

# TEN PRINCIPLES FOR PROVIDING EFFECTIVE DEFENSE ADVOCACY AT JUVENILE DETENTION HEARINGS

Prepared by NJDC for the Annie E. Casey Foundation's  
Juvenile Detention Alternatives Initiative

## PREAMBLE

### A. Goal of These Principles

These principles are developed as a resource to help defenders and other juvenile court professionals understand the elements of effective detention advocacy on behalf of indigent juvenile clients.<sup>1</sup> Defenders can be at a distinct disadvantage at the detention determination, whether it is at the beginning of the case, when indigent defense counsel often has the least information about the child and the charge compared to every other person in the courtroom,<sup>2</sup> or at the end of the case, when the child is post-disposition, and an unspoken but unmistakable presumption to detain creeps into the case discourse.<sup>3</sup> Juvenile indigent defense counsel have a duty “to explore promptly the least restrictive form of release, the alternatives to detention, and the opportunities for detention review, at every stage of the proceedings where such an inquiry would be relevant.”<sup>4</sup> Therefore, it is critically important for juvenile defenders to be as well-prepared as possible when they walk into detention hearings, where counsel’s often seemingly impossible goal is to present a history of the client leading up to the present day, along with an individualized release plan that is responsive to the client’s expressed interests<sup>5</sup> and that bears in mind the needs of the court.

In fall 2004, the National Juvenile Defender Center, with support from the Annie E. Casey Foundation, published *Legal Strategies to Reduce the Unnecessary Detention of Children*, an advocacy and training guide aimed at ensuring that juvenile defenders provide zealous and comprehensive legal advocacy at detention and related hearings. These Principles build on that work. The National Juvenile Defender Center works to ensure excellence in juvenile defense and promote justice for all children.

### B. Detention advocacy is crucial to every aspect of the case, including the development of the attorney/client relationship.

There are several reasons defenders must advocate aggressively at detention hearings. First, the detention decision is critical to the client’s ability to prepare for trial. A detained client cannot

assist as well in preparing for trial, and does not make as good an impression on the court, as a client who has been released.<sup>6</sup> In addition, detention halls are often crowded, dangerous, and unhygienic.<sup>7</sup>

Studies show that time spent in detention increases the likelihood that a child will recidivate,<sup>8</sup> in part because the child is likely to make negative peer connections,<sup>9</sup> and because positive, community-based relationships (in particular, with the child’s family) are interrupted. In fact, detention, as a predictor of future criminality, is more reliable than gang affiliation, weapons possession, or family dysfunction.<sup>10</sup> Indeed, detention is a demonstrated gateway into the juvenile delinquency system.

Defenders must advocate aggressively for release in service to the attorney-client relationship. In many detention hearings, the defender’s relationship with the client is new. There is no better way to realize the attorney/client relationship than by taking the time to understand and fight for the client’s expressed legitimate interest.

### C. Indigent defense delivery systems must pay particular attention to the disproportionate detention of the most vulnerable and over-represented groups of children in the delinquency system.

Nationally, children of color are severely over-represented at every stage of the juvenile justice process, and the detention stage is no exception.<sup>11</sup> As of the fall of 2005, over two-thirds of the youth in detention are children of color, largely African-American and Latino youth.<sup>12</sup> Not only are children from ethnic and racial minority groups disproportionately confined at detention hearings, but they suffer the effects of detention more acutely than other children.<sup>13</sup>

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# TEN PRINCIPLES

## 1

At the detention hearing, as at all other stages of a case, defenders fulfill their ethical obligation to advocate for the expressed interests of each client.

- A. The *IJA/ABA Juvenile Justice Standards* are clear that defenders have an ethical obligation to zealously advocate for the expressed interests of each juvenile client, even when the client's expressed legitimate interest conflicts with the defender's sound legal advice or with the defender's own personal judgment about what might be in the client's best interests.<sup>14</sup> These standards apply regardless of the client's age, education level, and perceived or measured intelligence level, so long as the client is "capable of considered judgment on his or her own behalf."<sup>15</sup>
- B. In every case where there is conflict between a juvenile client accused of an offense and his or her parents, and, in particular, in cases where there is a possible conflict of interest between the client and his or her parents, as in cases in which either the parent or one of the client's siblings is a complainant, counsel should inform all parties involved that counsel represents the expressed legitimate interests of the client, and that, in the event of a disagreement between the client and his parents, counsel must advocate for the client's expressed interests alone.<sup>16</sup>

## 2

Defenders consult with the client as early as possible, and in all cases prior to the detention hearing.

- A. As far in advance as possible before the detention hearing, defense counsel should consult with the client to find out the client's expressed interests regarding detention and detention alternatives, including placement with family members or in a community-based program, as well as any specific reasons that mitigate against detention of the client, including age, special needs, special strengths and talents, health concerns, and mental health issues.
- B. The initial meeting with the client should also include discussion of: attorney-client confidentiality; the attorney's ethical duty to zealously advocate for the child's expressed interests; the client's right to remain silent; and the client's objectives for the case. Consultation with the client also includes explaining the roles of each of the courtroom players, the purpose of each part of the initial hearing, and preparing the child for the accusatory character of the hearing. If the child is detained counsel should inquire whether there is any evidence that the child has been harassed or mistreated by either staff or other inmates.
- C. Although defenders cannot give the client's parent or guardian legal advice, as part of their ethical duty to zealously represent their juvenile clients, defenders should be sure to prepare the client's parent or guardian for the interview with the intake probation officer.<sup>17</sup> Defenders should relate to the parent the purpose of the interview, warn the parent that everything the parent says will likely be recited in open court, inform the parent that the judge might solicit the parent's opinion about the client's behavior and appropriate placement options in open court, and tell the parent the importance of supporting release when speaking with the probation officer. Defenders should also cover the specific areas likely to be discussed at the hearing, including school attendance, extracurricular activities and hobbies, parental control, dangerousness, and risk of flight.

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### 3

#### Defense counsel prepares for the hearing with creative and thorough investigation.

- A. Defense counsel should conduct a complete investigation of the client's history in preparation for the detention hearing. Counsel should make every effort to obtain the client's school and medical records, and talk with the client's parent or guardian, teachers, and any other adults to whom the client is close. The social history from the client should cover information about the client's strengths and skills, and the client's prior involvement in the system, as well as the client's special health needs, mental health needs, and family history.
- B. Defense counsel should also investigate the allegations against the client for the probable cause hearing. Counsel should request from the government, receive and review any existing prior delinquency, truancy, and dependency record, as well as the police reports in the case. Counsel should also talk with the client about potential exculpatory information that might be useful at the probable cause hearing.
- C. Defense counsel should advocate with the probation officer and the prosecutor before the hearing. Counsel should request from the probation officer, receive and review any risk assessment instrument (RAI) the probation officer intends to rely on in the detention hearing. Talking with the probation officer before the hearing also gives counsel an opportunity to negotiate on the client's behalf.

### 4

#### Defenders use all available arguments and information to oppose a finding of probable cause.

- A. The probable cause standard, which is a very low evidentiary standard, is defined as 1) whether there is probable cause to believe that a crime was committed and 2) whether there is probable cause to believe that the child was involved.<sup>18</sup>
- B. Where the state statute does not specify the burden or the standard of proof required, counsel should argue, pursuant to IJA/ABA standards, that the government bears the burden to prove probable cause by clear and convincing evidence.<sup>19</sup>
- C. In jurisdictions where probable cause is determined in an evidentiary hearing, counsel should carefully consider whether to waive a probable cause hearing. Even if there is no chance of winning the hearing, counsel can use the hearing as an opportunity for discovery, and for sworn statements to use at trial.
- D. Counsel should always make a probable cause argument. In most cases, an argument can be made concerning a deficient attestation, a lack of evidence concerning one or more of the elements of the charged offense, or an insufficient nexus between your client and the offense.
- E. Particularly if the client is detained, where counsel receives exculpatory information after the probable cause hearing, counsel should immediately file a motion to reopen the hearing.

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## 5

Defenders argue for judges to abide by statutory criteria for ordering detention, such as risk of flight and dangerousness.

- A. Defenders should go into detention hearings knowing the purpose clause of the state's juvenile justice act, the detention statute, and, specifically, the statutory criteria necessary to imposing detention. Defenders should make an abbreviated and portable reference packet that includes the statute and court rules, the statute's legislative history, and synopses of recent and relevant case law.
- B. Defenders should argue from the position that detention is the last resort. Most statutes, as they are constructed, support this position, and typically, judges have a great deal of discretion. The discretion lies in the determination of two specific factors: a client's potential dangerousness to the community and risk of flight.<sup>20</sup> In addition, most jurisdictions have statutory language stating that juveniles should be held in the least restrictive conditions necessary to ensure the safety of the community and the return of the juvenile to court.

## 6

In consultation with the client, defenders investigate and argue for alternatives to detention.

- A. An alternative to detention is whatever creative plan a defender and community partners can devise that is responsive to the needs of the client and addresses the concerns of the court. To craft individualized detention plans using community-based resources, defenders must become familiar with the available detention alternatives. Defenders should compile a list of each community-based program, with contact names and phone numbers, addresses, target populations, and develop a plan to keep the list updated.
- B. Defenders should visit community programs and aim to develop relationships with staff members.
- C. Defenders should challenge any decision to detain based on a lack of community resources. The failure of the community to provide suitable, evidence-based programs responsive to the client's needs does not mean that the client should be detained.

## 7

Defenders are aware of current research on the harmful effects of detention and, when appropriate, use this research to argue against detention.

- A. Defenders must be familiar with their local detention facilities to be able to argue convincingly concerning the harmful effects of detention. To that end, defenders should arrange tours of their local secure and non-secure detention facilities. They should request copies of each facility's standard operating procedures, and rules regarding how staff should treat residents. They should file Freedom of Information Act requests about criminal allegations, staff training guides, discipline guidelines, and statistics on the use of discipline. Finally, juvenile defenders should talk with their clients about their experiences with different staff members at different facilities.

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- B. Defenders should be aware of and argue the detention facilities' deficiencies, if they exist, including the limited or nonexistent access to special education, mental health treatment, and adequate medical care, increased chances of recidivism, and consequences of overcrowding and harsh treatment.<sup>21</sup>
  - C. Defenders should also be aware of and argue the advantages of staying on release, including continued involvement in family, school, and positive peer relationships.<sup>22</sup>

## 8

### Defenders request that the judge make written findings and an order regarding detention.

- A. Counsel should ensure that, in as timely a manner as possible, counsel receives a clear, concise written order documenting the court's findings with respect to the need for detention of the client. If counsel believes any conditions are excessively punitive or unnecessary, counsel should state that position on the record. If the order is ambiguous, counsel should seek clarification.
- B. Defenders should work to ensure that detention orders specify any special conditions or needs of the client.
- C. Both defense counsel and the client should receive copies of the order in a timely manner, and counsel should review the order with the client as soon as is practicable.
- D. Defense counsel should advocate for juvenile detention hearings to be recorded and transcribed.<sup>23</sup>

## 9

### Defenders ensure that each client who is released understands the conditions of his or her release and is prepared to fulfill these conditions.

- A. Counsel should adequately explain the conditions of release to the client, and provide the client with the name and telephone number of the court worker assigned to monitor the client's case. Counsel should also contact the worker, provide counsel's name, address, and phone number, and let the worker know that the worker should consider counsel another resource as the client's case progresses.
- B. If a client is released, counsel should ensure that the client's need for safety is met and that agencies are held responsible for the provision of any needed services.

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Defenders appeal detention decisions immediately, if warranted and in consultation with the client.

- A. If the client is detained, defense counsel should create and seek out opportunities to win release. In particular, defense counsel should file motions to reconsider, review or modify the detention decision based on evidence showing, inter alia: that time in detention has changed the circumstances of the case such that the child can be released into the community; that new evidence discovered after the probable cause hearing casts doubt on the correctness of the probable cause determination; or that defense counsel has, since the detention decision, been able to create a release plan that addresses the specific reasons the court cited in support of detention.
- B. If the client is detained, defense counsel should immediately inform the client of his or her right to appeal, the timeline of an appeal, the likely outcome, and the affect than an appeal of the detention decision might have on the client's case.
- C. If the client is detained, and counsel has exhausted the standard procedures available to obtain the client's release, defense counsel also considers filing a writ of habeas corpus, mandamus, or prohibition.
- D. If counsel is not prepared to handle the client's appeal, counsel should transfer the case to another attorney who is.

*For more information, please contact the National Juvenile Defender Center at 202.452.0010 or at [inquiries@njdc.info](mailto:inquiries@njdc.info).*

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## ENDNOTES

- 1 For the purposes of these *Principles*, detention means confinement in a secure detention facility during the interim period between arrest and adjudication.
- 2 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 4 (2004), available on the web at [http://www.njdc.info/pdf/detention\\_guide.pdf](http://www.njdc.info/pdf/detention_guide.pdf).
- 3 See generally, *Maine: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Maryland: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Montana: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters* (2003); *Florida: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2006). All of NJDC's state assessments are available at on the web at <http://www.njdc.info/assessments.php>.
- 4 Institute for Judicial Administration/American Bar Association (IJA/ABA), *Juvenile Justice Standards, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Standard 8.2 Standards for the Defense Attorney.
- 5 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties*, Standard 3.1 The Lawyer-Client Relationship (stating, "[h]owever 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").
- 6 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 5 (2004).
- 7 National Juvenile Detention Association and Youth Law Center, *Crowding in Juvenile Detention Centers: a Problem Solving Manual* (Dec 1998) 5-10, on the web at [www.njda.com/learn-materials-pub-r0711.html](http://www.njda.com/learn-materials-pub-r0711.html).
- 8 Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* 4 (2006).
- 9 *Id.* at 5.
- 10 Bart Lubow, 11 *Juvenile Justice Update* 1, 2, *Reducing Inappropriate Detention: A Focus on the Role of Defense Attorneys* (Aug/Sep 2005).
- 11 American Council of Chief Defenders & National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems* (January 2005) ([http://www.njdc.info/pdf/10\\_Principles.pdf](http://www.njdc.info/pdf/10_Principles.pdf)).
- 12 Bart Lubow, 11 *Juvenile Justice Update*, *Reducing Inappropriate Detention: A Focus on the Role of Defense Attorneys* 1, 2 (Aug/Sep 2005); see also Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* 12 (2006)(stating that "[e]ven in states with tiny ethnic and racial minority populations, (like Minnesota, where the general population is 90% white, and Pennsylvania, where the general population is 85% white) more than half of the detention population are youth of color").
- 13 *Id.* at 2, 14 (stating, "Indeed, detained youth are generally among the most disadvantaged and disconnected people in our country. . . . These youth have some of the worst odds of making a successful transition to adulthood in our country, and detention lowers those odds still further.")
- 14 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties*, Standard 3.1 The Lawyer-Client Relationship.
- 15 *Id.*
- 16 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Standard 8.1 Conflicts of Interest.
- 17 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 14 (2004).
- 18 *Gerstein v. Pugh*, 420 U.S. 103 (1975).
- 19 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Standard 4.2 Burden of Proof.
- 20 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 17-20 (2004) (listing potential detention hearing arguments concerning dangerousness and risk of flight).
- 21 *Id.* at 21.
- 22 *Id.* at 22.
- 23 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Appeals and Collateral Review*, recognizes the importance of having hearings transcribed. According to Standard 3.2, The Right to Counsel and Records, "Any party entitled to an appeal under Standard 2.2, or his or her counsel, is entitled to a copy of the verbatim transcript of the adjudication and dispositional hearings and any matter appearing in the court file."



NATIONAL JUVENILE DEFENDER CENTER

1350 Connecticut Avenue NW, Suite 304

Washington, DC 20036

Phone: 202.452.0010

Fax: 202.452.1205

[www.njdc.info](http://www.njdc.info)