in those jurisdictions that the attorney will zealously defend his client against the charges brought by the State. This can in part be attributed to the fact that there is a long-standing debate amongst juvenile judges and lawyers regarding the appropriate role of the juvenile attorney. Some view the primary role of the child’s attorney as that of a traditional defense attorney, which means accepting client decisions even when they are not in what the attorney perceives to be the child’s best interest. On the opposite side are those who believe that the attorney’s primary function is to argue what is in the child’s best interest, regardless of what the child wants. The Texas Family Code governing attorney appointments for children fails to resolve this debate. The result is that the type of representation a child receives can depend upon the prevailing view of a particular judge or attorneys in that county.

### 3. Lack of Support Services

The majority of appointed attorneys are solo practitioners with no staff support. While they are expected to conduct investigations into their cases and present expert evidence where appropriate, the attorneys are not compensated for their time or expenses in these areas. Where funding is available for investigative and expert services, caps are imposed—regardless of the service requested or the characteristics of the particular case—in the range of \$300-\$500.

A critical component of competent representation is adequate support services, including investigative and expert services.<sup>xxxii</sup> Although a few Texas counties have a procedure in place for securing an investigator or a necessary expert, the procedure is rarely used. Attorneys state that such requests would either fall on the deaf ears of the judiciary or waste everyone’s time.

Several attorneys admit that they will always use an investigator in a retained case, but rarely if ever, in appointed cases “because the judge won’t pay.” One attorney asked for an investigator on one of his first appointment cases and was told, “we just don’t do that here.” A few attorneys will employ an investigator or expert with their own money in hopes that the judge will reimburse them for the expense once the value of the services are demonstrated.

A second group of attorneys appear to have no use for investigative or expert services, holding that the police and probation officers do enough investigation of the charges. An all too common refrain is, “I don’t need an investigator — I get all of the information that I need from the probation officer and the DA.”

Experts are even more rarely requested and seldom provided. Many attorneys rely on the experts used by the county prosecutor. Said one attorney, “Why would I ask for an independent evaluation? Probation does all that for us.” Attorneys admit that the decision whether to employ an independent expert is dependent largely on the client’s financial resources. One attorney said that, although he could really use

**“The first thing that I ask is ‘did you do it’? I tell them that they can take it to trial to prove that they are innocent or plead guilty and accept the punishment. Most kids admit to what they have done. It’s just the kids trying to beat the system, trying to drag it out – you know that they are lying....If I feel that a client is innocent, I will take a jury. If I feel like he is just trying to prolong things, make it difficult for the court, I’ll take a judge.”**

Appointment attorney who reported that 97% of his cases plead on the first court date.

**“There is tremendous pressure** to plead the case out; you want to keep getting appointments, you bow to that pressure. Most of the time I am explaining the deal to the kid in court, after meeting him for the first time and talking to him for a few minutes, tops.”

Appointment Attorney

an investigator or mental health expert in about 50% of his cases, he stopped asking because he was routinely turned down.

**“I had one guy** that always asked for an investigator. I gave him one a couple of times, but then stopped doing it. He was taking advantage. I told him, you gotta stop making these requests – you don’t need an investigator, these are easy cases. He doesn’t get appointments any more.”

Juvenile Court Judge

Despite the fact that expert appointment is uncommon, many judges and attorneys acknowledge that children in delinquency court often have a host of developmental issues, mental health problems and special education needs. According to the Austin American Statesmen, in 1999, 42% of all children incarcerated had mental health needs.<sup>xxxiii</sup> Experts can be valuable at all stages of the proceedings. In addition to sorting out competency issues (the only purpose for which most Texas courts employ experts) experts can assist in determining whether a child had the mental ability to waive rights or understand his actions and in identifying whether a child has special needs or conditions that should be considered when making dispositional and placement decisions.

Summing up the feeling from the bench, one judge said that it would be helpful to be in a position to appoint investigators and experts more frequently, “but money is always going to be an issue whatever court you talk to.” Many courts do provide an investigator if the case is going to trial. But, as one attorney observed: “How do you know if you are going to trial unless you [first] get an investigator?”

All judges require attorneys to justify the appointment of an investigator or expert, with routine approvals being nonexistent. Some jurisdictions require an attorney to file a detailed motion on the record, thus putting him in the position of having to weigh disclosure of trial strategy and client confidences against the need for an investigator or expert. Other jurisdictions allow the attorney to make the request for an expert *ex parte*, which avoids disclosure to the prosecutor, but still presents the problem of having to make disclosures to the judge that may compromise the child’s case.

#### 4. The Absence of Advocacy

One discernable result of the insufficient compensation of attorneys is that an excessive amount of cases result in guilty pleas, with most of the pleas being entered on the first day the attorney appears in court on behalf of the child. This is usually the same day that the child meets his attorney for the first (and often last) time. Depending on the jurisdiction, this “first setting” is the day the petition is filed or an “announcement” of the charge is made (some jurisdictions have the announcement at the first or second detention review hearing).

Given the fact that very few attorneys are paid for work performed outside of the courtroom and have severely restricted access to investigative assistance, it is no small wonder that the majority of them do not perform the most basic functions that generally serve as a prerequisite to making an informed decision on whether to try a case or accept a plea. Attorney work on a case is generally confined to reviewing the court file and spending a few minutes with the client. Pre-trial investigations, mental health examinations and evaluations, and motions are the exception rather than the rule. The assessment revealed that:

- When pre-trial motions are filed, they are generally limited to Motions for Discovery. Even these are uncommon, as many jurisdictions have “open files” where the prosecution allows them to review (but not necessarily copy) portions of the state’s file.
- Several prosecutors report that many attorneys do not review the file in advance of the hearing, some not at all. One appointed attorney stated, “I don’t need to look at the prosecutor’s file – the case is going to plead anyway. If they have something that they think will help me, they’ll tell me.”
- Attorneys rarely contact the prosecutor or the probation officer in advance of appearing to facilitate a plea. One prosecutor reported, “Retained attorneys almost always call. An attorney who is retained on a case will call, but if that same attorney is appointed, he won’t.”

- Detention review hearings are often conducted informally, with the judge asking the unsworn probation officers questions from the bench. There is little cross-examination by the defense.
- Attorneys rarely present evidence at the detention hearings. Defense witnesses are usually limited to the parents of the child.
- The average length of time for a detention review hearing is approximately five minutes.
- Trials are a rarity in most jurisdictions; the average reported plea rate across most of the counties visited is 95%.
- Many attorneys surveyed said that they had tried fewer than five juvenile cases in their entire careers. Some had never taken a case to trial: “I’m a much better mediator than a trial lawyer.”
- Many of the jurisdictions visited reported a plea rate of in excess of 75% at the first setting, often after the attorney has just met the child client for the first time that morning.
- Dispositional hearings are usually informal; most jurisdictions rely on the report prepared by the probation officer, or an ‘informal conversation’ between the judge, the probation officer, the district attorney and the appointed attorney.
- Appointed attorneys rarely present evidence at the dispositional hearing. Cross-examination of the probation officer is uncommon and then only limited in scope. One attorney commented, “since the recommended disposition is probation, its usually not necessary to draw out the flaws of the probation officer or his report.”
- The average dispositional hearing takes under ten minutes. A common occurrence in counties observed is for an attorney to be handed a case file immediately after appointment. He reviews the file, spends five to ten minutes talking to the child, then steps up to plead his client guilty. After accepting the guilty plea, the judge hears the recommendation from probation or the prosecutor. In most instances, the defense attorney stands mute, except to say that he is in agreement with the recommendation. It is rare for the attorney to present any evidence on his client’s behalf. The entire hearing lasts five to ten minutes.

**Detention review hearings** in one large county are held in the afternoon. The attorneys are seated in chairs at the side of the bench or in gallery. Across the room, the children are brought in single file to the jury box. Attorneys are not able to talk to the children beforehand, as the judge has imposed a “quiet rule” in the courtroom. Since the attorney is usually appointed right then and there, he knows nothing about the child when stepping up. When the child’s case is called, he steps up to bench to meet his attorney for the first time. As this is a review hearing, the child has already met the associate judge, who admonishes him of his right to appear before a district judge, cautioning him that he will have to wait at least a day if he wants to exercise that right. The hearing lasts 1-5 minutes. At the conclusion of the hearing, the child is directed to stand to the left of the jury box, hands behind his back, and face to the wall until he is taken back to the detention center. The child has not spoken to his attorney and probably does not even know his name.

Court observer

*Case Study: A tiny child is brought into a crowded urban courtroom by a probation officer. He looks blankly over at his aunt, who is sitting across the aisle in a pew. File in hand, an attorney who has been moving in and out of the courtroom all morning rushes over to the aunt and calls across the two full pews, “Do you want him to come home?” The aunt begins to explain, “I was visiting friends here, we moved a few months back, and he went down the street. He. . . .” The attorney raises his hand and says, “I am asking you one question, do you want him home or not?” The aunt says yes and the attorney spins around to have the case called. At the bench, the child, dwarfed by the adults milling around him, stands quietly while the judge reads the charge and the child’s rights to him. When the judge asks a question of the child, he mumbles a response. “Speak up!” says the attorney, “just say yes sir!” The judge asks the child, “Did you commit the offense of theft” and the child says, “No.” The attorney whips towards the child with an exaggerated angry look, prompting the child to say meekly, “Yes.” The judge responds, “I want to*

**“In most of the cases,** probation tells you what the kid is going to plead to – they have already made the deal with the state, they’ve already talked to the defendant. Probation does all of the work. We just advise and consent.”

Appointed attorney

*make sure that you did this.” The attorney says hurriedly, “He understands judge, he did it. Say yes sir to the judge.” Within minutes, the child is placed on intensive probation, which includes drug tests, despite the fact that the child has no history of drug use. The entire process, from start to finish, takes approximately ten minutes, during which time, the attorney never speaks to his client, other than to order him to “speak up” and “say yes sir.”*

Entering a plea to probation does not necessarily guarantee that the child is going to go home. Attorneys and probation officers in two counties state that a child on probation can be sent to boot camp or some other secured facility at the probation officer’s request and without an additional hearing.

In addition, with very few objections by the defense, multiple conditions are imposed on first-time offenders that are completely unrelated to the offense charged. Court observations and interviews confirm that in many cases little thought goes into the conditions of probation. The excessive plea rates with onerous and un-individualized conditions of probation contribute significantly to the court’s backlog — many jurisdictions report that 50% of their caseloads are violations of probation.

- A thirteen-year old child was placed on intensive supervision for stealing a pair of sneakers from another child. Some of the numerous conditions included a curfew, counseling, drug testing (no evidence of drug use), maintaining a “C” average in school (although the child had not had a stable school placement for a long time and was learning disabled), and an order not to interact with the friend from whom he had stolen the shoes. His attorney did not object to any of these conditions or offer any alternatives. In fact, his attorney did not say anything at all.
- A child pleaded guilty to trespassing and theft of a bicycle. This was his first offense. The child was placed on intensive probation for a year, which includes daily contact with the probation officer, drug counseling, individual counseling, family counseling, as well as parenting and English classes for the mother. The judge said that she was doing this because the mother didn’t speak English and worked at night. The judge then turned to the mother and said, “Can you work at day and not at night? It would be better for your children.” During this entire exchange, the child’s attorney did not utter a single word.

One probation officer offered this explanation for the attorneys’ failure to participate significantly in the dispositional process, “Most of the time they trust us, they know that we are doing what is best for the kid.” Attorneys in his jurisdiction rarely ask for a copy of the Probation Report before the dispositional hearing.

**The problem is** that they have all of these conditions imposed on them. Then every slight violation results in them being taken to detention. I spend too much time on these cases. I want to institute a policy that allows for probation to end rather than keeping the kid in the system due to some minor infraction.

New Juvenile Court Judge

Several attorneys see a child’s involvement in the juvenile court as a blessing – children get services that they would otherwise miss out on. Guilt or innocence is secondary to these attorneys, as they view their primary duty “to get these kids help. If they don’t agree with me, I don’t care. I know what is in their best interest better than their parents do.” One attorney stated that he doesn’t feel bad about pleading a child guilty to a case the state cannot prove “if the kid really needs services.” Another said, “if we had more resources and time, less kids would be found guilty. You can’t think, ‘they can’t prove that’, instead, think what is best for the child — most of the time, its services.” Since an overwhelming majority of attorneys report that they never follow a case (“my job ends when the dispo[sition] ends”) they do not know whether their approach works or if it fails their clients. Seventy percent of the children in Texas Youth Commission secured facilities are on probation when committed.<sup>xxxiv</sup> In 1999, nearly 20% of all juvenile delinquency referrals were for probation violations or contempt of magistrate orders.<sup>xxxv</sup> Probation recidivism is expensive for both counties and the state.

## 5. Certifications to Adult Court and Determinate Sentencing

Under Texas law, a child accused of certain offenses may be certified to adult court on motion by the prosecution.<sup>xxxvi</sup> The number of children certified to adult court decreased from 433 in 1998 to 236 in 1999. Researchers at the Texas Criminal Justice Policy Council found that African Americans, and to a lesser extent, Hispanics were more likely to be certified than their Anglo counterparts, even where they were



adjudicated for the same offense, were the same age and had similar adjudication histories in the juvenile court.<sup>xxxvii</sup>

Many attorneys state that the reason for the decline in certifications is the determinate sentencing provision of the Texas Family Code,<sup>xxxviii</sup> which permits a prosecutor to seek in juvenile court a sentence of up to forty years. Under determinate sentencing, a juvenile will first serve his sentence in TYC, but may later be transferred to adult prisons and become subjected to adult parole laws. The transfer occurs at the request of TYC and is rarely denied.

The unique challenges facing attorneys representing children in certification hearings, cases that are successfully certified to adult court, and determinate sentencing cases are beyond the scope of this report.

**“The courts incarcerate kids for help** – it’s so bad that they want them out of their homes. Judges think that incarcerating them is the only way to get them treatment. The judges cannot order CPS or mental health to do anything but they can order me to do it. It’s so abusive right now that mid-year budget is two months away and we are already out of our budget. We get no money but we are responsible for all of it. Its inhumane.”

Chief of Probation

The investigation did reveal the following:

- Judges report that they attempt to assign more experienced attorneys to certification and determinate sentence cases.
- Some attorneys report that they do not fight certification too hard because they think that the child faces lower penalties in adult court than under the determinate hearing statute.
- The few attorneys interviewed that had either participated in or observed a certification hearing report that experts are rarely requested or provided for these hearings.
- Attorneys that lose certification hearings typically do not continue to represent the child in adult court. However, one juvenile judge is instituting a rule in her courtroom that even after certification, the child’s case will remain in her courtroom. The attorney who represented the child in the certification hearing will remain as counsel.
- One judge requires the prosecutor to bring the complaining witnesses to court for certification hearings, because “we may as well see if they even have a case before sending the kid to the adult court.”
- Judges that appoint attorneys for juveniles who have been certified to adult court do not appear to factor the minor’s age, background or circumstances into the appointment.

Given the increased reliance on determinate sentencing and the severity of the consequences of such convictions, detailed examination of attorney and judicial practices in these cases is critical.

#### **D. ATTORNEY-CLIENT CONTACT**

There was significant disparity with respect to attorney visits to the detention centers. In every jurisdiction visited, there were inconsistent reports about the frequency with which attorneys consult with their clients while they are in custody. Detention officers commonly report that retained attorneys “almost always come and see their clients” while most appointed attorneys do not. Interviews with children bore this out.

Many detention and probation officers can name a handful of appointed attorneys who “always come see the kids. You can look at the attorney visitation log and it is always the same people.” Said one detention officer, “The kids here always complain about not hearing from their lawyers. We can call the lawyers for them, but most of the lawyers always say they’re too busy or that they’ll talk to them in court.”

One judge makes visitation a requirement of appointment, but does not include it in recoverable fees.

Another judge says that if the child complains, she will “call the attorney to the mat and ask him why he has not visited the child.” However, neither judge compensates the attorneys for client visits and both depend upon reporting by juveniles, who often are told to keep quiet when before the judge. Public defenders see clients more frequently, as they are on site, have immediate access to the children and do not lose money in doing so.

Interviews conducted with children reveal that attorneys spend little, if any, time explaining their basic rights to them and that many children do not have a grasp on what happens in court. Interviews revealed that:

- By and large, children do not know what a jury trial means.
- Many think that the “right to remain silent” means: “that you have to be quiet in court”, “that you don’t get to talk in court” and “that you don’t have to say nothing once you get to court.”
- Many children understand what the attorney’s role is supposed to be “he is supposed to help me, help prove my innocence”; “to talk to the judge and talk to me and object at trial.”
- However, most children think that their appointed attorneys are in cahoots with the judge and the prosecutor.

Juveniles in the detention centers report that they get most, if not all, information about their cases from their probation officers. The probation officers tell them if they are going to plead guilty and what is going to happen to them. One detention officer reports that when he calls an attorney on behalf of a child, “the attorneys say, ‘tell them to talk to their PO.’” Despite the fact that her office is in the same building as the juvenile detention center, one public defender reports that she sends a waiver form to the probation officer for her client’s signature. When asked why she did not do it herself, she responded, “it’s just a waiver, the PO can explain it.

If you visit them, it takes too much time – they ask a lot of questions and want to talk to you. I don’t sign it before the child does because I don’t want them to think that I am agreeing with it.” Another attorney stated that probation officers send her signed waivers from her clients, “I don’t like it, but what can I do about it? What’s done is done.” A waiver is not valid, however, unless the attorney also signs it.

**“The only thing my lawyer ever said to me was ‘hush’ when I tried to tell the judge that we don’t have a phone because the lawyer was telling him to put me on Electronic Monitoring. My PO told me that my lawyer wants me to plead guilty and asked me what I was going to do. I want to get out of here so I am going to plead the case.”**

17-year-old girl in detention

One attorney reports that over 50% of the time attorneys in his jurisdiction do not talk to clients before a hearing. It was observed that attorneys rarely talk to the children after the hearings. One child said that her lawyer, “stands next to me in court. He does not explain anything after except, ‘hang in there, see you next time in court.’” Observers of detention hearings noted that most of the children were taken back to the detention facility without talking to the lawyers. One child said, “they never talk to you after a hearing.

They just shake your hand and say “good luck” and then you never see them again.”

## **E. OTHER INSTITUTIONAL BARRIERS**

### **1. Isolation of the Juvenile Court**

Under the adult appointments system, one benefit is that an attorney can handle several cases in multiple courtrooms on a given day, thus enabling him to charge fees for multiple cases at once. In the larger counties, most juvenile courts are located far away from adult court. Quite often, an attorney in juvenile court is there for that one case and the several hours he may spend there take away additional income he could be earning elsewhere. A frequent complaint made by appointed attorneys is that the remoteness of the juvenile court makes practicing there costly to them.

In most counties, the detention facilities are also far removed from the adult court. In the smaller counties, detention facilities are several miles away. The remoteness of the court and detention facilities, combined with the fact that attorneys generally are not compensated for client visits, results in minimal out-of-court attorney-client contact.

## **2. Lack of Adequate Meeting Space**

The majority of courts visited do not have adequate meeting space for private attorney-client interviews. In a significant majority of cases, the attorney and the juvenile meet one another for the first time in court. This initial meeting is a critical point in the child's representation, as decisions are likely to be made that day regarding the child's custodial status and whether to plead guilty. Lawyers need an opportunity to explain legal choices to the client; the client in turn needs to provide the lawyer with information that is pertinent to the impending hearing. In the majority of counties, this important consultation occurs either in the hallways of the courthouse or in the jury box of the courtroom, neither of which offers privacy nor is conducive to confidentiality, which is often viewed as the crux of an attorney-client relationship.

In instances where the attorney and client are able to meet beforehand, private space in the courthouse continues to be important, yet scarce. Once a child is in court, the attorney may need to discuss with him the recommendations of the probation department, details of the petition and offers by the State, and possible defenses, all of which are being presented for the first time in court. The juvenile will be asked if he wants to plead guilty to the charge or contest the recommendations of the probation officer. A separate meeting space for attorneys and clients is imperative to the child's ability to make an informed choice.

## **3. Provision of Interpreters**

Given the large Hispanic population in Texas, interpreters are often necessary to assist children or their parents in understanding the most basic aspects of the juvenile justice process. However, there is no continuity or standard procedure regarding who gets an interpreter and when. A few jurisdictions have interpreters on sight to interpret for the children or their parents, while one jurisdiction provides an interpreter only at trial. Another jurisdiction provides an interpreter for the child, but not the parent. In response to an inquiry from a clerk, one judge said, "tell the attorney that is not our problem. If the mom wants to understand what is going on, she'll get someone here to help her." At least two jurisdictions have the child interpret for his parents. Another jurisdiction uses a probation officer to interpret.

Language issues also affect appointments. Some jurisdictions appoint attorneys solely because they are bilingual. Within those counties, there is often an expectation that the attorney will act as the translator for the child or parent in court.

## **4. Lack of Sufficient Resources for Attorneys**

The funding available for the juvenile defense function is woefully inadequate and fails to make available to appointed attorneys those resources necessary to competently represent a child throughout the justice process. The vast majority of appointed attorneys are solo practitioners with no support staff, other than a shared secretary. Defenders receive inadequate local funding and no state funding at all. Where the prosecutors have full-time investigators available to them on every case (in addition to the police), most defenders do not. In one large county, every juvenile assistant prosecutor recently received a computer; the assistant public defenders in that county use their secretary's computer.

## **5. Lack of Sufficient Resources for Juveniles**

In every jurisdiction visited, judges, attorneys and probation officers agree that there are not sufficient services and programs in place to meet the varying needs of children both before and after disposition. A common refrain in interviews was the need for community-based programs, placement options or mental health programs. In addition, several people cited the fact that there are not sufficient programs and services to serve the children in the county as a cause of probation violations. In addition, some attorneys admit that once a child is on probation, there are few assurances that the conditions imposed are adapted to the needs and abilities of an individual child and thus violation is likely. The high numbers of delinquency referrals and TYC commitments due to probation violations underscores the need for additional and individually tailored services before, during and after disposition. The preventative and rehabilitative goals of the juvenile justice system cannot be met without sufficient community based programs, services and opportunities for the children committed to its care.

## 6. Lack of Training

Legal training, a cornerstone to any juvenile defender system, is almost non-existent in the state of Texas. Only one jurisdiction has training seminars or sessions. In that county, the juvenile judge hosts a luncheon twice a year where specific topics relating to juvenile delinquency and child protection cases are discussed. Attendance is optional, and few of the defenders interviewed reported having attended one of these sessions. In the overwhelming majority of jurisdictions, there are no training opportunities available to defenders. Some defenders state that they attend an annual juvenile law conference in Austin, Texas, but that more frequent, local workshops and training opportunities would enhance their representation.

## 7. Lack of Mentoring Programs

Judges and lawyers in almost every county report that new attorneys are encouraged and allowed to accept juvenile appointments. However, with one exception, no county has a formal mentoring program. In the county in which a mentorship program is purportedly in place, attempts at identifying and locating the coordinator of this program failed. One county previously required that new attorneys serve as second chair to an experienced attorney, but no longer does so. Lawyers and judges in a few counties report that informal mentoring happens naturally. One prosecutor said that she frequently gets calls from new attorneys asking questions concerning procedure and process.

## 8. Lack of Oversight and Assessment

No county has established review procedures to determine the efficacy of their appointments system. None of the counties have any supervision of attorneys, other than observations by the judge. Attorneys are not rated or evaluated. There are no systems in place to track in any detailed way the plea rates or efficacy of treatment. Only one judge interviewed could point to a confirmed process by which he kept, albeit informal, data on the plea rates and performance of appointed attorneys in his jurisdiction. No statewide review system appears to be in place.

## 9. The Hyper-Role of Probation

An unexpected consequence of the failures of the juvenile indigent defense appointment system is that the probation officers play a larger role in the juvenile process than is appropriate. The traditional role of the probation officer is to function as a neutral party that provides information to the court. In reality, their roles are much more expansive in Texas. One attorney, summing up this assessment's conclusion, commented, "The probation officer is an advocate and an adversary at the same time. It's confusing for the kid. It's confusing for me." Probation officers, while not lawyers or police officers, sometime assume these roles.

In an overwhelming majority of the jurisdictions in the sample, members of the departments of probation play significantly active roles from the very beginning of a case. In court, probation officers exert great influence: judges adopt their detention, certification and dispositional recommendations in excess of 90% of the time; many report a 97-99% acceptance rate. Probation officers have substantially more contact with the children and their families than do the attorneys. To varying degrees, children and their parents rely on the probation officers for information about the proceedings. Prosecutors rely on them for information, investigation, and filing and dispositional recommendations. Clerks and court coordinators rely on them for indigency determinations, case setting and even attorney selection. Judges rely on them for detention and dispositional recommendations and, in some cases, advocacy. Defense attorneys rely on them for information: about the case, about their client, about dispositional recommendations and alternatives, and sometimes for communications from their clients. In short, they appear to be the most active and powerful actors in the juvenile justice system.

### Probation Officers as Investigators

When the police arrest a person, they are required to issue *Miranda* warnings before asking him questions relating to the purported offense. Texas law requires that the police take a juvenile before a magistrate before taking his statement. These requirements do not extend to probation officers. With the exception of a few jurisdictions, probation officers statewide routinely take statements concerning the purported events for which the children are, or may be, charged. In one jurisdiction, an intake officer stated that he does not read the children their rights, but "I tell them, if you want to talk to me about the case, go ahead." One probation

chief reported that the “great majority of attorneys allow their clients to speak freely with us. A few will tell them not to talk about the facts of the case.” A child reported that when she came into the detention center, the probation officer “handed me a paper and told me to sign it. Then she asked me what happened and I told her because she needed to know.” The young lady did not know what the paper was (it was a waiver of rights) and she did not know that the probation officer could testify against her.

- Prosecutors and probation officers describe the range of duties of the probation officer before the filing of a petition to include:
- Gathering and providing information about the child;
- Making filing recommendations;
- Filling out the petition; and,
- Setting the first court date.

In at least three counties, the prosecutor does not appear for the detention hearings. Instead, the probation officer performs the role of the State’s advocate. One prosecutor reports that the probation department makes the initial determination of whether to file charges against a child. “When probation says file, unless it is obvious that there is no PC [probable cause], we file.” The general feeling among both attorneys and the children is one of confusion concerning the precise role of the probation officer.

### **Probation Officers at Adjudications**

In most counties, probation officers rarely take the stand during adjudication. One attorney stated that this was because, “by the time we get the case, it’s over. We know that he could take the stand.” One judge, upon being informed that it is standard procedure in his jurisdiction for probation to question children about the offenses for which they are charged, marveled, “no wonder everyone pleads guilty.”

Probation officers are often active participants in plea negotiations. There are instances where the probation officer negotiates a plea before an attorney has been assigned to the case. The probation officer will discuss the agreement with the child, encourage him to accept it, then present it to the attorney when he appears in court.

### **Probation Officers as Counselors**

In most, but not all jurisdictions, the probation officers visit with children on a regular basis. It appears that probation officers often perform what are commonly considered to be attorney functions. Many children report that probation officers are the only ones who will talk to them about what is happening with their cases. Probation officers frequently tell children what is going to happen to them. In a few jurisdictions, probation officers are in the position of explaining the legal significance of waivers and plea agreements, as they routinely obtain waivers from children and discuss plea options with them.

### **Probation Officers as Assistants to the Court**

In some jurisdictions, probation officers make referrals to the court, make indigency determinations, assist in making attorney appointments, notify the attorneys and the parents of the appointments, and set cases.

### **Probation Officers as Witness at Disposition**

Probation officers make dispositional recommendations to the judge. The judges adopt these recommendations in greater than 90% of the cases.

### **Probation Officer Contact with the Child’s Attorney**

Despite the significant role that the probation officer assumes, few report any outside contact with the attorneys. One probation officer said, “the only usual contact between the attorney and the PO before the hearing is behavioral, if the kid is acting up. The PO will call the attorney to try to get him to convince the kid that it is within his best interest to stop being difficult.”

## **F. CONCLUSION**

Currently, an indigent child facing charges in a Texas juvenile court has little chance of receiving meaningful representation. Many attorneys are not performing the most basic functions commonly recognized as essential to effective representation. Attorneys routinely fail to have meaningful client interviews, conduct pre-trial investigations, conduct witness interviews, file pre-trial motions, request mental health and educational reviews or prepare for trial and disposition.

Texas juvenile courts have become 'plea mills' with attorneys serving as facilitators rather than advocates. Judges have unlimited discretion concerning which attorneys they appoint and how much the attorneys are compensated. In many counties visited, attorneys who process cases through the system quickly and smoothly are rewarded with appointments; attorneys who request continuances, ask for investigators, and set cases for trial are punished with reduced fees and fewer appointments. The courtroom culture, fee structures and an over-reliance on the probation department all provide disincentives for advocacy. Texas courts are selling justice short, leaving her children utterly defenseless.



# RECOMMENDATIONS

## **SYSTEMIC CHANGES MUST BE MADE**

The state has a special and unique obligation to ensure that a child's right to due process is honored and that a child has meaningful access to competent counsel at all stages of the justice process. To this end, the following recommendations are made:

1. Independent oversight and monitoring of the juvenile indigent defense system should be established, supported, and maintained.
2. The appointment of attorneys to assist children should be guided by standardized, fair, and uniform procedures that consider both the nature of the case and the expertise of the attorney. Judges, who should continue to play an important judicial role in the selection and appointment of qualified counsel, should not have unlimited control over the selection process.
3. The state of Texas should develop an independent indigent juvenile defense oversight body to structure an appointment process and compensation structure that will ensure the independence of the defense counsel. There should be safeguards that protect the integrity of the attorney's representation of the juvenile against political pressures, financial disincentives, and conflicts of interest with the judge.
4. The inequitable funding structure of the justice system has directly contributed to the poor defense practices uncovered in this assessment. The state of Texas should provide adequate funding for the juvenile defense function as a whole—based not on present practice, but best practice.

5. Statewide guidelines and objective criteria should be developed that establish minimum qualifications and standards of representation for children in the justice system.
6. All children should be presumed indigent for purposes of the appointment of counsel.
7. Standards should be adopted to ensure that Probation officers can serve as a neutral party and provide information to the court, without assuming the duties of the police, prosecutor and defense attorneys. It should be the duty of the judge to ensure that defense counsel and probation officers are fulfilling their appropriate role.

#### **THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL MUST BE GUARANTEED**

The state of Texas must ensure that children have access to competent counsel and all of the necessary resources that effective assistance of counsel requires.

Attorneys should be appointed as early as possible in all juvenile cases.

Attorneys should have meaningful access to independent, qualified investigators, experts and other support.

Attorneys should have access to training and professional development opportunities.

Client consultation should be private, immediate, and ongoing throughout the judicial process.

Attorneys should be compensated for all reasonable work including—but not limited to—client meetings, pre-trial investigation, legal research, motions practice, and dispositional planning.

Continuity of representation should be encouraged where feasible or appropriate.

Further systemic study should be conducted regarding the representation of children in the adult system.





# ENDNOTES

<sup>i</sup> 387 U.S. 1 (1967)

<sup>ii</sup> 387 U.S. 1, 36 (1967)

<sup>iii</sup> National Advisory Committee for Juvenile Justice and Delinquency Prevention, July 1980, “3.132 Representation by Counsel—For the Juvenile,” *Standards for the Administration of Juvenile Justice* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, U.S. Dep. of Justice).

<sup>iv</sup> IJA-ABA Juvenile Justice Standards Relating to Counsel for Private Parties are included in the Appendix.

<sup>v</sup> See generally Puritz, et al., *A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, 1995

<sup>vi</sup> *Id.*

<sup>vii</sup> Building Blocks for Youth, Youth Law Center, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System*. April, 2000

<sup>viii</sup> *Id.*

<sup>ix</sup> D. Keating, *Adolescent Thinking*, in AT THE THRESHOLD, 54-89 (S. Feldman et al. eds., 1990); W. Overton, *Competence and Procedures*, in REASONING, NECESSITY AND LOGIC 1-32 (W. Overton ed. 1990)

<sup>x</sup> see Beyer, Marty Ph.D. Kentucky Children’s Rights Journal/Vol.VII, No. 1, Spring, 1999

<sup>xi</sup> *Id.*

<sup>xii</sup> See Ceci, Stephen J. Ph.D., *Why Minors Accused of Serious Crimes Cannot Waive Counsel*, 8 Court Review – Winter 1999

<sup>xiii</sup> Butcher, Allan K., Moore, Michael K, *Muting Gideon’s Trumpet: The Crisis in Indigent Criminal Defense in Texas*, State Bar of Texas Committee on Legal Services to the Poor in Criminal Matters. Committee Approval 9/8/00; Received by State Bar 9/22/00.

<sup>xiv</sup> Beck, Allen J, Ph.D., USDOJ, Bureau of Justice Statistics Bulletin, *Prisoners in 1999* (8/00)

<sup>xv</sup> *Id.*

- xvi Raspberry, William, *Texas True and False*, The Washington Post, 8/28/00 (op-ed)
- xvii Sickmund, M. and Wan, Y., OJJDP, *Census of Juveniles in Residential Placement: 1997 Datebook* (1999)
- xviii Snyder, H. and Sickmund, M., OJJDP, *Juvenile Offenders and Victims: 1999 National Report*, at p. 189
- xix *Id.*, p. 194 (1999)
- xx Reichers, Lisa, Fabelo, Tony Ph.D., Texas Criminal Justice Policy Council, *Projections of Juvenile Justice Correctional Populations: Fiscal Years 2000-2005* p. 6 (June 15, 1999)
- xxi TYC Commitment Profile Fiscal Years 1995-1999
- xxii Death Penalty Information Center, 1320 18th Street, NW, Washington, D.C. 20036
- xxiii Beck, Allen J, Ph.D., USDOJ, Bureau of Justice Statistics Bulletin, *Prisoners in 1999* (8/00)
- xxiv Reichers, Lisa, Fabelo, Tony Ph.D., Texas Criminal Justice Policy Council, *Projections of Juvenile Justice Correctional Populations: Fiscal Years 2000-2005* p. 6 (June 15, 1999)
- xxv Reichers, Lisa, Fabelo, Tony Ph.D., Texas Criminal Justice Policy Council, *Projections of Juvenile Justice Correctional Populations: Fiscal Years 2000-2005* p.5 (June 15, 1999)
- xxvi *Id.*, p.9
- xxvii TYC Commitment Profile Fiscal Years 1995-1999; Texas Juvenile Probation Statistical Report (1999) at p. 17.
- xxviii See TYC Commitment Profile Fiscal Years 1995-1999
- xxix Texas Family Code, Sec. 51.10
- xxx Annie E. Casey Foundation, *Juvenile Detention Alternatives Initiative – Pathways to Detention Reform* (1997); UDC Law Review article (Fall, 1995)
- xxxi Site visits provide initial confirmation of prior reports of institutional abuses of incarcerated children. Closer inspection of these facilities is critical.
- xxxii IJA-ABA Juvenile Justice Standard 2.1(c)
- xxxiii<sup>a</sup>This same linkage between political support for the judge and attorney appointments was independently noted in the statewide survey of judges conducted by the State Bar of Texas, Committee on Legal Services to the Poor in Criminal Matters. Roughly one third of the judges in that survey reported that their peers sometimes consider whether the attorney is a political supporter (35.1 %) or has contributed to their campaign (30.3%). *Muting Gideon's Trumpet: The Crisis in Indigent Defense in Texas*. (September 22, 2000)
- xxxiii Ball, Andrea, "Juvenile jails doubling as mental-care facilities" Austin American Statesman 10/1/00
- xxxiv TYC Commitment Profile Fiscal Years 1995-1999
- xxxv Texas Juvenile Probation Statistical Report (1999) at p. 11
- xxxvi Texas Family Code, section 54.02.
- xxxvii Fabelo, Tony, Ph.D., et al, *An Overview of Juvenile Certification in Texas*, Texas Criminal Justice Policy Council (1999).
- xxxviii Texas Family Code, Sec. 5405.



# APPENDIX

## *IJA-ABA Juvenile Justice Standards Relating To Counsel For Private Parties*

### **PART I. GENERAL STANDARDS**

#### **Standard 1.1. Counsel in Juvenile Proceedings, Generally.**

The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.

#### **Standard 1.2. Standards in Juvenile Proceedings, Generally.**

As a member of the bar, a lawyer involved in juvenile court matters is bound to know and is subject to standards of professional conduct set forth in statutes, rules, decisions of courts, and codes, canons or other standards of professional conduct. Counsel has no duty to exercise any directive of the client that is inconsistent with law or these standards. Counsel may, however, challenge standards that he or she believes limit unconstitutionally or otherwise improperly representation of clients subject to juvenile court proceedings.

As used in these standards, the term “unprofessional conduct” denotes conduct which is now or should be subject to disciplinary sanction. Where other terms are used, the standard is intended as a guide to honorable and competent professional conduct or as a model for institutional organization.

### **Standard 1.3. Misrepresentation of Factual Propositions or Legal Authority.**

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

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

### **Standard 1.5. Punctuality.**

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

### **Standard 1.6. Public Statements.**

The lawyer representing a client before the juvenile court should avoid personal publicity connected with the case, both during trial and thereafter.

Counsel should comply with statutory and court rules governing dissemination of information concerning juvenile and family court matters and, to the extent consistent with those rules, with the ABA Standards Relating to Fair Trial and Free Press.

### **Standard 1.7. Improvement in The Juvenile Justice System.**

In each jurisdiction, lawyers practicing before the juvenile court should actively seek improvement in the administration of juvenile justice and the provision of resources for the treatment of persons subject to the jurisdiction of the juvenile court.

## **PART II. PROVISIONS AND ORGANIZATION OF LEGAL SERVICES**

### **Standard 2.1. General Principles.**

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

Lawyers active in practice should be encouraged to qualify themselves for participation in juvenile and family court cases through formal training, association with experienced juvenile counsel or by other means. To this end, law firms should encourage members to represent parties involved in such matters.

Suitable undergraduate and postgraduate educational curricula concerning legal and nonlegal subjects relevant to representation in juvenile and family courts should regularly be available.

Careful and candid evaluation of representation in cases involving children should be undertaken by judicial and professional groups, including the organized bar, particularly but not solely where assigned counsel—whether public or private—appears.

*Compensation for services.* Lawyers participating in juvenile court matters, whether retained or appointed, are entitled to reasonable compensation for time and services performed according to prevailing professional

standards. In determining fees for their services, lawyers should take into account the time and labor actually required, the skill required to perform the legal service properly, the likelihood that acceptance of the case will preclude other employment for the lawyer, the fee customarily charged in the locality for similar legal services, the possible consequences of the proceedings, and the experience, reputation and ability of the lawyer or lawyers performing the services. In setting fees lawyers should also consider the performance of services incident to full representation in cases involving juveniles, including counseling and activities related to locating or evaluating appropriate community services for a client or a client's family.

Lawyers should also take into account in determining fees the capacity of a client to pay the fee. The resources of parents who agree to pay for representation of their children in juvenile court proceedings may be considered if there is no adversity of interest as defined in Standard 3.2, *infra*, and if the parents understand that a lawyer's entire loyalty is to the child and that the parents have no control over the case. Where adversity of interests or desires between parent and child becomes apparent during the course of representation, a lawyer should be ready to reconsider the fee taking into account the child's resources alone.

As in all other cases of representation, it is unprofessional conduct for a lawyer to overreach the client or the client's parents in setting a fee, to imply that compensation is for anything other than professional services rendered by the lawyer or by others for him or her, to divide the fee with a layman, or to undertake representation in cases where no financial award may result on the understanding that payment of the fee is contingent in any way on the outcome of the case.

Lawyers employed in a legal aid or public defender office should be compensated on a basis equivalent to that paid other government attorneys of similar qualification, experience and responsibility.

*Supporting services.* Competent representation cannot be assured unless adequate supporting services are available. Representation in cases involving juveniles typically requires investigatory, expert and other nonlegal services. These should be available to lawyers and to their clients at all stages of juvenile and family court proceedings.

Where lawyers are assigned, they should have regular access to all reasonably necessary supporting services.

Where a defender system is involved, adequate supporting services should be available within the organization itself.

*Independence.* Any plan for providing counsel to private parties in juvenile court proceedings must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship.

## **Standard 2.2. Organization of Services.**

*In general.* Counsel should be provided in a systematic manner and in accordance with a widely publicized plan. Where possible, a coordinated plan for representation which combines defender and assigned counsel systems should be adopted.

*Defender systems. Application of general defender standards.* A defender system responsible for representation in some or all juvenile court proceedings generally should apply to staff and offices engaged in juvenile court matters its usual standards for selection, supervision, assignment and tenure of lawyers, restrictions on private practice, provision of facilities and other organizational procedures.

*Facilities.* If local circumstances require, the defender system should maintain a separate office for juvenile court legal and supporting staff, located in a place convenient to the courts and equipped with adequate library, interviewing and other facilities. A supervising attorney experienced in juvenile court representation should be assigned to and responsible for the operation of that office.

*Specialization.* While rotation of defender staff from one duty to another is an appropriate training device, there should be opportunity for staff to specialize in juvenile court representation to the extent local circumstances permit.

*Caseload.* It is the responsibility of every defender office to ensure that its personnel can offer prompt, full and effective counseling and representation to each client. A defender office should not accept more assignments than its staff can adequately discharge.

*Assigned counsel systems.* An assigned counsel plan should have available to it an adequate pool of competent attorneys experienced in juvenile court matters and an adequate plan for all necessary legal and supporting services.

Appointments through an assigned counsel system should be made, as nearly as possible, according to some rational and systematic sequence. Where the nature of the action or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

### **Standard 2.3. Types of Proceedings.**

*Delinquency and in need of supervision proceedings.* Counsel should be provided for any juvenile subject to delinquency or in need of supervision proceedings.

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

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

### **Standard 2.4. Stages Of Proceedings.**

*Initial provision of counsel.* When a juvenile is taken into custody, placed in detention or made subject to an intake process, the authorities taking such action have the responsibility promptly to notify the juvenile's lawyer, if there is one, or advise the juvenile with respect to the availability of legal counsel.

In administrative or judicial postdispositional proceedings which may affect the juvenile's custody, status or course of treatment, counsel should be available at the earliest stage of the decisional process, whether the respondent is present or not. Notification of counsel and, where necessary, provision of counsel in such proceedings is the responsibility of the judicial or administrative agency.

*Duration of representation and withdrawal of counsel.* Lawyers initially retained or appointed should continue their representation through all stages of the proceeding, unless geographical or other compelling factors make continued participation impracticable.

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

If leave to withdraw is granted, or if the client justifiably asks that counsel be replaced, successor counsel should be available.

## **PART III. THE LAWYER-CLIENT RELATIONSHIP**

### **Standard 3.1. The Nature Of The Relationship.**

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

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

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

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

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

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

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

Where a guardian *ad litem* has not been appointed and, for some reason, it appears that independent advice to the juvenile will not otherwise be available, counsel should inquire thoroughly into all circumstances that a careful and competent person in the juvenile's position should consider in determining the juvenile's interests with respect to the proceeding. After consultation with the juvenile, the parents (where their interests do not appear to conflict with the juvenile's), and any other family members or interested persons, the attorney may remain neutral concerning the proceeding, limiting participation to presentation and examination of material evidence or, if necessary, the attorney may adopt the position requiring the least intrusive intervention justified by the juvenile's circumstances.

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

### **Standard 3.2 Adversity of Interests.**

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

Formally represent more than one client in a proceeding and have a duty to contend in behalf of one client that which their duty to another requires them to oppose.

Formally represent more than one client and it is their duty to contend in behalf of one client that which may prejudice the other client's interests at any point in the proceeding.

Formally represent one client but are required by some third person or institution, including their employer, to accommodate their representation of that client to factors unrelated to the client's legitimate interests.

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

### **Standard 3.3. Confidentiality.**

*Establishment of confidential relationship.* Counsel should seek from the outset to establish a relationship of trust and confidence with the client. The lawyer should explain that full disclosure to counsel of all facts known to the client is necessary for effective representation, and at the same time explain that the lawyer's obligation of confidentiality makes privileged the client's disclosures relating to the case.

*Preservation of client's confidences and secrets.* Except as permitted by 3.3(d), below, an attorney should not knowingly reveal a confidence or secret of a client to another, including the parent of a juvenile client.

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

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

The attorney should not encourage secret communications when it is apparent that the parent or guardian believes those communications to be confidential or privileged and disclosure may become necessary to full and effective representation of the client.

Except as permitted by 3.3(d), below, an attorney should not knowingly reveal the parent's secret communication to others or use a secret communication to the parent's disadvantage or to the advantage of the attorney or of a third person, unless (1) the parent competently consents to such revelation or use after full disclosure or (2) such disclosure or use is necessary to the discharge of the attorney's primary responsibility to the client.

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

Confidences or secrets with the informed and competent consent of the client or clients affected, but only after full disclosure of all relevant circumstances to them. If the client is a juvenile incapable of considered judgment with respect to disclosure of a secret or confidence, a lawyer may reveal such communications if such disclosure (1) will not disadvantage the juvenile and (2) will further rendition of counseling, advice or other service to the client.

Confidences or secrets when permitted under disciplinary rules of the ABA Code of Professional Responsibility or as required by law or court order.

The intention of a client to commit a crime or an act which if done by an adult would constitute a crime, or acts that constitute neglect or abuse of a child, together with any information necessary to prevent such conduct. A lawyer must reveal such intention if the conduct would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes disclosure is necessary to prevent the harm. If feasible, the lawyer should first inform the client of the duty to make such revelation and seek to persuade the client to abandon the plan.

Confidences or secrets material to an action to collect a fee or to defend himself or herself or any employees or associates against an accusation of wrongful conduct.

### **Standard 3.4. Advice and Service with Respect to Anticipated Unlawful Conduct.**

It is unprofessional conduct for a lawyer to assist a client to engage in conduct the lawyer believes to be illegal or fraudulent, except as part of a bona fide effort to determine the validity, scope, meaning or application of a law.

### **Standard 3.5. Duty to Keep Client Informed.**

The lawyer has a duty to keep the client informed of the developments in the case, and of the lawyer's



efforts and progress with respect to all phases of representation. This duty may extend, in the case of a juvenile client, to a parent or guardian whose interests are not adverse to the juvenile's, subject to the requirements of confidentiality set forth in 3.3, above.

## **PART IV. INITIAL STAGES OF REPRESENTATION**

### **Standard 4.1. Prompt Action to Protect the Client.**

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

### **Standard 4.2. Interviewing the Client.**

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

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

### **Standard 4.3. Investigation and Preparation.**

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts concerning responsibility for the acts or conditions alleged and social or legal dispositional alternatives. The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities. The duty to investigate exists regardless of the client's admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.

Where circumstances appear to warrant it, the lawyer should also investigate resources and services available in the community and, if appropriate, recommend them to the client and the client's family. The lawyer's responsibility in this regard is independent of the posture taken with respect to any proceeding in which the client is involved.

It is unprofessional conduct for a lawyer to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so.

### **Standard 4.4. Relations with Prospective Witnesses.**

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

## **PART V. ADVISING AND COUNSELING THE CLIENT**

### **Standard 5.1. Advising the Client Concerning the Case.**

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

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

### **Standard 5.2. Control and Direction of the Case.**

Certain decisions relating to the conduct of the case are in most cases ultimately for the client and others are ultimately for the lawyer. The client, after full consultation with counsel, is ordinarily responsible for determining:

the plea to be entered at adjudication;

whether to cooperate in consent judgment or early disposition plans;

whether to be tried as a juvenile or an adult, where the client has that choice;

whether to waive jury trial;

whether to testify on his or her own behalf.

Decisions concerning what witnesses to call, whether and how to conduct cross-examination, what jurors to accept and strike, what trial motions should be made, and any other strategic and tactical decisions not inconsistent with determinations ultimately the responsibility of and made by the client, are the exclusive province of the lawyer after full consultation with the client.

If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, his or her advice and reasons, and the conclusion reached. This record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

### **Standard 5.3. Counseling.**

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

## **PART VI. INTAKE, EARLY DISPOSITION AND DETENTION**

### **Standard 6.1. Intake and Early Disposition Generally.**

Whenever the nature and circumstances of the case permit, counsel should explore the possibility of early diversion from the formal juvenile court process through subjudicial agencies and other community resources. Participation in pre- or nonjudicial stages of the juvenile court process may be critical to such diversion, as well as to protection of the client's rights.

### **Standard 6.2. Intake Hearings.**

In jurisdictions where intake hearings are held prior to reference of a juvenile court matter for judicial proceedings, the lawyer should be familiar with and explain to the client and, if the client is a minor, to the client's parents, the nature of the hearing, the procedures to be followed, the several dispositions available and their probable consequences. The lawyer should further advise the client of his or her rights at the intake hearing, including the privilege against self-incrimination where appropriate, and of the use that may be made of the client's statements.

The lawyer should be prepared to make to the intake hearing officer arguments concerning the jurisdictional sufficiency of the allegations made and to present facts and circumstances relating to the occurrence of and the client's responsibility for the acts or conditions charged or to the necessity for official treatment of the matter.

### **Standard 6.3. Early Disposition.**

When the client admits the acts or conditions alleged in the juvenile court proceeding and, after investigation, the lawyer is satisfied that the admission is factually supported and that the court would have jurisdiction to act, the lawyer should, with the client's consent, consider developing or cooperating in the development of a plan for informal or voluntary adjustment of the case.

A lawyer should not participate in an admission of responsibility by the client for purposes of securing informal or early disposition when the client denies responsibility for the acts or conditions alleged.

#### **Standard 6.4. Detention.**

If the client is detained or the client's child is held in shelter care, the lawyer should immediately consider all steps that may in good faith be taken to secure the child's release from custody.

Where the intake department has initial responsibility for custodial decisions, the lawyer should promptly seek to discover the grounds for removal from the home and may present facts and arguments for release at the intake hearing or earlier. If a judicial detention hearing will be held, the attorney should be prepared, where circumstances warrant, to present facts and arguments relating to the jurisdictional sufficiency of the allegations, the appropriateness of the place of and criteria used for detention, and any noncompliance with procedures for referral to court or for detention. The attorney should also be prepared to present evidence with regard to the necessity for detention and a plan for pretrial release of the juvenile.

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

### **PART VII. ADJUDICATION**

#### **Standard 7.1. Adjudication without Trial.**

Counsel may conclude, after full investigation and preparation, that under the evidence and the law the charges involving the client will probably be sustained. Counsel should so advise the client and, if negotiated pleas are allowed under prevailing law, may seek the client's consent to engage in plea discussions with the prosecuting agency. Where the client denies guilt, the lawyer cannot properly participate in submitting a plea of involvement when the prevailing law requires that such a plea be supported by an admission of responsibility in fact.

The lawyer should keep the client advised of all developments during plea discussions with the prosecuting agency and should communicate to the client all proposals made by the prosecuting agency. Where it appears that the client's participation in a psychiatric, medical, social or other diagnostic or treatment regime would be significant in obtaining a desired result, the lawyer should so advise the client and, when circumstances warrant, seek the client's consent to participation in such a program.

#### **Standard 7.2. Formality, In General.**

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

#### **Standard 7.3. Discovery and Motion Practice.**

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

In seeking discovery, the lawyer may find that rules specifically applicable to juvenile court proceedings do not exist in a particular jurisdiction or that they improperly or unconstitutionally limit disclosure. In order to make possible adequate representation of the client, counsel should in such cases investigate the appropriateness and feasibility of employing discovery techniques available in criminal or civil proceedings in the jurisdiction.

*Other motions.* Where the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client's rights, such as motions to dismiss the petition, to suppress

evidence, for mental examination, or appointment of an investigator or expert witness, for severance, or to disqualify a judge. Such motions should ordinarily be made in writing when that would be required for similar motions in civil or criminal proceedings in the jurisdiction. If a hearing on the motion is required, it should be scheduled at some time prior to the adjudication hearing if there is any likelihood that consolidation will work to the client's disadvantage.

#### **Standard 7.4. Compliance with Orders.**

Control of proceedings is principally the responsibility of the court, and the lawyer should comply promptly with all rules, orders and decisions of the judge. Counsel has the right to make respectful requests for reconsideration of adverse rulings and has the duty to set forth on the record adverse rulings or judicial conduct which counsel considers prejudicial to the client's legitimate interests.

The lawyer should be prepared to object to the introduction of any evidence damaging to the client's interest if counsel has any legitimate doubt concerning its admissibility under constitutional or local rules of evidence.

#### **Standard 7.5. Relations with Court and Participants.**

The lawyer should at all times support the authority of the court by preserving professional decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors

When court is in session, the lawyer should address the court and not the prosecutor directly on any matter relating to the case unless the person acting as prosecutor is giving evidence in the proceeding.

It is unprofessional conduct for a lawyer to engage in behavior or tactics purposely calculated to irritate or annoy the court, the prosecutor or probation department personnel.

When in the company of clients or clients' parents, the attorney should maintain a professional demeanor in all associations with opposing counsel and with court or probation personnel.

#### **Standard 7.7. Presentation of Evidence.**

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

#### **Standard 7.8. Examination of Witnesses.**

The lawyer in juvenile court proceedings should be prepared to examine fully any witness whose testimony is damaging to the client's interests. It is unprofessional conduct for counsel knowingly to forego or limit examination of a witness when it is obvious that failure to examine fully will prejudice the client's legitimate interests.

The lawyer's knowledge that a witness is telling the truth does not preclude cross-examination in all circumstances, but may affect the method and scope of cross-examination. Counsel should not misuse the power of cross-examination or impeachment by employing it to discredit the honesty or general character of a witness known to be testifying truthfully.

The examination of all witnesses should be conducted fairly and with due regard for the dignity and, to the extent allowed by the circumstances of the case, the privacy of the witness. In general, and particularly when a youthful witness is testifying, the lawyer should avoid unnecessary intimidation or humiliation of the witness.

A lawyer should not knowingly call as a witness one who will claim a valid privilege not to testify for the sole purpose of impressing that claim on the fact-finder. In some instances, as defined in the ABA Code of Professional Responsibility, doing so will constitute unprofessional conduct.

It is unprofessional conduct to ask a question that implies the existence of a factual predicate which the examiner knows cannot be supported by evidence.

### **Standard 7.9. Testimony by the Respondent.**

It is the lawyer's duty to protect the client's privilege against self-incrimination in juvenile court proceedings. When the client has elected not to testify, the lawyer should be alert to invoke the privilege and should insist on its recognition unless the client competently decides that invocation should not be continued.

If the respondent has admitted to counsel facts which establish his or her responsibility for the acts or conditions alleged and if the lawyer, after independent investigation, is satisfied that those admissions are true, and the respondent insists on exercising the right to testify at the adjudication hearing, the lawyer must advise the client against taking the stand to testify falsely and, if necessary, take appropriate steps to avoid lending aid to perjury.

If, before adjudication, the respondent insists on taking the stand to testify falsely, the lawyer must withdraw from the case if that is feasible and should seek the leave of the court to do so if necessary.

If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during adjudication without notice, it is unprofessional conduct for the lawyer to lend aid to perjury or to use the perjured testimony. Before the respondent takes the stand in these circumstances the lawyer should, if possible, make a record of the fact that respondent is taking the stand against the advice of counsel without revealing that fact to the court. Counsel's examination should be confined to identifying the witness as the respondent and permitting the witness to make his or her statement to the trier of fact. Counsel may not engage in direct examination of the respondent in the conventional manner and may not recite or rely on the false testimony in argument.

### **Standard 7.10. Argument.**

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

## **PART VIII. TRANSFER PROCEEDINGS**

### **Standard 8.1. In General.**

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

### **Standard 8.2. Investigation and Preparation.**

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

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

### **Standard 8.3. Advising and Counseling the Client Concerning Transfer.**

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

### **Standard 8.4. Transfer Hearings.**

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

### **Standard 8.5. Post-Hearing Remedies.**

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

## **PART IX. DISPOSITION**

### **Standard 9.1. In General.**

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

### **Standard 9.2. Investigation and Preparation.**

Counsel should be familiar with the dispositional alternatives available to the court, with its procedures and practices at the disposition stage, and with community services that might be useful in the formation of a dispositional plan appropriate to the client's circumstances.

The lawyer should promptly investigate all sources of evidence including any reports or other information that will be brought to the court's attention and interview all witnesses material to the disposition decision.

If access to social investigation, psychological, psychiatric or other reports or information is not provided voluntarily or promptly, counsel should be prepared to seek their disclosure and time to study them through formal measures.

Whether or not social and other reports are readily available, the lawyer has a duty independently to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.

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

### **Standard 9.3. Counseling Prior to Disposition.**

The lawyer should explain to the client the nature of the disposition hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan. Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.

When psychological or psychiatric evaluations are ordered by the court or arranged by counsel prior to disposition, the lawyer should explain the nature of the procedure to the client and encourage the client's cooperation with the person or persons administering the diagnostic procedure.

The lawyer must exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical and social reports, tests or evaluations bearing on the client's history or condition or, if the client is a juvenile, the history or condition of the client's parents. In general, the lawyer should not disclose data or conclusions contained in such reports to the extent that, in the lawyer's judgment based on knowledge of the client and the client's family, revelation would be likely to affect adversely the client's well-being or relationships within the family and disclosure is not necessary to protect the client's interests in the proceeding.

### **Standard 9.4. Disposition Hearing.**

It is the lawyer's duty to insist that proper procedure be followed throughout the disposition stage and that orders entered be based on adequate reliable evidence.

Where the dispositional hearing is not separate from adjudication or where the court does not have before it all evidence required by statute, rules of court or the circumstances of the case, the lawyer should seek a

continuance until such evidence can be presented if to do so would serve the client's interests.

The lawyer at disposition should be free to examine fully and to impeach any witness whose evidence is damaging to the client's interests and to challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court. The lawyer should not knowingly limit or forego examination or contradiction by proof of any witness, including a social worker or probation department officer, when failure to examine fully will prejudice the client's interests. Counsel may seek to compel the presence of witnesses whose statements of fact or opinion are before the court or the production of other evidence on which conclusions of fact presented at disposition are based.

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

#### **Standard 9.5. Counseling After Disposition.**

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

### **PART X. REPRESENTATION AFTER DISPOSITION**

#### **Standard 10.1. Relations with the Client After Disposition.**

The lawyer's responsibility to the client does not necessarily end with dismissal of the charges or entry of a final dispositional order. The attorney should be prepared to counsel and render or assist in securing appropriate legal services for the client in matters arising from the original proceeding.

If the client has been found to be within the juvenile court's jurisdiction, the lawyer should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan.

Whether or not the charges against the client have been dismissed, where the lawyer is aware that the client or the client's family needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.

The decision to pursue an available claim for postdispositional relief from judicial and correctional or other administrative determinations related to juvenile court proceedings, including appeal, habeas corpus or an action to protect the client's right to treatment, is ordinarily the client's responsibility after full consultation with counsel.

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

The lawyer who represents a client during initial juvenile court proceedings should ordinarily be prepared to represent the client with respect to proceedings to review or modify adjudicative or dispositional orders made during earlier hearings or to pursue any affirmative remedies that may be available to the client under local juvenile court law.

The lawyer should advise the client of the pendency or availability of a postdispositional hearing or proceeding and of its nature, issues and potential consequences. Counsel should urge and, if necessary, seek to facilitate the prompt attendance at any such hearing of the client and of any material witnesses who may be called.

#### **Standard 10.3. Counsel on Appeal.**

Trial counsel, whether retained or appointed by the court, should conduct the appeal unless new counsel is substituted by the client or by the appropriate court. Where there exists an adequate pool of competent

counsel available for assignment to appeals from juvenile court orders and substitution will not work substantial disadvantage to the client's interests, new counsel may be appointed in place of trial counsel.

Whether or not trial counsel expects to conduct the appeal, he or she should promptly inform the client, and where the client is a minor and the parents' interests are not adverse, the client's parents of the right to appeal and take all steps necessary to protect that right until appellate counsel is substituted or the client decides not to exercise this privilege.

Counsel on appeal, after reviewing the record below and undertaking any other appropriate investigation, should candidly inform the client as to whether there are meritorious grounds for appeal and the probable results of any such appeal, and should further explain the potential advantages and disadvantages associated with appeal. However, appellate counsel should not seek to withdraw from a case solely because his or her own analysis indicates that the appeal lacks merit.

#### **Standard 10.4. Conduct of the Appeal.**

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

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

A lawyer who has represented a client through trial and/or appellate proceedings should be prepared to continue representation when post-dispositional action, whether affirmative or defensive, is sought, unless new counsel is appointed at the request of the client or continued representation would, because of geographical considerations or other factors, work unreasonable hardship.

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

The lawyer engaged in post-dispositional representation should conduct those proceedings according to the principles generally governing representation in juvenile court matters.

#### **Standard 10.6. Probation Revocation; Parole Revocation.**

Trial counsel should be prepared to continue representation if revocation of the client's probation or parole is sought, unless new counsel is appointed or continued representation would, because of geographical or other factors, work unreasonable hardship.

Where proceedings to revoke conditional liberty are conducted in substantially the same manner as original petitions alleging delinquency or need for supervision, the standards governing representation in juvenile court generally apply. Where special procedures are used in such matters, counsel should advise the client concerning those procedures and be prepared to participate in the revocation proceedings at the earliest stage.

#### **Standard 10.7. Challenges to the Effectiveness of Counsel.**

A lawyer appointed or retained to represent a client previously represented by other counsel has a good faith duty to examine prior counsel's actions and strategy. If, after investigation, the new attorney is satisfied that prior counsel did not provide effective assistance, the client should be so advised and any appropriate relief for the client on that ground should be vigorously pursued.

A lawyer whose conduct of a juvenile court case is drawn into question may testify in judicial, administrative or investigatory proceedings concerning the matters charged, even though in so doing the lawyer must reveal information which was given by the client in confidence.