

MONTANA



An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings

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in collaboration with

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The Editors

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EXECUTIVE SUMMARY

A national assessment of the legal representation of children in delinquency proceedings was conducted, in 1995, by the American Bar Association (ABA) Juvenile Justice Center, in collaboration with the Youth Law Center and Juvenile Law Center. The findings were published in *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. The findings and recommendations embodied in *A Call for Justice* laid the foundation for closer examination of the juvenile indigent defense systems in individual states. These examinations are required to ensure that state indigent defense systems adequately protect poor children in light of their particular vulnerabilities.

This assessment of access to counsel and quality of representation received by children in the State of Montana is part of a nationwide effort to address deficiencies and identify strengths in juvenile indigent defense practices. More than thirty-five years after the United States Supreme Court decided that children have a constitutional right to counsel, the spirit and promise of the *Gault* decision has been largely unfulfilled. With few exceptions, juvenile indigent defense practices have gone unchecked. The purpose of this assessment is to take a closer look at juvenile defense practices in Montana, identify the systemic and institutional obstacles that impede the development of an improved legal service delivery system, highlight innovative practices and offer recommendations for change.

In 1974, the Montana Legislature established the Montana Youth Court Act, codified under Title 41, Chapter 5 of the Montana Code Annotated. The Act has four express legislative purposes:

1. to preserve the unity and welfare of the family whenever possible and to provide for the care, protection and wholesome mental and physical development of the youth;
2. to prevent and reduce youth delinquency through a system that does not seek retribution but that provides immediate, consistent, enforceable and avoidable consequences of youths' actions and a program of supervision, care, rehabilitation, detention, compe-

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- tency development, and community protection for youth and, where appropriate, restitution;
3. separating the youth from the parents only when necessary for the welfare of the youth or for the safety and protection of the community; and
 4. to provide judicial procedures in which the parties are ensured a fair, accurate hearing and recognition and enforcement of their constitutional and statutory rights.

While the intentions are good, given a multiplicity of factors, Montana's youth are not facing a system that is living up to its promises. The Act guarantees the right to counsel, but it is often too late in the process to offer any meaningful protection of the youths' rights. Furthermore, institutional, financial, and professional barriers are compromising the quality of representation actually provided.

This assessment is the result of a partnership between the Cascade County Law Clinic of Montana, the Albin Law Firm, the National Juvenile Defender Center and American Bar Association Juvenile Justice Center. Many attorneys from the state and around the country were integral to collecting the data upon which this report is based. In addition to extensive interviewing and surveying of judges and indigent defense counsel across the state, youth were interviewed in juvenile detention and treatment facilities about their experiences in the juvenile court system and, more specifically, their experiences with attorneys. Site visits were conducted in a number of juvenile courts where investigators observed the performance of attorneys in court, conducted interviews with parents, youth, judges, juvenile justice workers, probation officers, attorneys and others and explored the overall judicial climate and handling of juvenile cases among differing jurisdictions.

While all available data was reviewed, six Montana judicial districts were selected for intensive on-site investigation to represent a broad and diverse representation of Montana's indigent juvenile defense system. The sites were selected based on a variety of factors including population, geographic location, public defense system, minority populations, and crime rates.

Significant Findings

While the report is comprehensive in its findings and recommendations concerning indigent defense representation and systemic barriers to effective representation, some of the most significant findings include the following:

Children and Youth Lack Access to Counsel at Critical Stages.

The provisions of the Montana Code regarding a juvenile's right to counsel suggest an understanding of the importance of counsel to protect a youth's rights. The Youth Court Act requires that "in all proceedings following the filing of a petition alleging that a youth is a delinquent youth or youth in need of intervention, the youth and the parents or guardian of the youth must be advised by the court or, in the absence of the court, by its representative that the youth may be represented at all stages of the proceedings." While the Code

Many cases are dealt with and evidence gathered prior to the filing of a petition.

requires the right to counsel “following the filing of a petition,” this may be too late in the process to actually protect the youth. Given the process of Montana’s juvenile justice system and its heavy reliance on probation officers, many cases are dealt with and evidence gathered prior to the filing of a petition. Upon referral from a police officer, sheriff or school resource officer, the probation department will conduct a “preliminary inquiry” hearing with the youth. The purpose of the hearing is to discuss the allegations with the youth and make a determination as to whether a petition should be filed. The youth, his parent and a probation officer attend these hearings, at the beginning of which the youth signs a form waiving his rights. While private counsel occasionally attend these hearings, public defenders are not appointed at this point.

Resources for Children are Lacking, Especially for the Mentally Ill and Girls.

Programs are also lacking for youth with mental health and chemical dependency problems. Cross discipline interviewees reported significant numbers of youth with mental health and substance abuse problems in the system, suggesting upward of 80 to 90%. For youth already in correctional facilities, funding has been reduced by the Department of Corrections and counties within Montana for mental health services. In addition, training and education planned for police, correctional staff, county attorneys, public defenders, and judges regarding mental health issues has not been implemented. In her 2002 report, the Montana Mental Health Ombudsman noted that access to mental health services for children had recently decreased. Efforts to provide children with mental health services are frustrated by the fact that 50 of 56 counties have shortages of mental health professionals.

Females in the juvenile justice system are usually burdened with complex health and mental health issues related to sexual behavior, substance abuse, trauma, and violence. In many cases, involvement in the juvenile justice system exacerbates the difficulties they face as adolescent girls. Adolescent female offenders exhibit high rates of mental health problems including higher rates of depression than boys throughout adolescence and are more likely to attempt suicide. Low self-esteem, negative body image, and substance abuse are also common problems for adolescent girls. Suicide attempts and self-mutilation by girls are particular problems in juvenile facilities.

The substance abuse treatment needs of females involved in the juvenile justice system are particularly acute. Studies show that nationally from 60 to 87% of adolescent female offenders need substance abuse treatment. Adolescent girls who come into contact with the juvenile justice system report extraordinarily high levels of abuse and trauma. Incarcerated girls report significantly more physical and sexual abuse than boys, with more than 70% of girls reporting such experiences. As a result of repeated exposure to multiple forms of violence and trauma, Posttraumatic Stress Disorder (PTSD) is prevalent among adolescent girls in the juvenile justice system, with nearly 50% meeting diagnostic criteria for the disorder. The girls in Montana’s juvenile justice system are no different.

Adolescent girls have a variety of programming needs, including: health care, education, mental health therapy, mutual support and mentoring oppor-

Females in the juvenile justice system are usually burdened with complex health and mental health issues related to sexual behavior, substance abuse, trauma, and violence.

tunities, prenatal care and parenting skills, substance abuse prevention and treatment, job training, and family support services. Given these complex needs, the placement options for female juvenile offenders are limited and sometimes non-existent in Montana. While Montana's secure facility for females is seen by some as being in a better position to treat the girls placed there because of its small size and its ability to fashion treatment to the specific needs of each girl, the number of girls entering the juvenile justice system is increasing.

Lack of Zealous Advocacy.

While statistics were only intermittently available, anecdotal evidence reveals that very few juvenile cases in Montana go to trial. According to one county attorney, "there is no case law in this state, and that is a direct result of the public defenders' lack of advocacy." A judge reported that he had 2–3 trials a year in his courtroom. Defenders also reported that they rarely take cases to trial. Investigative teams confirmed these views and noted, further, that there exists very little in the way of a motions practice, including competency determinations; dispositions were generally uncontested; and appellate practice was the rare exception. Likewise, there appears to be very little advocacy or even contact between attorneys and their clients following disposition.

Many youth interviewed did not feel they were being adequately guided through the process or educated about their options. One youth remarked that he "didn't know that [he] could have fought the charges." Many youth consistently expressed they were not often informed of the relevant issues in their cases, such as disposition options, nor did they usually discuss the circumstances surrounding their arrest with their attorney.

Lack of Community-Based Placement Options.

Further reducing juvenile defenders' ability to advocate for children and youth is the lack of community-based placement options in the state. It also appears that budget problems will further reduce the number of available programs. Funding levels available to youth courts for intervention and treatment programs and services have been severely, consistently reduced over the last several years. Many interviewees also believed that the regulation of youth placement funds by the Department of Corrections leads to inadequate resource management, unforeseen budget reductions, loss of breadth of placement options, and lack of appropriate service for youth. This, combined with the loss of contracted beds in out-of-home treatment programs, has critically reduced access to intervention programs that may prevent further entry into more expensive and secure placements.

Nevertheless, secure placement in correctional/non-treatment facilities continues to be fully funded for well over the number of youth in such programs and (by many accounts) well over the number of youth who need to be in such programs. Juvenile defense counsel cannot, in many cases, advocate for local placement options simply because they do not exist. Many placements are far away and not accessible by public transportation. Unfortunately, this distance also prevents regular contact between detained youth and their families, and it

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precludes including the family in the rehabilitation process, often a key to the success of youth in the system.

Lack of Resources and Support Services for Juvenile Defenders.

The use of experts by defenders is rare in part because the availability of experts for youth cases is inconsistent across the state and in part because of the way in which experts are funded for indigent youth. Generally, public defenders must request funds from the judge in order to access services, such as psychological evaluations or investigators, which means that access to experts may not always be subject to the professional judgment of counsel.

Another systemic barrier potentially limiting attorneys' access to mental health experts may stem from the disincentive within the system for obtaining mental health evaluations. If a youth is found to be seriously emotionally disturbed (SED), the Montana code prohibits her from being admitted to a correctional facility. The justice system, already overburdened, must then find and fund intervention and treatment programming for the youth.

Similar problems hold true for attorneys requesting investigators. Nearly all of the interviewed youth revealed that their attorneys had done no investigation into their cases. The public defender's office in one county has a full time investigator for juvenile cases, but in most of the counties, defenders must request the court for an investigator for a case. There is also a marked lack of access to and use of social workers by defenders. Only a very small handful of youth defenders have used or attempted to use their own social workers to assist in the defense of a charge or the development of alternative treatment options. While the Public Defender's Office in one county employs a social worker to assess the needs of each youth and connect them to services, this is the exception, rather than the rule in Montana.

Lack of Training for Juvenile Defenders.

Montana appears to have no minimum requirements for attorneys seeking appointment to defend children and youth in the justice system and very little, if any, oversight and supervision of attorneys handling a juvenile docket. In one county the judge employs at least four contract defenders, using money from an indigent defense fund. In addition to the juvenile cases, these attorneys also handle adult criminal, commitment, abuse and neglect cases—and there were no stated criteria for granting these defender contracts. In addition, it was reported that appointments are random and generally an attorney's experience was not taken into consideration. One attorney received a contract 2–3 months after graduating from law school. Another had started out in drug court, having had no significant juvenile experience, before she was awarded a contract for 1/3 of the juvenile cases. Even in a county that actually had a public defender solely for juveniles, which was relatively rare for the state, no initial training was provided for this position.

The chief public defender in one county mentioned his concerns over the lack of supervision over the contract defender in the county. He feared that children were not getting the same level of representation from the contract attorney, particularly because he was much harder for them to access. Furthermore,

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the public defender in one county remarked that the private contract attorneys often come to the public defenders for advice. With one exception, all of the attorneys interviewed believed that they would benefit from additional training and stated that if the county provided training opportunities, they would take advantage of them. The lone dissenter stated that he did not think juvenile cases have any extra elements that require training—an even stronger case for the need for more training for the state’s defenders.

Disproportionate Minority Representation.

Montana has a youth population of 223,799, 12 % of which is made up of minority youth. Approximately 10% of Montana’s youth are Native American with the remaining 2% being made up of Hispanics, Asians, and African Americans. Data indicate that minority youth are disproportionately represented in Montana’s secure detention and correctional facilities, and they suffer from an extreme lack of appropriate placement options. In 1999, although Native Americans constituted 10% of Montana’s youth population and 10% of juvenile arrests, they comprised 14% of youth incarcerated in secure juvenile correctional facilities, 15% of youth confined in secure detention facilities, and 19% of youth confined in adult jails. The Hispanic population comprised only 2% of the youth population in Montana, yet Hispanics represented 1% of youth confined in adult jails, 5% of youth entering secure detention facilities and 8% of youth incarcerated in secure juvenile correctional facilities.

Native American youth suffer unique problems in the state. Each Indian reservation in Montana has a different collection of resources available to its youth. Most have few resources internally and have further complications because of multiple levels of jurisdiction (BIA, IHS, tribal, state, county) for different youth. Given many reservations’ distances from population centers, it is difficult to access the limited resources. In spite of Montana’s large Native American population, there is only one tribal group home in the state. Counties can sometimes tap into tribal services for youth, however most of these services are located out of state.

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Conclusions and Recommendations

Across Montana there are dedicated and professional attorneys working on behalf of children in the justice system; this system, however, suffers from a lack of attention, insufficient funding, and a disenfranchised clientele. While the aims of the system are laudable, countless numbers of children are navigating the court system alone, never fully understanding the potential consequences of the decisions they make; children are both frustrated and confused over their experiences in the juvenile justice system.

The role of defense counsel is critically important. Without well-trained, well-resourced defense counsel there is no practical realization of due process and no accountability of the juvenile justice system. The juvenile defense counsel charged with the enormous responsibility of protecting children’s constitutional rights are struggling within a system that is burdensome and does not provide sufficient support, training or compensation. Some defenders remain zealous advocates despite the odds that they may not be successful in their

efforts; others, however, have succumbed to the notion that the defense attorney plays an insignificant role in juvenile court. Montana has an obligation to treat children and youth in the justice system with dignity, respect and fairness.

The assessment makes a number of recommendations to ensure continued improvement in the juvenile defender delivery system, to sustain existing reforms, and to assure that youth in the juvenile justice system are guaranteed their constitutional right to effective assistance of counsel. These recommendations include:

The State of Montana should:

1. Provide adequate funding and oversight of the juvenile defender system, including the equitable and fair distribution of available resources statewide.
2. Provide children and youth with access to well-trained, well-resourced counsel at the earliest stage of the process.
3. Provide children and youth with continued representation from arrest through dispositional placement and aftercare.
4. Provide additional, community-based placement alternatives, particularly for children and youth with mental health issues, educational disabilities and girls.
5. Provide increase community-based placement options and services for youth, including prevention and intervention programs, funding for out-of-home treatment programs that can address the mental health and/or co-occurring substance abuse treatment needs of youth, programs aimed at addressing the needs of children with learning disabilities, and strength-based programming for girls.
6. Provide and require specialized training for attorneys representing children in delinquency proceedings, including: child and adolescent development; issues relating to mental health and learning disabilities; mitigation; cultural diversity; the availability and appropriate use of community resources; effective motions practice; effective detention, dispositional, post-dispositional and appellate advocacy; and the ethical considerations in delinquency cases.
7. Study, report, and disseminate outcome studies of all programs available for children in the justice system.
8. Adopt and implement minimum standards for awarding positions and contracts and for representation in youth court.
9. Increase the available resources to support representation of juveniles in delinquency proceedings, including access to independent experts, social workers and investigators.
10. Study, report and recommend solutions on the issues of disproportionate minority representation in the justice system.

Juvenile Defenders should:

1. Increase their use of non-attorneys with expertise (*e.g.*, social workers, investigators and mental health professionals) to assist in representation.
2. Take advantage of any training opportunities and create mentoring systems for the sharing of experience and information.
3. Increase post-dispositional legal services for young clients.
4. Ensure zealous advocacy for the expressed interest of the child, rather than the best interest, from arrest through post-dispositional placement and aftercare.
5. Educate themselves about adolescent development, special education law, mental health issues, treatment programs, and professional standards of practice.
6. Advocate for placement in facilities as close to the client's community and family as is possible.
7. Be more accessible to their clients and ensure that children and youth understand the legal process.
8. Advocate for a more diverse array of treatment options, including in-home services, group homes, and community-based services.
9. Specialize in juvenile cases when possible.
10. Actively participate in movements to plan systemic programs, study issues within the juvenile justice system, and recommend improvements in the system.

INTRODUCTION

This assessment of access to counsel and quality of representation in Montana delinquency proceedings is part of a local and national movement to continuously review indigent juvenile defense delivery systems and evaluate how effectively attorneys in juvenile court are fulfilling constitutional and statutory obligations to their young clients. This study is designed to provide broad information about the role of defense counsel in the delinquency system, identify structural or systemic barriers to more effective representation of youth, and to make viable recommendations for ways in which to improve the delivery of defender services for youth in Montana's justice system.

Due Process and Delinquency Proceedings

The bedrock elements of due process for youth were recognized as essential to delinquency proceedings by the United States Supreme Court in a series of cases. Through the most sweeping of these cases, *In Re Gault*, the Court focused attention on the treatment of youth in the juvenile justice system, spurring the states in varying degrees to begin addressing the concerns noted in the Court's decision.¹ Demonstrating concerns over safeguarding the rights of children, the United States Congress enacted the Juvenile Justice and Delinquency Prevention Act in 1974. This Act created the National Advisory Committee for Juvenile Justice and Delinquency Prevention. This Committee was charged with developing national juvenile justice standards and guidelines. Published in 1974, these standards require that children be represented by counsel in all proceedings arising from a delinquency action from the earliest stages of the process.

Beginning in 1971, and continuing over a ten-year period, the Institute for Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards promulgated twenty-three volumes of comprehensive juvenile justice standards.² The structure of the project was as intricate as the volumes of standards it produced. The draft standards were circulated widely to individuals and organizations throughout the country for comments and suggestions before final revision and submission to the American Bar Association.

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tion House of Delegates. By 1981, nearly all of these standards, designed to establish the best possible juvenile justice system, were adopted as official ABA policy.

Upon reauthorizing the JJDP in 1992, Congress re-emphasized the importance of lawyers in juvenile delinquency proceedings, specifically noting the inadequacies of prosecutorial and public defender offices to provide individualized justice. Also embedded in the reauthorization bill were the seeds of a nationwide assessment strategy.

In the fall of 1993, the American Bar Association Juvenile Justice Center, in conjunction with the Youth Law Center and Juvenile Law Center, received funding from the federal Office of Juvenile Justice and Delinquency Prevention to initiate the Due Process Advocacy Project. The intent of the project was to build the capacity and effectiveness of juvenile defenders through increasing access to lawyers for young people in delinquency proceedings and enhancing the quality of representation those lawyers provide. As part of this project, the collaboration produced *A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* in 1995.³ This report was the first national assessment of the state of representation of youth in juvenile court and an evaluation of training, support, and other needs of practitioners. Since that time, juvenile defender assessments have been conducted in Georgia, Kentucky (an assessment and a re-assessment one year later), Louisiana, Maine, Maryland, Montana, North Carolina, Ohio, Pennsylvania, Texas, Virginia and Washington to analyze state-specific policies and practices. Several other states are in the preliminary stages of the assessment process.

Past Evaluations of Montana's Juvenile Justice System

In 1993, a Performance Audit Report on Juvenile Justice in Montana was submitted to the Montana legislature. The report indicated several structural deficiencies in the juvenile justice system which adversely affected the entire system including a lack of cohesion, communication, an overall treatment approach to guide staff in the system, oversight, and in-depth planning. The report found these deficiencies in turn affected youth court in such a way as to hinder consistent delivery of services to youth. In addition, the investigators found that they were hampered in their ability to assess the system due to a general lack of data collection and analysis on youth court programs and outcomes.⁴

In 1995, a follow up report was submitted to the legislature, which found that many of the recommendations in the 1993 report had not been made, and the system remained fragmented. At that time, no steps had been taken to begin collecting information on youth court programs, nor on measuring their effectiveness. As such, the programs in which youths have been placed have not been evaluated, and decisions regarding placement continue to be made without all the relevant information.⁵

In 1996, an interim commission was established, in part as a reaction to the 1993 audit, to complete a comprehensive review of the Montana juvenile justice system and mental health delivery system for youth and to create a plan to ensure the effective and efficient delivery of services to all youth in both systems. The study was to include, among other things, a comprehensive review of

past and present programs used to successfully rehabilitate youth and reduce juvenile crime and a review of the effectiveness and efficiency of each state correctional facility and of each detention facility operated by the state, including the feasibility of privatizing each facility.⁶ Generally, the commission found that for numerous categories of youth commonly in the system there were insufficient services, programs, detention, and resources including those for (severe) conduct disorder; organic brain syndrome (OBS); seriously emotionally disturbed (SED); sex offenders; chemical dependency; violent offenders; status offenders; criminal nonviolent offenders; and female offenders in need of a secure correctional facility. The deficiencies included limited or nonexistent community and regional detention and shelter care, limited or nonexistent local day treatment, no state-operated, long-term, secure residential mental health or sex offender facilities, no secure correctional facility for delinquent female youth, no facilities for youth under 18 years of age charged in adult court (neither Pine Hills School, nor state prisons (Montana State Prison or Women's Correctional System)) are appropriate (or legal for youth under age 16). They also found a lack of meaningful and useful data, a general resistance to sharing of information by parties involved with youth, and a lack of appropriate education and treatment programming in existing detention facilities. As such, many youth are sent out of state, which is expensive and difficult on the youth and their families. They also found that youth who were involved in the justice system often came from families in crisis, yet there were few programs for prevention and early intervention.

The commission found there was an immediate need for a cost-effective continuum of services in Montana. Many youth are sent out of state or are put in inappropriate placements due to the lack of available resources. This costs the state a substantial amount of money and can be a hardship on the youth, their families, and legal counsel involved. The commission also stated that the greatest need was to develop midlevel and intermediate resources, such as therapeutic foster care and therapeutic group homes. In addition, they found family involvement, support, and responsibility needed to be built into the entire continuum of juvenile programs from community-based programs and probation to correctional facilities and parole/aftercare.

The commission went on to find that rigid categorization of children was creating barriers between the education, justice, and mental health systems and also negatively affecting the way in which treatment was able to be funded. Funding problems lead to over-definition of youth problems, which is then used to refuse services, instead of integrating services and providing accountability for actions. Clear definitions of the status of children are needed in the Youth Court Act, and one label or definition (e.g., mental illness) cannot be used to relieve accountability for other issues (e.g., criminal behavior).

In addition, the commission noted that since the juvenile justice system mainly rests under local control, there was a further need to study whether there were wide disparities in the treatment of youth from community to community. Likewise, the commission was concerned as to issues of fairness involved when youth are not give equal access to programs because of a lack of resources or interest locally.

Although, there have been efforts to address some of the commission's concerns, including the opening of a juvenile female secure correctional facility, as

well as an additional detention center, many of the noted issues remain problems. For instance, the commission found that emotionally disturbed and seriously emotionally disturbed youth were being sent to the state's correctional facility for boys inappropriately, and as insufficient resources and placements remain problems, this seems to continue to be the case today.

At the time of the report there was no secure facility for sex offending youth. The commission noted that the Department of Corrections had plans to begin a program within the state's correctional facility for boys. The commission reported it had concerns regarding whether the correctional facility was appropriate for such a program including that the location of the facility was such that most youth would be very far from their family, which would severely limit family participation in their treatment. In addition, the commission was concerned about the facility being able to attract and retain treatment professionals. Further, the study had just found that appropriate educational and treatment programs in its existing detention facilities were lacking and that more information was necessary on the quality, extent, and effectiveness of the programs at the facility. The commission expressed a desire for the Department of Corrections to "examine all possible locations and treatment options for sex offender treatment in the state. Contracts with private providers, community out-patient treatment, and other alternatives would enable youth to be close to their family when visitation and cooperation by the family would be conducive for successful treatment." Nevertheless, the Department of Corrections placed a sex offender program into the corrections facility, and it remains the only in-patient sex offender treatment facility in the state.

In addition, the state's only inpatient youth chemical dependency treatment program is located within a state juvenile correctional facility. Investigators could find no report of the program's efficacy. However, the location of the program was of concern to many interviewees. A program director and a previous juvenile corrections officer, for instance, were concerned that the program brought lower offense level addicted youth into contact with serious offenders and generally placed chemically dependent youth in unnecessarily secure placement.

Current Program Deficiencies

Today, there remain a few clearly articulated deficiencies in the current programs. Reports and interviewees expressed concerns over the state's juvenile correctional facilities, sexual offender program, chemical dependency programs, and detention.

Correctional Facilities

In 1993, the Center for the Study of Youth Policy examined over 400 youth who were residing in secure care treatment facilities or committed to the state's correctional facilities for boys or girls. Based on the investigation, it was determined that 24% of the youth could have been treated in alternative programs other than secure care, and 46% could have been more appropriately referred to community programs.⁷

Based on its findings, the Center for the Study of Youth Policy developed a

placement guideline which was tested in a pilot project with notable successes. It also issued several recommendations for improvement to the Montana juvenile justice system including recommendations to divert low risk youth to community programs, to develop resources for mentally ill youth, and to decrease the capacity at the boys' correctional facility, as a large percentage were found to be more appropriately placed in other programs. However, many of these suggestions appear to have never been implemented, and Montana continues to struggle with the same issues.

In 1996, the aforementioned interim commission found that each time that elements in the juvenile system have been discontinued or closed, there have not been sufficient programs developed to replace them (i.e., Twin Bridges, Swan River Forest Camp, Mountain View School, reduction of beds at Pine Hills School). This remains the case today. For instance, in 2002, a promising residential/wilderness treatment program was closed after the state cancelled its funding. To date, no program has filled this void.

Sex Offender Programs

Montana's boys' correctional facility has the only in-patient sex offender treatment program in the state. Recently, several Montana Sex Offender Treatment Association (MSOTA) counselors evaluated the program and found it lacking in several areas. The evaluation suggested that although sex offender treatment was available, there was a lack of highly qualified and experienced staff, and a program design that "appeared nearly impossible for many of the youths to complete" before they are discharged from the facility. Staff was also found to be "overwhelmed by their duties and frustrated by the lack of support from administration." Other concerns included limited individual sessions, a lack of transition planning, and a general failure to use polygraph examinations which are viewed as essential in the treatment of sex offenders. Recommendations were made to improve the program and included having an MSOTA clinical member or individual with comparable training provide supervision, provide further training for the unit manager and therapists, condense the cognitive-behavioral portion of the program, and provide for transition planning among other things.⁸

Juvenile Detention

Detention also appears to be a problem in the state. A performance audit on juvenile detention submitted to the legislature in 2000 found that the average length of stay was increasing at juvenile detention centers in Montana. The report suggested that among the reasons for this trend was that the number of beds available had increased, thus allowing for longer placements. Other factors suggested were that juvenile cases were taking longer than before because there was a perception that youth were increasingly being charged with more serious allegations, and youth had to wait for entities such as the Department of Corrections and Youth Placement Committees to determine where they would be placed.⁹

The audit also found that different communities used detention for different reasons and at varying frequencies. Some were inclined to use detention as an

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immediate consequence for youth, while others treated it as a last resort.¹⁰ The frequency at which youth courts or probation officers utilized detention depended on factors such as the distance to the nearest detention facility, the cost, the availability of beds, the communities' reaction toward juvenile crime, the availability of alternative placements, or simply the size of the juvenile population in the area.¹¹ Furthermore, although the Montana Youth Court Act does not allow detention for a status offenses under MCA § 45-7-309, youth are in fact placed in detention for status offenses, if they are on probation and are charged with criminal contempt for probation violations.¹²

In a strange turn of events, secure detention has also had an unplanned financial incentive. MCA §41-5-1904 allowed the Montana Board of Crime Control to award grants to eligible counties not to exceed 50% of the estimated costs for secure detention and not to exceed 75% of the estimated costs for non-secure detention. The 1991 statute stated its intent as to "discourage the use of secure detention and promote the use of less costly, non-secure community-based programs." However, in practice, during the fiscal years of 1998–1999 and 1999–2000, non-secure expenditures only made up 3.4% and 2.6%, respectively.¹³ In addition, during this period the number of secure detention beds in Montana more than doubled. Those performing the audit found that the consensus among MBCC staff and regional detention officials was that the incentive for non-secure detention did not play out because it was offset by the high cost of detention. Thus, 50% of the higher daily rate of secure detention facilities yielded more money for the counties than 75% of the significantly lower daily rate for non-secure detention. The audit recommended that should the legislature wish to retain incentives for non-secure detention, the existing criteria for the grants should be revised. The audit also provided a few possible options that might be successful.¹⁴ Thus far, there have been no significant changes in Montana's statutory scheme as it affects this incentive.

The Study and Its Methodology

This study represents a partnership between the Cascade County Law Clinic, the Albin Law Firm and the National Juvenile Defender Center and Juvenile Justice Center of the American Bar Association. In order to gather the data for this assessment, several Montana attorneys and other juvenile justice professionals from across the country convened to investigate the representation of the state's youth. Prior to investigation, statistics and research were collected on population, crime rates, minority populations, and public defense systems, among other factors, to select six judicial districts that would present a broad and diverse picture of Montana's juvenile defender system.

A team of investigators visited each site to conduct interviews (pursuant to standardized protocols), observe judicial proceedings and gather documentary evidence. The focus of these investigations centered on the role and performance of defense counsel. Investigators interviewed judges, county attorneys, court personnel and administrators, probation personnel, defenders, youth and parents.

CHAPTER ONE

Montana's Juvenile Justice System

Montana's Children and Youth

Environmental factors have become reliable indicators of involvement in the kind of behavior which leads to entanglement with the juvenile justice system. Increasingly, it is not as much the criminality of the behavior but the lack of alternatives for children with severe emotional and behavioral problems, children who have been expelled from school, and children whose families cannot provide adequate care which brings them into the juvenile justice system. Basic census data provides some context to a consideration of the condition of children in Montana. According to the 2000 census, Montana has 230,062 children under the age of 18 which constitute over 25% of the state's population.¹⁵ Montana expects a 3% increase in their juvenile population between 1995 and 2015.¹⁶

The racial demographics for Montana are less diverse than the national population. According to a 1999 report of the OJJDP, the U.S. juvenile population was 79% white. Montana's juvenile population was 85% white, 0.4% was African American, 0.6% was Asian, and 3.2% was of Hispanic origin.¹⁷ Montana also has the 5th largest percentage of Native American juveniles, who represent 10% of the youth population. Juveniles are slightly more diverse than the at-large population in Montana. Of 740,410 Montanans, 90% of the total population is white, 0.3% is African American, 0.5% is Asian, 2% is of Hispanic origin, and 6% is Native American.¹⁸

Child Poverty

In 1999, 18.7% of Montana's children lived in poverty, slightly better than the 19% national rate. Of those children in poverty, 7.4% of Montana's children are living in extreme poverty in a family with income at less than 50% of the poverty level which is slightly worse than the 7% national rate.¹⁹ Younger chil-

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dren are somewhat more likely to live in poverty, with 23% of children under age 5 in Montana living in poverty.²⁰

Poverty rates do not vary widely among different regions of Montana; however the state on the whole is not wealthy. Thirty-one percent of children live with parents who do not have full-time, year-round employment. Montana is well beyond the national figure of 24% for this indicator, coming in ahead of only Louisiana and West Virginia.²¹ With a median income of \$51,964 for families with their own children, only Jefferson County surpasses the national median income of families with children (\$50,000).²² In a majority of Montana's counties (37 out of 56) the child poverty rate exceeds the national average.

Urban and rural distinctions do not correlate with child poverty rates. In Roosevelt, Big Horn, and Blaine counties, where child poverty rates range from 37–42%, the urban population ranges from 0–60%. Yet in Jefferson, Gallatin, and Stillwater counties, where child poverty ranges from 11–13%, the urban population represents between 0–57%. Although the economic disparity between Jefferson county (median income: \$51,964, child poverty rate: 10.8%) and Roosevelt county (median income: \$24,796, child poverty rate: 41.8%) is alarming, economic indicators do not demonstrate any clear poverty trends across Montana, with the exception of some relationship between Native American reservations and low income.²³ The seven reservations in Montana are primarily located in counties with a family median income of \$25,000–\$30,000.²⁴

Children's Health

Health concerns are another indicator of the well being of Montana's children. Children in Montana appear to start off well, given that Montana's infant mortality rate is the 12th best in the country at 6.1% and below the national average of 6.9%.²⁵ Additionally, data collected in 2000 revealed that only 6.2% of births in Montana are low-birth weight (less than 5.5 lbs.), which is lower than the national rate of 7.6% and better than 42 other states.²⁶ However, as Montana's children grow, they do not fare as well as children in other states. The child and teen death rates are both the 4th highest in the country.²⁷

Health insurance for children is worse than the national average. According to statistics from 1999, 18.4% of children in Montana are without coverage while the national average is 14%.²⁸ An equally serious problem is the overall shortage of health professionals in Montana. Of 56 counties, 46 have been designated as Health Professional Shortage Areas by the Montana Department of Health and Human Services.²⁹

Mental Health

As resources for children's mental health services continue to shrink in this nation, the numbers of children in need of help is increasing. The recent White House Conference on Mental Health estimated that one in ten children and adolescents suffer from mental illness severe enough to cause impairment. In her 2002 report, the Montana Mental Health Ombudsman noted that access to mental health services for children decreased. Increased usage has led to increased costs, which have been inflated by budget shortfalls. Montana has responded by increasing cost sharing for Medicaid recipients, tightening uti-

Efforts to provide children with mental health services are further frustrated by the fact that 50 of 56 counties have shortages of mental health professionals.

lization criteria, and reducing some services. Youth in the non-Medicaid Mental Health Services Plan (MHSP) “lost coverage for intensive case management” last year and future coverage of remaining services is uncertain.³⁰ Efforts to provide children with mental health services are further frustrated by the fact that 50 of 56 counties have shortages of mental health professionals.³¹

Although the juvenile courts and juvenile correctional facilities do not keep records on the number of children with mental health diagnoses in the normal course of their business, many personnel interviewed estimated that 40–70% of the youth in their respective systems suffered from mental illness. This is consistent with a 1994 OJJDP study which found that 73% of juveniles screened at admission to a juvenile correctional facility had mental health problems and 57% reported having prior mental health treatment or hospitalization. According to the National Mental Health Association, girls in the juvenile justice system exhibit even higher rates of mental health problems than their male counterparts.

Medicaid coverage of mental health services is limited for those who are committed to the custody of the Montana Department of Youth Services.³² In 1996, the state legislature found that services for detained juveniles suffering from (severe) conduct disorder, organic brain syndrome (OBS), and seriously emotionally disturbed (SED) were insufficient.³³

Substance Abuse

Drug abuse violations accounted for 203,900 juvenile arrests in the U.S. in 2000.³⁴ Alcohol related offenses, including driving under the influence, liquor law violations, and public drunkenness, amounted to more than 200,000. Without factoring in the influence of drugs or alcohol in arrests on other charges, arrests for substance abuse constituted 16% of all juvenile arrest.³⁵ In Montana, arrests of juveniles for drug and alcohol abuse violations in 2002 numbered 2,049, second only to arrests for theft. Arrests for related crimes including driving under the influence and possession of drug paraphernalia and tobacco represented another 765 arrests.³⁶

A 2001 survey of Montana high school students “indicated that 46.7% of them [have] tried marijuana [the most common drug in the state³⁷] at least once in their lifetime.”³⁸ This number has been steadily rising over the past decade, nearly doubling since 1991 when the amount of teens with marijuana experience was 26.1%.³⁹ Almost 83% of those surveyed have experimented with alcohol.⁴⁰ Use of methamphetamine and ecstasy, especially in larger cities and in

Percent of High School Students Using Selected Drugs, Montana, 2001⁴²

Drug Type and Lifetime Use	Female	Male	Total
Marijuana	45.7%	47.5%	46.7%
Cocaine	9.2%	9.5%	9.4%
Inhalant	14.7%	15.1%	15.0%
Heroin	3.3%	4.6%	4.0%
Methamphetamine	13.2%	12.0%	12.6%
Illegal steroids	4.1%	5.9%	5.3%
Injected Illegal Drugs	2.1%	3.1%	2.7%

college towns, is on the rise, however other “club drugs,” such as ecstasy, are not as pervasive in Montana.⁴¹

Education

Recent test scores reveal that overall, Montana’s education system is doing well. Achievement test scores in 1999 improved among all age groups tested in Mathematics. However, scores in other areas, including Language Arts, Social Studies, Reading, and Science either stayed the same or declined for this same group. Compared to the national average though, Montana’s children still tested well, beating the national average on every exam.

When test scores are broken down by race and ethnicity, however, Montana’s accomplishments are not as impressive. For example, although high school students scored a 21.8 on average (out of a possible 36) on the ACT and a 1091 on the SAT, the Native Indian subset of students scored only an 18.3 and a 1034 on these exams.⁴³

The disparity between Native Americans and other students is also apparent in the high school completion rate. While 81% of entering high school freshmen go on to complete high school, only 59.6% of Native American freshmen reach this milestone.⁴⁴ Although Montana’s overall high school dropout rate for 16–19 year-olds remains below the national rate, this accomplishment masks other troubling data.⁴⁵ While the 3.5% drop out rate for white students is commendable, the 10.4% rate for Native Americans, nearly three times the rate for white students, is alarmingly high.⁴⁶

Montana’s education system also faces an impending teacher shortage crisis. First identified in 2000 in the Governor’s Task Force on Teacher Shortage, the recruitment efforts of other states and comparatively low teacher salaries have encouraged Montana’s teachers to go elsewhere.⁴⁷ In 2001–2002, Montana’s teacher salaries ranked 46th and with an average payment of \$34,379, Montana’s teachers made almost \$10,000 less than the national average.⁴⁸ Emergency authorization for and provisional certification of temporary teachers has increased dramatically from 1998–2002.⁴⁹

The inequity of resources for public education is another serious challenge faced by the education system in Montana. In a study conducted by Education Week in 1999, Montana scored a D for state equalization efforts in school funding.⁵⁰ The issue came before the Montana Supreme Court in 1989, when the justices determined that unequal educational spending across districts violated the guarantee of Mont. Const. Art. 10, § 1, which states that “(1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.” Justice Weber, writing for the court, noted in *Helena Elementary School Dist. No. 1 v. State* that the constitution provided a clear and unambiguous “guarantee of equality of educational opportunity [that] applies to each person of the State of Montana, and is binding upon all branches of government whether at the state, local, or school district level.”⁵¹ The court declined to state a specific ratio of spending disparity that is acceptable for the legislature to allow, but recognized that the 8 to 1 spending gap among some districts allowed wealthier school to provide superior programs and this violated the “equality of educational opportunity” guarantee.⁵²

While the 3.5% drop out rate for white students is commendable, the 10.4% rate for Native Americans, nearly three times the rate for white students, is alarmingly high.

Child Abuse and Neglect

A child is abused or neglected every three hours in Montana.⁵³ During the year 2000, public children's agencies in Montana investigated nearly 21,127 cases of maltreatment.⁵⁴ The investigations yielded 3,347 substantiated and indicated victims.⁵⁵ Of these children, 61% were neglected, 9% suffered physical abuse, 11% experienced sexual abuse, and 13% were subject to psychological/emotional abuse or neglect.⁵⁶ Victims included slightly more females (53%) than males (47%).⁵⁷ Also, with 2 reported deaths due to child maltreatment, Montana's rate of child fatalities resulting from abuse was well below the national average. A study reported by the U.S. Department of Health and Human Services Children's Bureau in 2000 found that Montana's rate of child fatalities from maltreatment was 0.87 deaths per every 100,000 children age 0–18. The national average was 1.71 child deaths due to maltreatment.⁵⁸

Child abuse strongly correlates with juvenile delinquency, especially among girls. About 40–73% of girls in the juvenile justice system are believed to have been sexually and/or physically abused as compared to 23–24% of girls in the general population. Girls who are abused are abused or neglected are twice as likely to be arrested as girls who are not abused (20% vs. 11.4%) and have a continuing risk of arrest for violence as adults.⁵⁹

A child is abused or neglected every three hours in Montana.

Violence

A child or teen in the United States is killed by gunfire every three hours; in Montana gunfire takes the life of a child or teen once every three weeks.⁶⁰ Children are at a much greater risk of being the victims than the perpetrators of violent crime. Juveniles make up 12% of all crime victims reported to the police, including 71% of all sex crimes. One out of every 19 victims of violent crime, and one of every three victims of sexual assault is under age 12. And despite recent declines, the teen homicide rate is about 10% higher than the average homicide rate for all Americans.⁶¹ The arrest rates for juveniles in Montana further reflect less violence among youth than the national average. According to an OJJDP report based upon FBI statistics in 1999, the violent crime index rate was 315 arrests per 100,000 juveniles. The national average was 366 arrests for violent crimes per 100,000 juveniles.⁶²

Gang membership has recently been shown to be a factor in delinquency. The OJJDP published an extensive report based upon several studies which found that gang members account for disproportionate share of delinquent acts, especially violent offenses.⁶³ The report also found that although Montana had no gang cities through the 1980s, by 1998 11 cities were designated as such.⁶⁴ Youth gangs in Montana are not just an urban problem, as several gangs of Native American youths have cropped up in reservations as well.⁶⁵

Girls in Montana's Juvenile Justice System

The placement options for female juvenile offenders are limited and sometimes non-existent in Montana. Girls tried as adults may be placed in adult facilities or sent out of state to juvenile facilities for females because Montana does not offer adequate facilities of its own.⁶⁶ Although this creates the potential

for juvenile males and female to be treated differently in their dispositional assignments, an actual case where a female juvenile has been placed in an adult facility in a situation where a male juvenile would not meet the same fate has not yet come before the court.⁶⁷

While the total number of crimes committed by juvenile females in Montana decreased 20.7% from 5780 in 1997 to 4585 in 2002, the number of female status offenses, including girls reported for running away, disorderly conduct and curfew violations, increased by 6%, with the largest increase in the number of curfew offenses. The national arrest rate for girls increased as much as the arrest rate for boys between 1993 and 1997, with disproportionate rates of arrest of girls for status offenses.⁶⁸ Girls made up 100% of the runaway population in residential placement in 1999.⁶⁹

The risk factors for Montana's girls include many of those faced by Montana's boys but which seem to affect girls more negatively. School failure is the single most significant indicator of a girl's involvement in the juvenile justice system.⁷⁰ The risk of becoming an offender is increased three times for a girl with poor grades or expulsion from school.⁷¹

Mental illness is also more common in girls in the juvenile justice system than boys.⁷² In the first study of post traumatic stress disorders in female juvenile offenders which was reported, in the *Journal of the American Academy of Child and Adolescent Psychiatry* in 1998, 48.9% were experiencing symptoms at the time of the study.⁷³ Female offenders were 50% more likely to suffer from PTSD than male offenders which were linked to the fact that girls are more likely to be victims of violence and boys were more likely to be witnesses.⁷⁴

Teen pregnancy is another significant risk factor leading to involvement by girls in the juvenile justice system. The teen birth rate in Montana in 1999 was 19 per 1,000 girls ages 15–17.⁷⁵ This marks a decrease from 24 per 1,000 in 1990 and is better than the national average of 27 births per 1,000 girls.⁷⁶

Organization of Youth Courts in Montana

Montana's juvenile justice system is based upon a system of 22 Judicial Districts encompassing all of Montana's 56 counties. Each judicial district must have at least one judge for the youth court.⁷⁷ As in most states, Montana's juvenile or youth court is a statutory creation and is subject to numerous amendments each legislative session.

Funding for representation of Montana's indigent youth is the responsibility of local county governments, as are the costs of detention.⁷⁸ However, following amendments passed in the 2003 legislative session, probation officers and assessment officers are now employees of the judicial branch of the state government.⁷⁹

Youth court has original exclusive jurisdiction over all proceedings in which a youth is alleged to be a delinquent or a youth in need of intervention, or over any person under 21 years of age charged with violating any law of the state, other than traffic, fish, and game, prior to turning 18.⁸⁰ That being said, there are numerous provisions that erode youth court jurisdiction including provisions to transfer juvenile cases and supervision of juveniles from youth court to district court and to sentence juveniles as adults.

Funding for representation of Montana's indigent youth is the responsibility of local county governments, as are the costs of detention.

Juveniles charged with offenses in youth court have a statutory right to counsel from the time that a petition is filed in youth court.⁸¹ If a youth is being detained, a petition must be filed within seven days.⁸² If the youth is not detained, there is no statutory time limit. Indigent youth are entitled to appointed counsel unless waived by a youth and his parents, guardian or counsel.⁸³ However, youth facing the possibility of a commitment to a state institution for more than six months are not allowed to waive counsel.

Procedure in Montana's Juvenile Justice System

Prevention and Intervention

Montana law requires participating counties (currently all but one) to use available resources for early intervention strategies for troubled youth and to use a risk assessment instrument for measurement of a youth's risk to the community and the likely effectiveness of treatment.⁸⁴ Despite these efforts, many more youth than necessary continue to enter secure detention and placements.⁸⁵

Youth in Custody

When a youth is taken into custody for questioning or for a violation of placement under home arrest, a probable cause hearing must be held within 24 hours, excluding weekends and legal holidays. The hearing must be held in person or by videoconference. It may also be held by telephone, if no other means are practical. A hearing is not required for a youth in detention for an alleged parole violation.⁸⁶ Youth in detention or shelter care may be released on bail.⁸⁷ Youth may also be released to probation (under supervision of the court) or parole (under Department of Corrections supervision) after having been placed in a state correctional facility. Montana's Department of Corrections controls juvenile corrections, as well as adult corrections.

Preliminary Inquiry

While most jurisdictions abandoned the use of informal adjudications in the early 1970's after the United States Supreme Court decision *In Re Gault*, Montana codified certain informal proceedings that are the exclusive domain of the probation staff. When the court receives information from an agency or person that there are reasonable grounds to find that a youth is delinquent, a probation officer or assessment officer must make a preliminary inquiry. In conducting this inquiry, the officer must advise the youth of his rights and determine whether the matter is in the court's jurisdiction.⁸⁸ Upon completion of the inquiry, the probation or assessment officer must decide whether further action should be taken or to terminate the inquiry.⁸⁹ If the officer determines that further action is necessary, she must either arrange for an informal disposition or refer the matter to the county attorney for the filing of a petition in youth court. Under a temporary statute in 2001–2002, an assessment officer could work out of a law enforcement office. However, the 2003 statute is silent on this issue.⁹⁰

Youth facing the possibility of a commitment to a state institution for more than six months are not allowed to waive counsel.

Informal Disposition

If a probation or assessment officer decides that further action in a matter should be taken, but that referral to the county attorney for the filing of a petition is not required, she has several options. She may provide counseling herself, refer the youth and his family to another agency for appropriate services, or take any other appropriate actions that don't involve probation or detention. However, if the officer believes that treatment or adjustment involving probation or other disposition is necessary, and it is agreed upon voluntarily by the youth and his parents or guardian, the officer can refer this agreement, or consent adjustment, to the county attorney for review.⁹¹ A consent adjustment must be put in writing and signed by the youth and his guardian. A consent adjustment only needs approval from a youth court judge if the complaint alleges the commission of a felony or if the youth has been or will be detained.⁹²

There are a variety of dispositions permitted in a consent adjustment, including probation, placement of the youth in substitute care in a youth facility or with a private agency, placement of the youth under house arrest, placement in a youth assessment center for up to 10 days, placement in a detention center for up to 3 days, community service, or restitution, among others.⁹³ However, a youth may not be placed in a state youth correctional facility under a consent adjustment. Because youth are not given the right to counsel until a petition is filed, there is no statutory provision for counsel for the youth during the formation of the consent adjustment. Furthermore, while Montana statute provides that statements a youth makes to his probation officer while she is "giving counsel or advise" may not be used against the youth, this is not necessarily the case in practice.⁹⁴

Formal Proceedings

If a matter is referred by the probation officer to the county attorney, a petition alleging either a delinquency or at-risk behavior may be filed with the youth court, thereby initiating a formal proceeding under the Youth Court Act. When a youth is held in detention or in a youth assessment center, a petition must be filed within 7 working days from the time the youth was taken into custody. Otherwise, the petition must be dismissed, and the youth released, unless good cause is shown.⁹⁵ The right to counsel, along with other rights afforded in the Montana Code, such as the right to confront witnesses, attach upon the filing of the petition.⁹⁶

Consent Decree with Petition

After the filing of a petition and before the entry of a judgment, the court, on motion of counsel for the youth or on its own motion, may suspend the proceedings and order continued supervision of the youth under the terms and conditions negotiated with probation and all parties. This order, known as a consent decree, may not be used by the court unless the youth admits guilt and accepts responsibility for her actions. If the youth or her counsel object to the consent decree, the court shall proceed to adjudication.⁹⁷ Furthermore, Montana law allows the court to re-instate a petition and nullify a consent decree without a hearing.⁹⁸

Adjudicatory Hearing

Unless a jury trial is demanded by the youth or his or her parents, all adjudicatory hearings in youth court are tried by a judge.⁹⁹ These hearings must be recorded verbatim by whatever means the court considers appropriate.¹⁰⁰ In these hearings, the general public may only be excluded if the petition alleges that the youth is in need of intervention.¹⁰¹

Dispositional Hearing

As soon as possible following the finding of a youth to be delinquent or in need of intervention, the court must conduct a dispositional hearing, in which the judge hears all relevant evidence to make a proper disposition that best serves the interest of the youth, victim and the public. A written youth assessment or pre-disposition report must be submitted to the court and counsel prior to the disposition hearing.¹⁰² The court has a number of dispositional options depending upon whether the youth is found to be in need of intervention, to have violated a consent adjustment or to be delinquent. For example, there are community-based sanctions and treatment options available including probation, community service, restitution, out of home placements and 45-day placements for evaluations.¹⁰³ Youth in need of intervention, status offenders, or youth who violated consent adjustments may not be placed in a state youth correctional facility.¹⁰⁴ In addition, the court has the discretion to commit the youth to the Department of Adult and Juvenile Corrections until the age of 18.¹⁰⁵ Supervision may continue until age 21 or 25.¹⁰⁶ Once a youth is committed to the department for placement in a state youth correctional facility, the department is responsible for determining an appropriate date of release or an alternative placement.¹⁰⁷ However, a youth may not be held in a state correctional facility for a time longer than the maximum period of imprisonment for an adult convicted of the same offenses.¹⁰⁸

Youth Placement Committees

In each judicial district, the youth court must establish a youth placement committee to recommend an appropriate placement for a youth referred to the youth court or when a change is required in the placement of a youth who is already in the custody of the department. The committee must include a juvenile parole officer, a representative of the Department of Health and Human Services, the chief probation officer, a mental health professional, and a person knowledgeable about Indian culture, if an Indian youth is involved.¹⁰⁹ The code no longer requires the inclusion of school personnel with knowledge of the youth.¹¹⁰ The committee must consider all relevant information, including the costs of care, and make a written recommendation to the youth court judge or the department.¹¹¹

Counsel for youth often do not attend placement committee meetings, though the fate of their clients often depends on what happens in the meetings. In addition, probation officers often do not inform defenders of when the placement committee meeting will be held. When they do attend, some defenders have indicated they are simply allowed to be present for a few minutes, then

asked to leave while decisions are made. One lawsuit reviewed by investigators alleges that the decision of the placement committee seemed to have been made up before the meeting began. The appealing attorney writes that the written form was already completed with first and second recommendations for placement and that one member of the committee entered the meeting before discussions had begun and indicated he was “ready to sign.”

Disposition/Placement Options

Placement options for youth who need secure care are limited. The most utilized secure care placement is housed within one of the state’s two correctional facilities and operated by the Department of Corrections. With few exceptions, these facilities do not provide treatment and were not designed for youth with serious emotional disabilities, despite many accounts that 70 to 90% of the youth in these facilities suffer from such disabilities. Furthermore, many reports indicate that most of the youth in these facilities do not even need secure care; however, the lack of alternatives leads to these placements. Much of the control over placements is vested in the Department of Corrections.¹¹²

Counsel for youth often do not attend placement committee meetings, though the fate of their clients often depends on what happens in the meetings.

Post-Disposition

Final decisions of the youth court may be appealed to the Montana Supreme Court by any party other than the state.¹¹³ Since the youth court is a court of record, the appeal is based upon the files, records and a transcript of the evidence presented to the court. It is not unusual for the appeal process to last over a year.

Probation Revocation

A petition prepared in the same manner as a petition alleging delinquency must initiate all probation revocations. Although the youth court judge without a jury hears all petitions for revocation, all other procedural rights and duties applicable in a trial are available to the youth in a probation revocation hearing. If the petition is proved by a preponderance of the evidence, the judge may impose any disposition that could have been imposed in the original case.¹¹⁴

Transfer

If a youth was 12 years of age or older at the time of allegedly committing certain offenses, including sexual intercourse without consent or deliberate homicide, among others, the county attorney may file a motion for leave to file an information in district court.¹¹⁵ The county attorney may also file a motion for leave to file an information for a youth who was 16 or older at the time of certain alleged crimes, such as arson, negligent homicide, robbery or assault with a weapon, among others.¹¹⁶ Some of the transfers are solely in the discretion of the county attorney, while some charges require that transfer be made. All transfers must be reviewed and approved by the district or youth court.

A statutory alternative to transferring a case to district court allows the county attorney to request a case to be designated an extended jurisdiction

juvenile prosecution, if a youth was at least 14 years of age at the time he allegedly committed what would be a felony if committed by an adult.¹¹⁷ The court must hold a hearing on the motion and find by clear and convincing evidence that the transfer serves public safety.¹¹⁸ If a youth is adjudicated delinquent, the court may impose a juvenile disposition and suspend an adult sentence to be imposed, if necessary, after the youth completes the juvenile term. The court must hold a revocation hearing at which the youth is entitled to the right to counsel and other statutory rights. If the court finds a violation, the court has several options, the most severe of which is to terminate the juvenile's extended jurisdiction status and youth court jurisdiction.¹¹⁹

CHAPTER TWO

Findings

The Right to Counsel

The provisions of the Montana Code regarding a juvenile's right to counsel suggest an understanding of the importance of counsel to protect a youth's rights. The Youth Court Act requires that "in all proceedings following the filing of a petition alleging that a youth is a delinquent youth or youth in need of intervention, the youth and the parents or guardian of the youth must be advised by the court or, in the absence of the court, by its representative that the youth may be represented at all stages of the proceedings."¹²⁰ Indeed, according to Section 41-5-1413, neither a youth nor his parents may waive counsel if adjudication could result in a commitment to the Department for a period of more than 6 months.

While the Code requires the right to counsel "following the filing of a petition," this may be too late in the process to actually protect many youth. Given the process of Montana's juvenile justice system and its heavy reliance on probation officers, many cases are dealt with prior to the filing of a petition or instead of filing a petition. Upon referral from a police officer, sheriff or school resource officer, the probation department will conduct a "preliminary inquiry" hearing with the youth. The purpose of the hearing is to discuss the allegations with the youth and make a determination as to whether a petition should be filed. The youth, his parent and a probation officer attend these hearings, at the beginning of which the youth signs a form waiving his rights. Private counsel occasionally attend these hearings, but public defenders do not; it would appear that presence of counsel is not mandated by Montana law. Therefore, youth generally are not appointed an attorney for the preliminary inquiry or any action leading up to the filing of a petition.

At this initial hearing, the probation officer elicits a statement from the youth. One county attorney observed that "the youth probation officer is like

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any other law enforcement officer — he is supposed to take a statement.” These hearings are taped, but the statements are only transcribed upon the request of the county attorney. These statements can and have been admitted at trial against a youth.

Once the county attorney receives a request for a petition from the probation officer, she makes the final decision on whether to file. Investigation revealed that it is extremely rare for the county attorney to decline to file a petition. However, according to probation officers and defense attorneys, it takes an average of 3 to 4 months for a petition to actually be filed. In a few extreme cases, it took up to a year. Because an attorney is not appointed until the petition is filed, valuable evidence may be lost in the interim. Moreover, the delay means youth do not receive services they need nor experience the immediate consequences for their actions until many months later. When a youth is detained, however, it was consistently reported that once the petition is filed, there is a detention hearing within 24 hours.

Again, at the Youth Placement Committee meeting, counsel is only allowed to briefly give a recommendation. Hence, for almost the entirety of the process, there is no advocate or representation for the youth. It was reported that Youth Placement Committees almost always endorse the probation officer’s recommendation, further indicating an over-reliance on one function of the justice system without formal advocacy on behalf of children and youth.

Attorneys representing children and youth bear enormous responsibility in representing their clients.

Access to Counsel

Attorneys representing children and youth bear enormous responsibility in representing their clients. In addition to the responsibilities of preparing and presenting the criminal case, defenders must understand and apply principles of adolescent growth and development, including at least a general familiarity with issues of adolescent mental health, to ascertain their young clients’ abilities and needs. Defenders must prepare social history backgrounds in order to advocate in the more complicated cases. They must be familiar with the strengths and needs of youth’s families and assess what interventions are likely to be supported or undermined by their clients’ families. Defenders must be aware of the child’s educational status and keep abreast of the ever changing availability of community resources. The fact that most juvenile defendants come from poor families—and thus have very limited resources to assist the defender—significantly increases the burden placed on the defender to provide adequate representation.

Children who come into the juvenile justice system are often mistrustful of adults, and often for good reasons. An attorney must have regular contact with her client, and must take the time to build a relationship which will allow the client to share deeply personal and sometimes painful information. An attorney must instill in the client a sense that at least this one adult is entirely committed to his well-being both in and out of the courtroom. Only through the development of that relationship will the child be willing to share the type of information which will allow the lawyer to fully represent his interests. In addition, the potential for rehabilitation of the client is increased significantly if the client feels that the system has treated him fairly.

Equally important, defenders must take the time to keep clients informed

before and after court appearances and other important events relating to their cases. Children in detention centers constantly need to know and be reassured about the status of their case, when they can go home, the effect their behavior in the institution may have on the court process, and the range of alternatives which will be available to the Court at the next hearing. Clients and families need to be told exactly how to get in touch with counsel and when their counsel will next contact them. A good defender uses comprehensible language in a timely way to advise clients and their families of the court process and the family's responsibilities between court appearances.

Youth across the state of Montana have very uneven access to their attorneys. Investigation revealed that the level of accessibility to attorneys too often stems from such random factors as courtroom assignment. One investigator found that in one courtroom, an attorney was always present for the initial appearance, and the judge encouraged the youth to talk to her attorney about all the facts of her case. In one case, a 17-year-old wanted to waive counsel and plead guilty. The judge tried to convince the youth to agree to a continuance so the youth could consult with an attorney. When the youth would not agree, the judge ordered an adult public defender (no juvenile defenders were present) to speak to the youth. The youth ended up denying the charge, much to the dismay of his father. However, in other courtrooms, investigators found that attorneys were not appointed until after the initial appearance.

When youth do meet with their attorneys, it is often a brief and distracted encounter. While some attorneys made efforts to meet with their clients before the first court date, according to many probation officers, it is more common for the youth and the attorney to meet for 5–10 minutes prior to court. Furthermore, because there are generally no facilities for private meetings and many counties do not have a separate youth court, attorneys must meet with their clients in hallways in front of many other adults and youth. There was even one report of an attorney meeting with a group of his young clients at the same time.

Further limiting youths' contact with their attorneys is the location of detention facilities in the state. For one county, the detention center is approximately 150 miles away. Given funding and time constraints, it is very difficult for defenders to visit their detained clients. Youth and employees of facilities corroborated that "attorneys almost never come." In another county, youth were detained in a facility over 400 miles away. As a result, there were several reported cases of detention hearings by telephone.

Post disposition access to counsel is similarly restricted. Investigators reviewed one lawsuit in which a youth's attorney had been denied court coverage of expenses to visit his client placed approximately three hundred miles away. The judge had refused to cover these travel expenses, despite his expressed concern about the youth's need for access to counsel.¹²¹

Levels of Advocacy

The pretrial stage of the proceedings sets the stage for strategies at trial, negotiations with prosecution, and for adjudication and disposition hearings. During this critical period juvenile defenders must investigate the facts, obtain discovery from prosecutors, and acquire additional information about a client's personal history through school authorities, juvenile community corrections

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officers and any other person with pertinent personal information. At this juncture, pretrial motions and preparation of any defenses to the charge are submitted to the court. Juvenile defenders ideally should be able to identify any mental health issues or learning disabilities particular to this client, and determine whether or not those issues have played a part in the alleged misconduct of the juvenile.

It is this stage that the attorney needs to determine whether the child has developmental or mental health issues which would impact the *mens rea* elements of the case against the child. Counsel should gather school, counseling, mental health, and treatment records. Counsel should also obtain releases from parents so that she can review documents and speak to treatment providers and evaluators. Counsel needs to interview at some length, the child and his family to assess roughly the strengths and weaknesses of the family system. Counsel must determine whether or not an evaluation will be necessary and, if so, how to fund it. The ability to negotiate the resolution of the charge and to provide the most appropriate rehabilitation program will likely depend in large part on the investigation work done during this period.

Children eligible for or receiving special education are afforded the protections of federal statutes such as the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415, Section 501 of the Vocational Rehabilitation Act, 29 U.S.C. 794, and the American with Disabilities Act, 42 U.S.C. §12132. These congressional statutes protect children from being subjected to school disciplinary actions without due process or discriminatory actions by the school and often mandate that schools continue to educate even those students who have been expelled. In addition, acquiring an understanding of a client's educational needs may help the juvenile defender in raising issues of competence and requisite intent, negotiating with prosecutors, developing appropriate dispositional plans and the funding to implement them. This is crucial in view of the frequency with which educational difficulties are harbingers or early symptoms of children's other adjustment and development issues.¹²² Defenders, to fully represent young clients, must increasingly be aware of these educational rights under state and federal law.

There are very few trials in juvenile court in Montana. Most cases end with a plea agreement. This is not necessarily a bad outcome and should not necessarily be read as a failure of advocacy. Juvenile prosecutors often make offers that attorneys are professionally bound to recommend to clients. Excellent juvenile defense practice in plea negotiations is critical. A plea negotiation is an opportunity for defense counsel to obtain positive outcomes for youth and risks being squandered by lack of preparation. Juvenile defenders must be prepared well in advance. Plea negotiations need to be fully considered with a complete understanding of the short and long-term consequences of different scenarios. The juvenile defender must be proactive, *e.g.* submitting a proposal prior to the state's offer, for example, and not simply reacting to the state's offer.

A juvenile defender must also be fully informed about how an adjudication of guilt could affect the youth's adult life. For example, a defender needs to be aware of which crimes become matters of public record, how an adjudication will affect credit ratings, or the ability to apply for financial aid. A complete understanding of the collateral effects of an adjudication is necessary for juvenile defenders to effectively and accurately represent a youth in a plea negotiation and properly advise their clients as to the risks of going to trial.

There are very few trials in juvenile court in Montana. Most cases end with a plea agreement.

While statistics were intermittently available, anecdotal evidence reveals that very few juvenile cases in Montana go to trial. According to one county attorney, “there is no case law in this state, and that is a direct result of the public defenders’ lack of advocacy.” A judge reported that he had 2–3 trials a year in his courtroom. Defenders also reported that they rarely take cases to trial. One defender reported that in three years he had never taken a case to trial because his clients don’t want him to. He explained, “I tell the clients the rights that they have, but the risks are so low, they don’t want to go through with it. The worst that they can look at is [a county facility] until 18. They realize that the system does not provide consequences that are worth going through a trial.” A defender in another county reported that he had had one bench trial in his nine years of practice. In another county, a county attorney reported that approximately 98% of cases result in a plea bargain resolution.

Many youth interviewed did not feel they were being adequately guided through the process or educated about their options. One youth remarked that he “didn’t know that [he] could have fought the charges.” Many youth consistently expressed they were not often informed of the relevant issues in their cases, such as disposition options, nor did they usually discuss the circumstances surrounding their arrest with their attorney. Because it was noted that judges do not communicate with youth in “kid language” or language easily understood by youth, it is even more important for defenders to translate the legal process for their clients.

In one county, investigators found that dispositions were generally uncontested. Both a county attorney and a public defender in this county believed many dispositions were not individualized, nor were they effective. However, both believed contesting dispositions was often futile, given that the judge almost always followed the probation officer’s recommendations.

Furthermore, there is an uneven motions practice by defenders across the state. The most commonly filed motion is the “206 transfer motion.” However, in one county, the majority of the defenders could only remember having one or two of these motions, and some had not filed one of these motions in over a year. Other defenders reported having filed motions to dismiss, motions to suppress and motions regarding waivers of rights, among a few others. Although, in another county, an investigator found a significant motions practice. In this county, both the public defender and the contract public defender reported filing many motions to suppress, to dismiss for failure to meet time requirements and other legal issues. Time in the courtroom may also be a factor in the number of motions filed. One public defender suggested that juvenile cases are often put “on the back burner” when caseloads are mixed with juvenile and adult cases, as is the case in many counties.

There appears to be very little advocacy or even contact between attorneys and their clients following disposition. In one county, probation officers reported that only one attorney continues to keep in contact with his clients after disposition. In another county, only one attorney reported ever filing an appeal. A judge in this county said that he would pay for appeals, but had never had an appeal since taking the bench. Furthermore, when an attorney wishes to provide post-disposition advocacy, she may be thwarted by the court’s refusal to provide access to funds or to the client.

There is an uneven motions practice by defenders across the state.

Lack of Community-Based Options and Services for Youth

Further restricting juvenile defenders' ability to advocate for their clients is the lack of community-based placement options in the state, as well as a lack of resources for juvenile offenders, specifically for the mentally ill, sex offenders, and girls. Many surmise that budget problems will further reduce the number of available programs. Even when programs are found to be innovative or promising, one judge noted they are often cut due to lack of funding. Funding levels available to youth courts for intervention and treatment programs and services have been severely, consistently reduced over the last several years. Many interviewees also believed that the regulation of youth placement funds by the Department of Corrections leads to inadequate resource management, unforeseen budget reductions, loss of breadth of placement options, and lack of appropriate services for youth. This, combined with the loss of contracted beds in out-of-home treatment programs, has critically reduced access to intervention programs that may prevent further entry into more expensive and secure placements.

Nevertheless, secure placement in correctional/non-treatment facilities continues to be fully funded for well over the number of youth in such programs and (by many accounts) well over the number of youth who need to be in such programs. In one county, juvenile court personnel described the difficulty for defenders in having no options for which to advocate, saying that on the one hand defense counsel did not act in the best interest of the child to get services and on the other hand there were not enough programs for kids in the community or group homes. As previously noted, many placements are very far away and are not accessible by public transportation, thereby limiting families access to their children and attorneys' access to their clients. Preventing regular contact between detained youth and their families precludes including the family in the rehabilitation process, often a key to the success of youth in the system. In one lawsuit reviewed by investigators, a youth was placed approximately four hundred miles from his family. The family had no funds to visit the youth and requested the court provide funds for one or more to visit, but the request was refused.¹²³

Furthermore, many youth who are involved in the justice system come from families in crisis. The state has some programs for families in various levels of crisis (mostly abuse and neglect) through the Department of Public Health and Human Services, though there are few programs for prevention and early intervention. Some of the problems that need addressing are status offenses (drinking, runaways, truancy) as early warning signs before the family is in deeper crisis or the youth becomes delinquent.

Youth also may not be receiving special education benefits while in secure placement. Data indicate that only 22 youth were considered eligible for such services in correctional facilities during 2002. However, some interviewees advised that certain facilities ask youth to reject services, or the facilities simply do not investigate youths' needs for special education.

Programs in Montana do not appear to be monitored for effective treatment. Investigators found no verifiable statistics on recidivism rates. Court services in one county suggested that there was only 10% recidivism, but county attorneys, judges and defenders believed the rate was upwards of 70% because the pro-

grams were “rubber stamps” and inadequate to address the needs of youth. Overall, these youth court personnel cited a need for more group homes as an alternative to detention and secure care and a dire need for out patient and inpatient treatment for chemical dependency and sex offense issues. According to one corrections facility manager, in the limited circumstances in which recidivism is tracked, it appears to be narrowly defined as whether the youth’s release was revoked due to a felony conviction. Parole violations (for youth who have been discharged from a correctional facility) are generally not considered “recidivism.” Also, offenses that occur after the age of 18 are not factored into the parole recidivism rates that do appear. This skews data tremendously and perhaps leads system participants to the incorrect conclusion that correctional facilities are more effective in reducing recidivism than systemic, community-based, and/or mental health and out-of-home treatment programs.

A consistent practice of reviewing placements for specific youth is also lacking in the state. The Montana Youth Court Act requires Youth Placement Committees to review placements semiannually. However, a performance audit completed for the legislature in 1999 indicated that while some counties complete some kind of review, the process was not consistent across the state.¹²⁴

Given the aforementioned problems, juvenile defenders are generally unaware of the effectiveness of programs, including community treatment options, and are, thus, not equipped to effectively advocate for their clients. In court or in placement committee meetings, recidivism is rarely discussed. If anything, decision makers are provided with anecdotal information, such as, “Well, I had one kid who did well there.” A few interviewees expressed the opinion that “out-patient treatment is basically a joke in Montana.” However, for tough decisions regarding important treatment options, this type of feedback is not sufficient. Outcome studies are necessary.

That being said, outcome studies that are performed for non-secure placements, prevention and intervention programs, and treatment facilities may not even be considered by state decision makers when contracts are given or renewed. For instance, two interviewees discussed an intervention program with impressive outcome and recidivism data. This program was left unfunded, fueling the crisis for youth who need non-secure residential programs. Hence, defenders should advocate for the completion and use of outcome studies in distributing funds to programs.

Mental Health and Chemical Dependency

Programs are also lacking for youth with mental health and chemical dependency problems. Cross discipline interviewees reported significant numbers of youth with mental health and substance abuse problems in the system, suggesting upward of 80 to 90%. One attorney reported that he has handled approximately 2 cases a month as an appointed and private attorney where the juvenile has serious mental health problems. A program director reported that he can comfortably say that 70% of the youth in Montana’s youth correctional facilities meet the diagnostic criteria for Serious Emotional Disturbance. For youth already in correctional facilities, funding has been reduced by the Department of Corrections and counties within Montana for mental health services. In addition, training and education planned for police, correctional

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staff, county attorneys, public defenders, and judges regarding mental health issues has not been implemented.¹²⁵

In her 2002 report, the Montana Mental Health Ombudsman noted that access to mental health services for children had recently decreased.¹²⁶ Efforts to provide children with mental health services are frustrated by the fact that 50 of 56 counties have shortages of mental health professionals.¹²⁷ The superintendent of one facility corroborated that mental health is always an issue, but he explained that his facility tries not to take kids with serious mental health problems.

It has also been reported that programs that provide mental health and chemical dependency services to youth with dual diagnoses are rarely eligible for reimbursement for the chemical dependency services they provide. The state contracts with various providers in Montana, but distance and excessive caseloads often inhibit timely adjunct services. Also, programs often prefer to incorporate the chemical dependency service as part of their overall service and may be reluctant to incorporate a counselor from another 'approved' (contracted) provider as an adjunct service. This creates a disincentive to providers to address co-occurring illness. In addition, access to services is limited due to the length of time it takes to coordinate with another provider. Unfortunately, a youth may be discharged from a program before his or her name comes up on the waiting list for adjunct services. Furthermore, it was reported that in some cases, some individuals are reluctant to put a youth in "the custody of the court" for placement purposes because if a treatment placement fails, the youth may need to be transferred to a more expensive out-of-state program at the expense of the county.

Montana has developed several teen drug courts. One such court completed outcome studies that suggest that teens going through this court have recidivism rates ten times lower than other youth. This same drug court orders immediate family members into the program. The judge interviewed felt that this was a powerful component and thinks that families should be brought more into the system.

While defenders may be hampered by the lack of alternative treatment options, there are success stories in which defenders asserted their young clients' rights and won. In one lawsuit, a petition for writ of *habeas corpus*, the attorney argued his client was placed in a program that was statutorily disallowed from accepting youth who are a danger to themselves or others. The Montana Supreme Court agreed and ordered the youth released and placed in an appropriate program.¹²⁸

Youth clearly agreed that more services were needed to help them overcome many of the factors that may have put them in the system in the first place. One detained youth expressed that the state needs "more group homes because not many people will take us in after we get out of here. We go back to the same environment we were in — we are going to fail." Another youth thought that there needed to be more treatment centers. He believed that "the court is quick to put us in correctional facilities because it cost the county too much to send us to treatment centers."

Placement of youth in the state's correctional facilities is a zero-cost option for counties, courts and probation departments. Where they may have to pay hundreds of dollars a day to place a youth in a treatment program, placing the

same youth in a secure, non-treatment program costs nothing under the state's current placement funding scheme. This may well lead to unnecessary placement in secure programs. In years past the same zero cost had held true for a wilderness program operated out of central Montana. As a result, many youth were served in the positive peer culture program. However, once that program's contract expired, counties were required to use their placement budget to place a youth in the program.

Because once a youth has been placed in a state correctional facility, the youth is very unlikely to thereafter be placed in a less secure and non-zero-cost placement such as a therapeutic or regular group home, it is of the utmost importance that defenders zealously advocate for their clients as early as possible in the process. One program director stated that the parole system (as compared to the probation system) does not seem to value therapeutic interventions post placement at a correctional facility. This is due to the alleged belief that "treatment doesn't work" and that therapeutic interventions following a stay in a correctional facility are inappropriate. There also appears to be a belief that paroled youth who re-offend should simply be returned to a correctional facility. Unfortunately, this appears to be the general practice, even though a return to pre-correctional-facility actions may actually indicate a need for a different type of program.

Although the lack of community options and services is generally attributed to scarce funding, the Institute for Human Services Management issued an initial federal funding report for Juvenile Probation Services in January 2003, which found that under Social Security Act Titles IV-E and XIX there are substantial funds available to the youth courts, juvenile probation offices, and the Department of Corrections provided that agencies set in place and comply with federal guidelines. If the juvenile justice system in Montana responds to this opportunity, the youth in the system would have more access to the appropriate placements and treatment they need. Additionally, courts and youth probation officers could also be provided funds for preventative measures that may in the long run keep youth out of the juvenile system all together.¹²⁹ Defenders need to advocate for use of such funding.

Girls in the System

Females in the juvenile justice system are usually burdened with complex health and mental health issues related to sexual behavior, substance abuse, trauma, and violence. In many cases, involvement in the juvenile justice system exacerbates the difficulties they face as adolescent girls.¹³⁰ Adolescent female offenders exhibit high rates of mental health problems including higher rates of depression than boys throughout adolescence and are more likely to attempt suicide. Low self-esteem, negative body image, and substance abuse are also common problems for adolescent girls. Suicide attempts and self-mutilation by girls are particular problems in juvenile facilities.

The substance abuse treatment needs of females involved in the juvenile justice system are particularly acute. Studies show that nationally from 60 to 87% of adolescent female offenders need substance abuse treatment.¹³¹ Many of these young women may be self-medicating with illegal substances in attempt to cope with stress or mental health difficulties, such as anxiety or depression.

Placement options for female juvenile offenders are limited and sometimes non-existent in Montana.

Research has shown a strong connection between exposure to trauma and abuse (e.g. sexual abuse and family violence) and substance use among girls.

Adolescent girls who come into contact with the juvenile justice system report extraordinarily high levels of abuse and trauma. Incarcerated girls report significantly more physical and sexual abuse than boys, with more than 70% of girls reporting such experiences. As a result of repeated exposure to multiple forms of violence and trauma, Posttraumatic Stress Disorder (PTSD) is prevalent among adolescent girls in the juvenile justice system, with nearly 50% meeting diagnostic criteria for the disorder.¹³²

Adolescent female offenders have complex and sometimes conflicting relationships with family members, boyfriends/relationship partners, and children which present special challenges for their reintegration and rehabilitation. Appropriate treatment of adolescent female offenders must address these kinds of family issues, as well as issues such as violence and conflict in dating relationships. Juvenile justice personnel and mental health professionals working with these young women must be cautious not to re-traumatize girls who have been abused or victimized, while encouraging them to learn appropriate coping strategies and constructively explore and resolve their feelings.

Adolescent girls have a variety of programming needs, including: health care, education, mental health therapy, mutual support and mentoring opportunities, prenatal care and parenting skills, substance abuse prevention and treatment, job training, and family support services. Given these complex needs, the placement options for female juvenile offenders are limited and sometimes non-existent in Montana. In one county, attorneys were aware of only one program in the state for girls. Hence, girls tried as adults may be placed in adult facilities or sent out of state to juvenile facilities for females. While Montana's secure facility for females is seen by some as being in a better position to treat the girls placed there because of its small size and its ability to fashion treatment to the specific needs of each girl, the number of girls entering the juvenile justice system is increasing.

Resources for Experts and Related Defender Services

The use of experts by defenders is rare in part because the availability of experts for youth cases is inconsistent across the state and in part because of the way in which experts are funded for indigent youth. Generally, public defenders must request funds from the judge in order to access services, such as psychological evaluations or investigators, which means that access to experts may not always be subject to quality of counsel, but to the discretion of district court judges who are operating under budget constraints. One defender explained that it is difficult to get the court to pay for an expert. In another county, a defender reported using experts in approximately 5–10% of his cases. The most common expert requested is a psychologist or other mental health professional. In one county's courtroom a defense request for an expert is made *ex parte*. At any time, the county attorney or the probation officer can look at the docket sheet and discover that there was likely a defense request for a mental health expert. In this courtroom, the county attorney and probation officers have taken the position that because the county pays for court ordered examinations, they are entitled to view these reports. Hence, in some cases it may be a strategic

Another systemic barrier potentially limiting attorneys' access to mental health experts may stem from the disincentive for the court, probation or the Department of Corrections to obtain a mental health evaluation. If a youth is found to be seriously emotionally disturbed (SED), the Montana code prohibits her from being admitted to a correctional facility.

decision, instead of a financial one, not to request a mental health expert. Attorneys voiced concerns that if they caused a stir about the other parties seeing the results of the examination, the county attorney and other court personnel would assume the worst about the youth, as the defender felt she had something to hide. Defenders may also be concerned that judges would order the report of evaluation released to the state.

In a different courtroom, it was reported that requests for experts are rarely approved; hence, requests are rarely made. One attorney reported that she had a serious case for which she sought the appointment of a nationally renowned expert in youth violence. In declining her request, the judge begrudged the fact that she had not relied on someone "local." It was insignificant to the judge that there was no comparable expert in Montana.

Another systemic barrier potentially limiting attorneys' access to mental health experts may stem from the disincentive for the court, probation or the Department of Corrections to obtain a mental health evaluation. If a youth is found to be seriously emotionally disturbed (SED), the Montana code prohibits her from being admitted to a correctional facility. The burden then rests on probation to find and fund intervention and treatment programming for the youth.

Similar problems hold true for attorneys requesting investigators. Nearly all of the interviewed youth revealed that their attorneys had done no investigation into their cases. The public defender's office in one county has a full time investigator for juvenile cases, but in most of the counties, defenders must request the court for an investigator for a case. Reasons defenders gave for not requesting investigators included, "you don't need an investigator in a juvenile case," to "I would love to have one, but I know the judge will not appoint one, so why even bother." One public defender explained that he does his own investigation or relies on volunteers, who are interested in going to law school. Tragically, one defender relied on the probation officer for her investigation. She reported that as soon as she is assigned to a case, she calls the probation officer and asks, "what is the minor's history; what do you think is in the minor's best interest; and how do we get there?"

Similar problems limit the use of social workers by defenders. Only a very small handful of youth defenders have used or attempted to use their own social workers to assist in defense or development of treatment options. While the Public Defender's Office in one county employs a social worker to assess the needs of each youth and connect them to services, this is the exception, rather than the rule in Montana.

Funding

Investigators found numerous juvenile defenders who claimed that they are sometimes pressured to keep billing low in juvenile cases because of budget concerns. However, as those who represent youth know, juvenile cases often take extraordinary amounts of time and effort to understand, prepare, and defend.

In Montana, it is the responsibility of county commissioners to ensure funds for indigent youth's legal expenses.¹³³ However, because the judges have almost exclusive control over the appointment and payment of experts, counsel, investigators, and other support services, in one county, the system is subject to their

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individual philosophies on juvenile justice and access to effective representation. The defenders in this county are paid a flat rate of \$2,000 a month or \$50 an hour (because they are expected to work 40 hours a month). However, most attorneys reported that they spend an excess of the allotted hours working on appointed cases. For example, one juvenile defender reported that he typically spends 60–80 hours a month on appointed cases, but rarely applies for overtime. He has applied for and received additional funds from the judge in the past, but he reserves these requests for extraordinary cases.

Another county, however, has refused to pay attorneys for overtime, reasoning that the flat fee assumes that the attorney will work more hours one month and fewer hours the next month. Copies, phone, office and research expenses are not reimbursed. Travel is reimbursed at the state rate.

One attorney in this county acknowledged the problem that such method of funding presents and the disincentives to zealous advocacy for a young client. He noted, “on the face of it, this [refusal to compensate for additional time spent on cases] provides a disincentive to working up a case. In reality, I would like to think that it does not. But there is an extra disincentive for taking a case to trial.” The investigator corroborated that this attorney had never had a juvenile case go to trial.

Lack of Specialization, Supervision, Standards and Training

In one county there are at least four contract defenders, paid with funds from an indigent defense fund. In addition to the juvenile cases, these attorneys also handle adult criminal, commitment, abuse and neglect cases. These appointments were made, however, without any stated criteria for granting defender contracts. In addition, it was reported that appointments are random and generally an attorney’s experience was not taken into consideration. One attorney received a contract 2–3 months after graduating from law school. Another had started out in drug court, having had no significant juvenile experience, before she was awarded a contract for 1/3 of the juvenile cases. Even in a county that actually had a public defender solely for juveniles, which was relatively rare for the state, no initial training was provided for this position.

The chief public defender in one county mentioned his concerns over the lack of supervision over the contract defender in the county. He feared that juveniles were not getting the same level of representation from the contract attorney, particularly because he was much harder for them to access. Furthermore, the public defender in one county remarked that the private contract attorneys often come to the public defenders for advice.

Others advocated the need for minimum practice standards for defenders. One judge suggested a “reality orientation” for new attorneys in the youth court system. This judge also proposed that the Judicial Council should encourage more training of attorneys. A defender believed that the court and county attorneys believe it is fine to put the “greenest,” most inexperienced attorneys on the juvenile cases. He admitted that that was a reflection of how these parties view the delinquency system.

In one county, there is a small amount of money in the budget for a contract attorney to attend training. Only one defender had actually taken advantage of the opportunity. That defender indicated the national legal education training

in juvenile defense he had received was the best time and money he had spent. However, other defenders in this same county seemed to be unaware of this budget item, as they consistently reported that there are no training opportunities available through the court. With one exception, all of the attorneys interviewed believed that they would benefit from additional training and stated that if the county provided training opportunities, they would take advantage of them. The lone dissenter stated that he did not think juvenile cases have any extra elements that require training — an even stronger case for the need for more training for the state's defenders.

Finally, because of the specialized knowledge and interest required for juvenile cases, numerous interviewees felt it would be ideal for defenders to be able to specialize in defense of youth clients.

Disproportionate Minority Representation

Montana has a youth population of 223,799, 12 % of which is made up of minority youth. Approximately 10% of Montana's youth are Native American with the remaining 2% being made up of Hispanics, Asians, and African Americans. Data indicate that minority youth are disproportionately represented in Montana's secure detention and correctional facilities, and they suffer from an extreme lack of appropriate placement options. For example, in 1999, although Native Americans constituted 10% of Montana's youth population and 10% of juvenile arrests, they comprised 14% of youth incarcerated in secure juvenile correctional facilities, 15% of youth confined in secure detention facilities, and 19% of youth confined in adult jails. Likewise, the Hispanic population comprised only 2% of the youth population in Montana, yet Hispanics represented 1% of youth confined in adult jails, 5% of youth entering secure detention facilities and 8% of youth incarcerated in secure juvenile correctional facilities. During 1999, both Native Americans and Hispanics were charged with more serious offenses than other ethnic groups. These statistics seem to be consistent with surrounding years' data as well.¹³⁴

According to one corrections facility director, minority over-representation in juvenile facilities in Montana is extremely disturbing. Often the percentage of minority youth in a facility can reach as high as 40%. At the time of this writing, in the juvenile detention facility for girls, 12 of the 19 girls are from an ethnic minority: 2 are African American; 3 are Hispanic; one is mixed race; and 6 are Native American. In the juvenile detention facility for boys, 28% are minority youth, 18% Native Americans, 6% Hispanic, 3% African Americans, and 1% Asians.¹³⁵

Native American youth suffer unique problems in the state. Each Indian reservation in Montana has a different collection of resources available to its youth. Most have few resources internally and have further complications because of multiple levels of jurisdiction (BIA, IHS, tribal, state, county) for different youth. Given many reservations' distances from population centers, it is difficult to access the limited resources. In spite of Montana's large Native American population, there is only one tribal group home in the state. Counties can sometimes tap into tribal services for youth, however most of these services are located out of state.

Confusion Over the Role of Defenders

Confusion over the roles of defenders may be partially to blame for the absence of zealous advocacy in many counties around the state. In one county, most of the defense attorneys spoke in glowing terms about probation officers and revealed their reliance on them to “help the kids.” Another defense attorney stated, “the probation officers do a good job because they are familiar with the youth, they will follow up on violations and they show the youth the consequences of their actions.” In one courtroom in this particular county, it was reported that probation and the defenders agree on the disposition 85–90% of the time, whereas the county attorney agrees with the probation officer only 75% of the time. This is unusual, as typically the probation and the county attorney are aligned. In another county, a probation officer said that defense attorneys are easy to work with, and that he has open communication with them. He explained that, “we work to figure out the kid’s best interest.”

Interviews with youth around the state revealed that defenders were often working for the “best interests of the child” and not advocating for the youth. A 17-year-old girl explained her experience in court with her attorney: “I asked my P.O. if there was anyone to talk for me, but nobody would answer me. My attorney said to the judge that I should go to a group home, but I never spoke with him.” A 15-year-old girl explained that “a deal was made with [her] P.O. and the county attorney, but [her] attorney wasn’t involved. [Her attorney] never asked [her] side of the story.” Another 17-year-old explained that his father spoke to the judge because his attorney would not. Another 15-year-old described how her judge did not think she needed to be in detention, but her attorney said that the probation officer disagreed, so the judge changed his mind and sent her to her current facility.

In another county, a defender explained that there was no motivation to go to trial in youth court because of the lack of consequences. He said that it could be worthwhile to go to trial if “the kid did not commit the crime, which in my experience has never happened.” Given the lack of investigation performed, it is troubling that this attorney would automatically assume that every one of his clients is guilty.

Public defenders are not the only participants in the system that display this confusion. There seems to be a fundamental misunderstanding of the role of the public defender by judges, prosecutors, and probation officers. For instance, in one county, investigators found that other participants in the system believe the role of public defenders is to protect the “best interests” of the child and believed public defenders should make an effort to get along with everyone. One defender noted that judges wanted public defenders to be advocates for the system, presumably rather than advocates for their young clients. In this same county investigators found that with the exception of some of the defenders, many were not concerned with whether the youth actually committed the offense.

As noted previously, in one county, probation officers and county attorneys believed they should have access to any reports generated by the defense, including psychological evaluations, because the county pays for them. This illuminates the confusion of the role of the public defender in that it suggests that indigent youth and their counsel must forfeit a certain amount of privi-

Confusion over the roles of defenders may be partially to blame for the absence of zealous advocacy in many counties around the state.

leged information to the system what a non-indigent youth and their counsel would not, since that youth would be able to pay for his own evaluation or investigator without giving notice to the court.

Youth Court Culture

While there were many reports of a lack of zealous advocacy, in one county where the public defender was vigorously advocating for her clients (confirmed by interviews with youth and investigator observation), it came with a professional and social cost. Zealous advocacy seemed to be met with hostility and was negatively viewed as a means to get kids “off.” Judges, probation officers, and county attorneys had unkind words for the public defender, but nothing to say about the contract defender because he was less inclined to “rock the boat.” Perhaps based on a misapprehension of counsel’s role, some court personnel observed that defense counsel should “get along” with everyone and “act in the child’s best interest.” One probation officer said that “public defenders focus on getting [kids] off, not on what they need.” Another explained that “the public defender is the biggest obstacle for us.” A youth court judge suggested that “a defender should be able to switch gears and say, ‘I’ll represent you, but you are a terror and you need some rules’.” Another judge complained that “[public defenders] are in there always talking about their rights. I would get rid of the public defender and make it a court appointed system.” Another stated, “public defenders ding around with it [their juvenile cases] and delay the system.” These and similar comments are indicative of an attitude that suggests zealously advocating for young clients’ rights is an inconvenience to the courts, as well as indicative of the hostile culture in which some public defenders are working.

Unfortunately, this role confusion among juvenile court personnel was not isolated to one county in the state. In another county, the public defender reported a significant problem between how others in the justice system see the public defenders and how the defenders see themselves. While the public defenders see themselves as advocates and aggressive in their representation of youth, it appears that others want the PD’s to be advocates for the system. Furthermore, in another county, probation officers were so threatened by one particularly zealous defender that they asked the judge to discontinue appointing him to juvenile cases. The county attorney argued that this defender was making “everything too adversarial.” The juvenile defender was not removed by the court.

As is common in many other jurisdictions, youth court in Montana is often viewed as a lesser playing field than district court. One youth court judge claimed that, “youth court is the red-headed step child.” While the public defender in one county spends 25% of his time working on juvenile cases, he is charged with handling 2/3 of the youth court cases. The majority of his caseload is adult misdemeanor and felony cases. Many youth court personnel, including defenders, viewed youth court as a necessary stepping-stone to moving up in the office. However, this feeling was not universal, as the chief public defender in another county did not see youth court as a stepping-stone to a felony caseload and had a very positive attitude towards juvenile work.

Zealous advocacy seemed to be met with hostility and was negatively viewed as a means to get kids “off.”

Over-Reliance on Probation

As discussed above, Montana's juvenile justice system relies heavily upon the judgment and action of the probation and assessment officers in the youth court system. While probation officers are vital members of the juvenile justice community, given systemic and institutional constraints, they are often forced to assume inappropriate roles in this process. In deciding whether to refer a case to the county attorney, handle the case herself, or terminate inquiry into the case, the probation officer is arguably one of the most powerful decision makers in this process. Despite the significant ramifications of these decisions, youth are forced to face this stage without the assistance of counsel to protect their rights. Hence, while the legislature ensures the right to counsel in the formal stages of the adjudicatory process in order to protect youths' rights, the reality is that many youth never get far enough in the formal decision making process to reap the benefits of this protection. In one county, just under 1/3 of the cases referred to probation result in a request by the probation department that the county attorney file a petition. Furthermore, in this county, 90% of the time the county attorney and the probation officer have negotiated a consent decree by the first appearance.

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Not only are probation officers the gatekeeper to the youth court system—and often to other treatment and intervention programs—but their recommendations are highly influential on other decision makers in the process, including county attorneys, placement committees, judges, and even the defenders. In one county, the county attorney reported that the probation officer will often approach him at the initial appearance and say, "this is what we want to do." This county attorney stated that he defers to probation in 90% of the cases. In this same county, the probation officers reported that most of the defense attorneys also rely upon and agree with their recommendations. In one courtroom, it was reported that probation and public defenders agree on the disposition 85–90% of the time. In another county, a contract attorney remarked that "court services has a lot of authority" and "the judges follow their recommendations almost all the time." In even another county, a probation officer noted to an investigator that judges will agree with the probation officers 98% of the time.

The county attorney in another county reported that the Director of Court Services frequently meets *ex parte* with the judges when she hears that the county attorney or the public defender disagree with a recommendation. Both groups of lawyers believe it is futile to contest a disposition because the judge will ultimately follow the probation officer's recommendation. When asked by an investigator about the difference between the probation officer and his attorney, a youth explained that the probation officer "takes me where I need to go. He is always in the Judge's chambers—always."

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Also potentially troubling is that probation officers will talk to youth about the disposition even after an attorney has been appointed for the youth. Indeed, it was reported that some defenders would call the probation officer and ask her to sit down alone with the parents and the youth to work out a deal. Some probation officers also found that because defenders were not educating youth about the legal system, they were forced to assume this responsibility. As one probation officer noted, when parents and kids cannot reach the attorney for information, they call the probation staff.

Furthermore, there does not appear to be a system of checks and balances. Most decisions made by probation are not reviewed by anyone. Also, the majority of defenders stated that they trust probation and often rely on them for information about their clients. Some attorneys even relied on probation officers to communicate with their clients. The failure of defense attorneys to get information themselves about a youth means that they are relying on the probation officer's assessment of what is relevant. This is problematic, as the probation officer is the same person that makes the recommendation to file a case in the first place. A probation officer may unintentionally withhold valuable information about a juvenile or not even obtain it, because of his view of the child or the case. Illustrating the bias that may be inherent in the investigation by probation officers is the comment by one probation officer that he "need[s] something to keep this kid in detention." Furthermore, observations in one courtroom revealed that the county attorney seemed prepared, but had very little to do, given that his case was made by the probation officer. One judge reported that the probation officer is "a watchdog for state money and not necessarily working in the best interest of the child." It is presently unclear how this issue will be impacted by the amendments to the Montana Code making probation officers employees of the state instead of the county.¹³⁶

Investigators also found that defenders were either allowing or relying upon probation officers to order and receive mental health and other evaluations for their young clients. Furthermore, defenders often do not retain the right to review the evaluation results before they are disseminated. One lawsuit reviewed by investigators alleges that the probation officer requested and received three evaluations of a youth prior to getting an evaluation that recommended secure placement. The youth's attorney alleges that he was not notified of the evaluations, nor did the youth or counsel waive rights to allow release of the evaluation. Nevertheless, the probation officer used the evaluation to justify a recommendation for secure placement.¹³⁷

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CHAPTER THREE

Conclusions and Recommendations

While there were reports of very dedicated juvenile defenders, the majority of investigation revealed that the state's indigent juvenile defense system is not supporting this dedication. It is not encouraging zealous advocacy from the attorneys to protect the rights of Montana's children. Not only are there institutional, financial, and professional barriers discouraging the juvenile defenders, but barriers for the youth as well. A public defender in one county mentioned that he would like to say that he makes a difference in the lives of his clients, but he no longer believes it. His current goal is to make the system run the way it should run and to protect the constitution. His biggest challenge is "to hold the state accountable by treating kids fairly and equally." And youth clearly have little faith in their representation, "Public pretenders is what they are. They pretend they want to help you and be your friend, but they want to get rid of you and move onto the next case."

While this report outlines many barriers to zealous representation of Montana's youth, there also appears to be great potential for change in the system. Indeed the participation by people across the state in this assessment is evidence of the desire for change. Furthermore, there already exist several promising approaches in the state.

One district—not visited as part of this assessment—reported an impressive, established system for juvenile offenders which included specialized training for defenders, potentially adequate funding, a teen drug court, prevention and intervention services, use of social workers, and buy-in from defense, prosecution, judges, law enforcement, child protective services, schools, and the treatment community. Another district is in the middle of a conversion from a contract public defender system to a public defender office. The office will serve courts throughout one county. This new development is an opportunity to implement improvements to the representation of youth and emulate model systems. Other districts will soon be deciding whether to change their systems.

Currently, the ACLU has filed a civil rights class action, *ACLU v. Martz*,

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Complaint: C DV-2002-133, against several counties and state government officials alleging the state has failed to provide adequate legal representation to indigent adult criminal defendants. Plaintiffs argue that the State has not set standards for the counties' indigent defense services, does not provide resources to meet the needs of defense services, does not adequately supervise such programs, has allowed counties to under-fund these services to the point that the quality of representation is impeded, and refuses to fully reimburse counties which results in defense budgets being designed so as to limit financial liability rather than ensure quality representation. Plaintiffs maintain that as a result indigent clients are suffering deprivations of their constitutional and statutory rights. In addition, Plaintiffs submit the State has been aware of such deficiencies for decades as two state-wide studies, and a 1982 legislative report cited similar problems that continue to persist without sufficient actions taken to remedy them. While it is hopeful that such impact litigation is being pursued, it is important that the rights of juveniles are also addressed in such efforts.

Furthermore, the Montana legislature has appointed an interim legislative committee to review issues surrounding juvenile justice. The legislature requested the following be addressed:

- (1) an examination of the various elements of the juvenile justice system and how it operates, including the different administrative bodies within the Executive and Judicial Branches of government and their respective roles within the system;
- (2) an examination of the operation of the juvenile justice system in other states;
- (3) an examination specifically of juvenile probation programs and the appropriate body to administer juvenile probation programs and provide management and oversight of juvenile probation officers and a determination of the advisability of creating uniform policies and procedures within juvenile probation; and
- (4) any other aspect of the administration of juvenile justice in Montana that is determined to be appropriate.

The committee plans to spend 40% of its time on the issue of whether the state should assume the obligation of hiring, training, and paying public defenders, 20% of its time on the aforementioned four issues, and the rest on various other topics.¹³⁸ This will be an excellent opportunity for the legislative committee to advise counties and the state on how to improve the provision of indigent juvenile representation. The investigators for this assessment hope that the information contained herein will also assist decision-makers in the state in improving representation to the state's youth.

Across Montana there are dedicated and professional attorneys working on behalf of children in the justice system; this system, however, suffers from a lack of attention, insufficient funding, and a disenfranchised clientele. While the aims of the system are laudable, countless numbers of children are navigating the court system alone, never fully understanding the potential consequences of the decisions they make; children are both frustrated and confused over their experiences in the juvenile justice system.

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The role of defense counsel is critically important. Without well-trained, well-resourced defense counsel there is no practical realization of due process and no accountability of the juvenile justice system. The juvenile defense counsel charged with the enormous responsibility of protecting children's constitutional rights are struggling within a system that is burdensome and does not provide sufficient support, training or compensation. Some defenders remain zealous advocates despite the odds that they may not be successful in their efforts; others, however, have succumbed to the notion that the defense attorney plays an insignificant role in juvenile court. Montana has an obligation to treat children and youth in the justice system with dignity, respect and fairness.

The assessment makes a number of recommendations to ensure continued improvement in the juvenile defender delivery system, to sustain existing reforms, and to assure that youth in the juvenile justice system are guaranteed their constitutional right to effective assistance of counsel. These recommendations include:

The State of Montana should:

1. Provide adequate funding and oversight of the juvenile defender system, including the equitable and fair distribution of available resources statewide.
2. Provide children and youth with access to well-trained, well-resourced counsel at the earliest stage of the process.
3. Provide children and youth with continued representation from arrest through dispositional placement and aftercare.
4. Provide additional, community-based placement alternatives, particularly for children and youth with mental health issues, educational disabilities and girls.
5. Provide increase community-based placement options and services for youth, including prevention and intervention programs, funding for out-of-home treatment programs that can address the mental health and/or co-occurring substance abuse treatment needs of youth, programs aimed at addressing the needs of children with learning disabilities, and strength-based programming for girls.
6. Provide and require specialized training for attorneys representing children in delinquency proceedings, including: child and adolescent development; issues relating to mental health and learning disabilities; mitigation; cultural diversity; the availability and appropriate use of community resources; effective motions practice; effective detention, dispositional, post-dispositional and appellate advocacy; and the ethical considerations in delinquency cases.
7. Study, report, and disseminate outcome studies of all programs available for children in the justice system.
8. Adopt and implement minimum standards for awarding positions and contracts and for representation in youth court.

Countless numbers of children are navigating the court system alone, never fully understanding the potential consequences of the decisions they make.

9. Increase the available resources to support representation of juveniles in delinquency proceedings, including access to independent experts, social workers and investigators.
10. Study, report and recommend solutions on the issues of disproportionate minority representation in the justice system.

Juvenile Defenders should:

1. Increase their use of non-attorneys with expertise (e.g., social workers, investigators and mental health professionals) to assist in representation.
2. Take advantage of any training opportunities and create mentoring systems for the sharing of experience and information.
3. Increase post-dispositional legal services for young clients.
4. Ensure zealous advocacy for the expressed interest of the child, rather than the best interest, from arrest through post-dispositional placement and aftercare.
5. Educate themselves about adolescent development, special education law, mental health issues, treatment programs, and professional standards of practice.
6. Advocate for placement in facilities as close to the client's community and family as is possible.
7. Be more accessible to their clients and ensure that children and youth understand the legal process.
8. Advocate for a more diverse array of treatment options, including in-home services, group homes, and community-based services.
9. Specialize in juvenile cases when possible.
10. Actively participate in movements to plan systemic programs, study issues within the juvenile justice system, and recommend improvements in the system.

APPENDIX

IJA/ABA Juvenile Justice Standards Standards Relating to Counsel for Private Parties

PART I. GENERAL STANDARDS

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

Standard 1.2. Standards in Juvenile Proceedings, Generally.

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

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

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

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

Standard 1.6. Public Statements.

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

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

PART II. PROVISIONS AND ORGANIZATION OF LEGAL SERVICES

Standard 2.1. General Principles.

- (a) *Responsibility for provision of legal services.* Provision of satisfactory legal representation in juvenile and family court cases is the proper concern of all segments of the legal community. It is, accordingly, the responsibility of courts, defender agencies, legal professional groups, individual practitioners and educational institutions to ensure that competent counsel and adequate supporting services are available for representation of all persons with business before juvenile and family courts.
 - (i) Lawyers active in practice should be encouraged to qualify themselves for participation in juvenile and family court cases through formal training, association with experienced juvenile counsel or by other means. To this end, law firms should encourage members to represent parties involved in such matters.
 - (ii) Suitable undergraduate and postgraduate educational curricula concerning legal and nonlegal subjects relevant to representation in juvenile and family courts should regularly be available.
 - (iii) Careful and candid evaluation of representation in cases involving children should be undertaken by judicial and professional groups, including the organized bar, particularly but not solely where assigned counsel—whether public or private—appears.
- (b) *Compensation for services.*
 - (i) Lawyers participating in juvenile court matters, whether retained or appointed, are entitled to reasonable compensation for time and services performed according to prevailing professional standards. In determining fees for their services, lawyers should take into account the time and labor actually required, the skill required to perform the legal service properly, the likelihood that acceptance of the case will preclude other employment for the lawyer, the fee customarily charged in the locality for similar legal services, the possible consequences of the proceedings, and the experience, reputation and ability of the lawyer or lawyers performing the services. In setting fees lawyers should also consider the performance of services incident to full representation in cases involving juveniles, including counseling and activities related to locating or evaluating appropriate community services for a client or a client's family.
 - (ii) Lawyers should also take into account in determining fees the capacity of a client to pay the fee. The resources of parents who agree to pay for representation of their children in juvenile court proceedings may be considered if there is no adversity of interest as defined in Standard 3.2, *infra*, and if the parents understand that a lawyer's entire loyalty is to the child and that the parents have no control over the case. Where adversity of interests or desires between parent and child becomes apparent during the course of representation, a lawyer should be ready to reconsider the fee taking into account the child's resources alone.
 - (iii) As in all other cases of representation, it is unprofessional conduct for a lawyer to overreach the client or the client's parents in setting a fee, to imply that compensation is for anything other than professional services rendered by the lawyer or by others for him or her, to divide the fee with a layman, or to undertake representation in cases where no financial award may result on the understanding that payment of the fee is contingent in any way on the outcome of the case.
 - (iv) Lawyers employed in a legal aid or public defender office should be compensated on a basis equivalent to that paid other government attorneys of similar qualification, experience and responsibility.

- (c) *Supporting services.* Competent representation cannot be assured unless adequate supporting services are available. Representation in cases involving juveniles typically requires investigatory, expert and other nonlegal services. These should be available to lawyers and to their clients at all stages of juvenile and family court proceedings.
 - (i) Where lawyers are assigned, they should have regular access to all reasonably necessary supporting services.
 - (ii) Where a defender system is involved, adequate supporting services should be available within the organization itself.
- (d) *Independence.* Any plan for providing counsel to private parties in juvenile court proceedings must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship.

Standard 2.2. Organization of Services.

- (a) *In general.* Counsel should be provided in a systematic manner and in accordance with a widely publicized plan. Where possible, a coordinated plan for representation which combines defender and assigned counsel systems should be adopted.
- (b) *Defender systems.*
 - (i) Application of general defender standards. A defender system responsible for representation in some or all juvenile court proceedings generally should apply to staff and offices engaged in juvenile court matters its usual standards for selection, supervision, assignment and tenure of lawyers, restrictions on private practice, provision of facilities and other organizational procedures.
 - (ii) Facilities. If local circumstances require, the defender system should maintain a separate office for juvenile court legal and supporting staff, located in a place convenient to the courts and equipped with adequate library, interviewing and other facilities. A supervising attorney experienced in juvenile court representation should be assigned to and responsible for the operation of that office.
 - (iii) Specialization. While rotation of defender staff from one duty to another is an appropriate training device, there should be opportunity for staff to specialize in juvenile court representation to the extent local circumstances permit.
 - (iv) Caseload. It is the responsibility of every defender office to ensure that its personnel can offer prompt, full and effective counseling and representation to each client. A defender office should not accept more assignments than its staff can adequately discharge.
- (c) *Assigned counsel systems.*
 - (i) An assigned counsel plan should have available to it an adequate pool of competent attorneys experienced in juvenile court matters and an adequate plan for all necessary legal and supporting services.
 - (ii) Appointments through an assigned counsel system should be made, as nearly as possible, according to some rational and systematic sequence. Where the nature of the action or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

Standard 2.3. Types of Proceedings.

- (a) *Delinquency and in need of supervision proceedings.*
 - (i) Counsel should be provided for any juvenile subject to delinquency or in need of supervision proceedings.
 - (ii) Legal representation should also be provided the juvenile in all proceedings arising from or related to a delinquency or in need of supervision action, including mental competency, transfer, postdisposition, probation revocation, and classification, institu-

tional transfer, disciplinary or other administrative proceedings related to the treatment process which may substantially affect the juvenile's custody, status or course of treatment. The nature of the forum and the formal classification of the proceeding is irrelevant for this purpose.

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

Standard 2.4. Stages Of Proceedings.

- (a) *Initial provision of counsel.*
 - (i) When a juvenile is taken into custody, placed in detention or made subject to an intake process, the authorities taking such action have the responsibility promptly to notify the juvenile's lawyer, if there is one, or advise the juvenile with respect to the availability of legal counsel.
 - (ii) In administrative or judicial postdispositional proceedings which may affect the juvenile's custody, status or course of treatment, counsel should be available at the earliest stage of the decisional process, whether the respondent is present or not. Notification of counsel and, where necessary, provision of counsel in such proceedings is the responsibility of the judicial or administrative agency.
- (b) *Duration of representation and withdrawal of counsel.*
 - (i) Lawyers initially retained or appointed should continue their representation through all stages of the proceeding, unless geographical or other compelling factors make continued participation impracticable.
 - (ii) Once appointed or retained, counsel should not request leave to withdraw unless compelled by serious illness or other incapacity, or unless contemporaneous or announced future conduct of the client is such as seriously to compromise the lawyer's professional integrity. Counsel should not seek to withdraw on the belief that the contentions of the client lack merit, but should present for consideration such points as the client desires to be raised provided counsel can do so without violating standards of professional ethics.
 - (iii) If leave to withdraw is granted, or if the client justifiably asks that counsel be replaced, successor counsel should be available.

PART III. THE LAWYER-CLIENT RELATIONSHIP

Standard 3.1. The Nature Of The Relationship.

- (a) *Client's interests paramount.* However engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance.
- (b) *Determination of client's interests.*
 - (i) Generally. In general, determination of the client's interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney.
 - (ii) Counsel for the juvenile.
 - [a] Counsel for the respondent in a delinquency or in need of supervision proceeding should ordinarily be bound by the client's definition of his or her interests with

respect to admission or denial of the facts or conditions alleged. It is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings.

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

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

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

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

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

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

Standard 3.2 Adversity of Interests.

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

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

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

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

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

Standard 3.3. Confidentiality.

- (a) *Establishment of confidential relationship.* Counsel should seek from the outset to establish a relationship of trust and confidence with the client. The lawyer should explain that full disclosure to counsel of all facts known to the client is necessary for effective representation, and at the same time explain that the lawyer's obligation of confidentiality makes privileged the client's disclosures relating to the case.
- (b) *Preservation of client's confidences and secrets.*
 - (i) Except as permitted by 3.3(d), below, an attorney should not knowingly reveal a confidence or secret of a client to another, including the parent of a juvenile client.
 - (ii) Except as permitted by 3.3(d), below, an attorney should not knowingly use a confidence or secret of a client to the disadvantage of the client or, unless the attorney has secured the consent of the client after full disclosure, for the attorney's own advantage or that of a third person.
- (c) *Preservation of secrets of a juvenile client's parent or guardian.* The attorney should not reveal information gained from or concerning the parent or guardian of a juvenile client in the course of representation with respect to a delinquency or in need of supervision proceeding against the client, where (1) the parent or guardian has requested the information be held inviolate, or (2) disclosure of the information would likely be embarrassing or detrimental to the parent or guardian and (3) preservation would not conflict with the attorney's primary responsibility to the interests of the client.
 - (i) The attorney should not encourage secret communications when it is apparent that the parent or guardian believes those communications to be confidential or privileged and disclosure may become necessary to full and effective representation of the client.
 - (ii) Except as permitted by 3.3(d), below, an attorney should not knowingly reveal the parent's secret communication to others or use a secret communication to the parent's disadvantage or to the advantage of the attorney or of a third person, unless (1) the parent competently consents to such revelation or use after full disclosure or (2) such disclosure or use is necessary to the discharge of the attorney's primary responsibility to the client.
- (d) *Disclosure of confidential communications.* In addition to circumstances specifically mentioned above, a lawyer may reveal:
 - (i) Confidences or secrets with the informed and competent consent of the client or clients affected, but only after full disclosure of all relevant circumstances to them. If the client is a juvenile incapable of considered judgment with respect to disclosure of a secret or confidence, a lawyer may reveal such communications if such disclosure (1) will not disadvantage the juvenile and (2) will further rendition of counseling, advice or other service to the client.
 - (ii) Confidences or secrets when permitted under disciplinary rules of the ABA Code of Professional Responsibility or as required by law or court order.
 - (iii) The intention of a client to commit a crime or an act which if done by an adult would constitute a crime, or acts that constitute neglect or abuse of a child, together with any information necessary to prevent such conduct. A lawyer must reveal such intention if the conduct would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes disclosure is necessary to prevent the harm. If feasible, the lawyer should first inform the client of the duty to make such revelation and seek to persuade the client to abandon the plan.
 - (iv) Confidences or secrets material to an action to collect a fee or to defend himself or herself or any employees or associates against an accusation of wrongful conduct.

Standard 3.4. Advice and Service with Respect to Anticipated Unlawful Conduct. It is unprofessional conduct for a lawyer to assist a client to engage in conduct the lawyer believes to be ille-

gal or fraudulent, except as part of a bona fide effort to determine the validity, scope, meaning or application of a law.

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

PART IV. INITIAL STAGES OF REPRESENTATION

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

Standard 4.2. Interviewing the Client.

- (a) The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.
- (b) In interviewing a client, it is proper for the lawyer to question the credibility of the client's statements or those of any other witness. The lawyer may not, however, suggest expressly or by implication that the client or any other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may the lawyer intimate that the client should be less than candid in revealing material facts to the attorney.

Standard 4.3. Investigation and Preparation.

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

Standard 4.4. Relations with Prospective Witnesses.

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

PART V. ADVISING AND COUNSELING THE CLIENT

Standard 5.1. Advising the Client Concerning the Case.

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

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

Standard 5.2. Control and Direction of the Case.

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

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

PART VI. INTAKE, EARLY DISPOSITION AND DETENTION

Standard 6.1. Intake and Early Disposition Generally. Whenever the nature and circumstances of the case permit, counsel should explore the possibility of early diversion from the formal juvenile court process through subjudicial agencies and other community resources. Participation in pre- or nonjudicial stages of the juvenile court process may be critical to such diversion, as well as to protection of the client's rights.

Standard 6.2. Intake Hearings.

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

Standard 6.3. Early Disposition.

- (a) When the client admits the acts or conditions alleged in the juvenile court proceeding and, after investigation, the lawyer is satisfied that the admission is factually supported and

that the court would have jurisdiction to act, the lawyer should, with the client's consent, consider developing or cooperating in the development of a plan for informal or voluntary adjustment of the case.

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

Standard 6.4. Detention.

- (a) If the client is detained or the client's child is held in shelter care, the lawyer should immediately consider all steps that may in good faith be taken to secure the child's release from custody.
- (b) Where the intake department has initial responsibility for custodial decisions, the lawyer should promptly seek to discover the grounds for removal from the home and may present facts and arguments for release at the intake hearing or earlier. If a judicial detention hearing will be held, the attorney should be prepared, where circumstances warrant, to present facts and arguments relating to the jurisdictional sufficiency of the allegations, the appropriateness of the place of and criteria used for detention, and any noncompliance with procedures for referral to court or for detention. The attorney should also be prepared to present evidence with regard to the necessity for detention and a plan for pretrial release of the juvenile.
- (c) The lawyer should not personally guarantee the attendance or behavior of the client or any other person, whether as surety on a bail bond or otherwise.

PART VII. ADJUDICATION

Standard 7.1. Adjudication without Trial.

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

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

Standard 7.3. Discovery and Motion Practice.

- (a) *Discovery.*
 - (i) Counsel should promptly seek disclosure of any documents, exhibits or other information potentially material to representation of clients in juvenile court proceedings. If such disclosure is not readily available through informal processes, counsel should diligently pursue formal methods of discovery including, where appropriate, the filing of motions for bills of particulars, for discovery and inspection of exhibits, docu-

ments and photographs, for production of statements by and evidence favorable to the respondent, for production of a list of witnesses, and for the taking of depositions.

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

(b) Other motions. Where the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client's rights, such as motions to dismiss the petition, to suppress evidence, for mental examination, or appointment of an investigator or expert witness, for severance, or to disqualify a judge. Such motions should ordinarily be made in writing when that would be required for similar motions in civil or criminal proceedings in the jurisdiction. If a hearing on the motion is required, it should be scheduled at some time prior to the adjudication hearing if there is any likelihood that consolidation will work to the client's disadvantage.

Standard 7.4. Compliance with Orders.

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

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

Standard 7.5. Relations with Court and Participants.

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

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

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

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

Standard 7.7. Presentation of Evidence.

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

Standard 7.8. Examination of Witnesses.

(a) The lawyer in juvenile court proceedings should be prepared to examine fully any witness whose testimony is damaging to the client's interests. It is unprofessional conduct for

counsel knowingly to forego or limit examination of a witness when it is obvious that failure to examine fully will prejudice the client's legitimate interests.

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

Standard 7.9. Testimony by the Respondent.

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

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

PART VIII. TRANSFER PROCEEDINGS

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

Standard 8.2. Investigation and Preparation.

- (a) In any case where transfer is likely, counsel should seek to discover at the earliest opportunity whether transfer will be sought and, if so, the procedure and criteria according to which that determination will be made.
- (b) The lawyer should promptly investigate all circumstances of the case bearing on the appropriateness of transfer and should seek disclosure of any reports or other evidence that will be submitted to or may be considered by the court in the course of transfer proceedings. Where circumstances warrant, counsel should promptly move for appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protection of the client's rights.

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

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

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

PART IX. DISPOSITION

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

Standard 9.2. Investigation and Preparation.

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

Standard 9.3. Counseling Prior to Disposition.

- (a) The lawyer should explain to the client the nature of the disposition hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities

under the proposed dispositional plan. Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.

- (b) When psychological or psychiatric evaluations are ordered by the court or arranged by counsel prior to disposition, the lawyer should explain the nature of the procedure to the client and encourage the client's cooperation with the person or persons administering the diagnostic procedure.
- (c) The lawyer must exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical and social reports, tests or evaluations bearing on the client's history or condition or, if the client is a juvenile, the history or condition of the client's parents. In general, the lawyer should not disclose data or conclusions contained in such reports to the extent that, in the lawyer's judgment based on knowledge of the client and the client's family, revelation would be likely to affect adversely the client's well-being or relationships within the family and disclosure is not necessary to protect the client's interests in the proceeding.

Standard 9.4. Disposition Hearing.

- (a) It is the lawyer's duty to insist that proper procedure be followed throughout the disposition stage and that orders entered be based on adequate reliable evidence.
- (b) Where the dispositional hearing is not separate from adjudication or where the court does not have before it all evidence required by statute, rules of court or the circumstances of the case, the lawyer should seek a continuance until such evidence can be presented if to do so would serve the client's interests.
- (c) The lawyer at disposition should be free to examine fully and to impeach any witness whose evidence is damaging to the client's interests and to challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court. The lawyer should not knowingly limit or forego examination or contradiction by proof of any witness, including a social worker or probation department officer, when failure to examine fully will prejudice the client's interests. Counsel may seek to compel the presence of witnesses whose statements of fact or opinion are before the court or the production of other evidence on which conclusions of fact presented at disposition are based.
- (d) The lawyer may, during disposition, ask that the client be excused during presentation of evidence when, in counsel's judgment, exposure to a particular item of evidence would adversely affect the well-being of the client or the client's relationship with his or her family, and the client's presence is not necessary to protecting his or her interests in the proceeding.

Standard 9.5. Counseling After Disposition.

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

PART X. REPRESENTATION AFTER DISPOSITION

Standard 10.1. Relations with the Client After Disposition.

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

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

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

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

Standard 10.3. Counsel on Appeal.

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

Standard 10.4. Conduct of the Appeal.

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

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

- (a) A lawyer who has represented a client through trial and/or appellate proceedings should be prepared to continue representation when post-dispositional action, whether affirmative or defensive, is sought, unless new counsel is appointed at the request of the client or continued representation would, because of geographical considerations or other factors, work unreasonable hardship.
- (b) Counsel representing a client in post-dispositional matters should promptly undertake any factual or legal investigation in order to determine whether grounds exist for relief

from juvenile court or administrative action. If there is reasonable prospect of a favorable result, the lawyer should advise the client and, if their interests are not adverse, the client's parents of the nature, consequences, probable outcome and advantages or disadvantages associated with such proceedings.

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

Standard 10.6. Probation Revocation; Parole Revocation.

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

Standard 10.7. Challenges to the Effectiveness of Counsel.

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

ENDNOTES

- ¹ *In Re Gault*, 387 U.S. 1, 15 (1967).
- ² IJA/ABA JUVENILE JUSTICE STANDARDS (1980).
- ³ Puritz, Burrell, Schwartz, Soler, Warboys. *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. American Bar Association Juvenile Justice Center (December 1995).
- ⁴ *Performance Audit Report to Legislature: Juvenile Justice in Montana*, 92P-28, June, 1993.
- ⁵ *Performance Audit Follow-up Report to Legislature: Juvenile Justice in Montana*, 94SP-40, June 1995, p. 2.
- ⁶ *A Report of the Juvenile Justice and Juvenile Mental Health Study*, December, 1996.
- ⁷ *Performance Audit Follow-up Report to Legislature: Juvenile Justice in Montana* 94SP-40, p. 2, June, 1995.
- ⁸ MSOTA Results of Survey Conducted at Youth Correctional Facility
- ⁹ *Performance Audit Report to Legislature: Juvenile Detention*, p. 12–13, October, 2000
- ¹⁰ *Ibid* at 14-15.
- ¹¹ *Ibid* at 15-16.
- ¹² *Id.*
- ¹³ *Ibid* at 26-27.
- ¹⁴ *Ibid* at 27-28.
- ¹⁵ U.S. Census Bureau. DP-1 Profile of General Demographic Characteristics 200. <http://factfinder.census.gov/home/en/datanores/exps/flu.htm>.
- ¹⁶ OJJDP Statistical Briefing Book. Online <http://ojjdp.ncjrs.org/ojstabb/html/qa252.html>. 20 January 2002.
- ¹⁷ http://www.childrensdefense.org/fs_census2000_pop.htm.
- ¹⁸ http://www.childrensdefense.org/fs_census2000_pop.htm.
- ¹⁹ <http://www.aecf.org> KidsCount 2003.
- ²⁰ <http://www.aecf.org> KidsCount 2003 (Ranking Montana 10th in the US on this indicator).
- ²¹ <http://www.aecf.org/cgi-bin/kc.cgi?action=ranking&variable=fte&year=2000>.
- ²² <http://www.aecf.org> KidsCount 2003.
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- ²⁴ <http://www.opi.state.mt.us/PDF/EdProfile/Profile2001.pdf>, p. 9.
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