

**Testimony of Robert E. Shepherd, Jr.**  
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**Juvenile Justice Committee**  
**American Bar Association Criminal Justice Section**

before the  
**HOUSE COMMITTEE ON COURTS OF JUSTICE**

on

House Bill 600,

A Bill to amend and reenact §§ 16.1-250, 16.1-250.1, 16.1-266, 16.1-267 and 16.1-268 of the  
Code of Virginia, relating to detention hearings.

January 30, 2004

Mr. Chairman and members of the Committee, thank you for the opportunity to appear before you to discuss Delegate Dudley's proposed juvenile justice legislation, House Bill 600. I am here today in my capacity as a member and former chair of the American Bar Association's Juvenile Justice Committee and will comment on the proposed legislation in light of standards and policy adopted by the American Bar Association. I am delighted to have the opportunity to discuss these critically important juvenile justice issues.

The American Bar Association is the world's largest voluntary professional membership organization, and for over 125 years it has placed a high priority on promoting justice that requires fair treatment and is based on sound reason. The Juvenile Justice Committee works specifically to improve the administration of justice for youth. This commitment spans over three decades, beginning in the early 1970s with the promulgation of the *Institute for Judicial Administration/American Bar Association Juvenile Justice Standards*. These Standards were the result of over a decade of critical thought, discussion, writing and editing by over 300 multidisciplinary experts leading to 23 volumes addressing the administration of juvenile justice. The fundamental objective guiding these experts was that the Standards be designed to establish a stable and enduring juvenile justice system for our society, not to fluctuate in response to transitory headlines or controversies.

In addition to the *IJA/ABA Juvenile Justice Standards*, ABA policy has consistently supported upgrades, reforms and improvements to the juvenile justice system. Through the work of the Juvenile Justice Center, an outgrowth of the expanding work of the Committee, a balanced and thoughtful approach to legislative, judicial and executive agency reform has been at work, supporting practices that are just and fair.

The American Bar Association supported an intensive and arduous process of developing standards for juvenile justice that would withstand the test of time. Throughout these Standards and numerous subsequent policies, the ABA has a strong position in favor of

the notion that youth should be treated differently from adults and that their age and development should be considered at every phase of the court process.

This proposed legislation, as a whole, respects that position. I will address myself to four areas of changes to current law embodied in this bill that are of particular interest from the perspective of the American Bar Association and the IJA/ABA Juvenile Justice Standards.

### **Counsel for the Juvenile Prior to Detention Hearing**

Perhaps the most significant change surrounding detention hearings proposed by this bill is the requirement that prior to the detention hearing, the court shall appoint an attorney to represent the child, unless an attorney has been retained and appears on behalf of the child. From the perspective of the American Bar Association, this would mark a significant change for the better. Legal representation in screening, judicial and administrative proceedings which may affect a juvenile's custody, status or course of treatment is viewed throughout the Standards as important and necessary.

The provision in this Bill for court-appointed counsel prior to the detention hearing is strongly supported by the IJA/ABA Juvenile Justice Standards. Those Standards call for "the effective assistance of counsel at all stages of the proceeding," and advise that the right to counsel should attach as soon as possible. (Pretrial § 5.1). The prompt provision of counsel will relieve pressures on overcrowded detention facilities by speeding the release of juveniles whose continued incarceration there is unnecessary.

The proposed amendments would also give attorneys for juveniles the opportunity to represent their clients in the manner prescribed by the IJA/ABA Juvenile Justice Standards. For example, under the standards, attorneys are advised that "[m]any 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." (Counsel for Private Parties § 4.1).

Youthful clients stand in particular need of careful advice concerning their constitutional rights by someone who is expressly and solely identified with their interests. The child "needs counsel and support if he is not to become the victim first of fear, then of panic." *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948). Parents alone cannot provide advice because their interests are not always identical with those of the child. Moreover, in some cases physical items must be preserved or analyzed and witnesses located if evidence is not to be lost. Prompt medical or psychiatric examination of the client can also be significant. Indeed, the need for prompt action is a theme that runs throughout the sections of the Standards that discuss the responsibilities of attorneys. Giving attorneys the ability to move quickly also supports the efficient movement of matters through the juvenile court.

## **Waiver of the Right to Counsel**

House Bill 600 would require that a child cannot waive his right to counsel unless he has consulted with an attorney, the attorney and the child have signed a written waiver, and the court has determined that the waiver is free and voluntary. This change would significantly improve Virginia's juvenile justice system by protecting juveniles' rights and by assisting the court in handling matters efficiently. While the fact of counsel's advice and signature cannot discharge the judge or other administering official from the responsibility to look behind the express waiver of the right to counsel, the requirements of these amendments should relieve the official who administers waiver from inquiring in great detail into the juvenile's capacity, understanding and voluntariness in executing it.

The procedure for waiver of the right to counsel outlined in these amendments is quite similar to that proposed by the IJA/ABA Juvenile Justice Standards for all waivers of the rights of child respondents. Specifically, the Standards require that "[e]xpress waivers should be executed in writing" (Pretrial § 6.4) and that a juvenile may not personally waive any right "except in the presence of and after consultation with counsel." (Pretrial § 6.2).

In total, the requirements with regard to waiver avoid several problems with the current system. The 'totality' test by which Virginia judges the validity of waivers is difficult to administer, and invites uncertainty at all stages of the proceedings. Few juveniles have the experience and understanding to decide meaningfully that the assistance of counsel would not be helpful. One study indicates that in waiving Miranda rights, 86 of 90 minors waived without a thorough understanding of their action. Ferguson and Douglas, "A Study of Juvenile Waiver," 7 *San Diego L. Rev.* 39, 53-54 (1970). A requirement that the child's parents advise the juvenile and/or concur in the waiver does not cure these difficulties. Studies indicate that, for several reasons, parents may be of little aid to their children in deciding whether to waive counsel. The parents may themselves not be able to adequately understand the consequences of waiver, and may be equally swayed by official pressures to waive.

## **Postponement of Decision on Indigence**

House Bill 600 creates an initial presumption of indigence for the purposes of the detention hearing, delaying the court's traditional inquiry into financial means until after the detention hearing. From the perspective of the American Bar Association this is a step in the right direction. The IJA/ABA Juvenile Justice Standards require a procedure that at no time questions the financial means of the child and his parents (Pretrial § 5.3). This Standard is based in part on the consideration of the harm caused to a juvenile who is perceived to be a financial drain on his family, and on the reality that the large majority of families with the means to do so will have already hired private counsel.

The simple postponement of the financial inquiry offers several practical benefits for both individual children and Virginia's juvenile justice system as a whole. The values of prompt attorney action discussed above are served by removing the obstacle of a

financial inquiry that stands between a court-appointed attorney and her client. Also, in many instances, it is too much to expect the child or the parents to appreciate the need for representation from the outset. Under this legislation, child and parent benefit from the advise of counsel before having to decide on whether to retain private counsel after the detention hearing.

### **Continuity of Representation**

This bill provides an important clarification that ensures that children, parents and other participants in the juvenile court are provided with consistent representation. By specifically noting that appointed counsel continue their representation through appeals to the Circuit Court, unless affirmatively relieved or replaced, House Bill 600 is in line with the Standards' requirement that "[l]awyers initially retained or appointed should continue their representation through all stages of the proceeding, unless geographical or other compelling factors make continued participation impracticable." (Counsel § 2.4(b)). This standard follows the view adopted by the American Bar Association with regard to duration of representation in criminal matters. Continuity is of particular importance in juvenile court proceedings, where close familiarity with clients' circumstances and behavior and those of their parents are of critical significance at disposition. Accordingly, it is undesirable for different lawyers, even within the same office or agency, to represent the same child or other respondent at the various stages of the juvenile court process.

### **Conclusion**

I greatly appreciate the opportunity to appear before you today on these issues of utmost importance. I urge you to recognize the effort, consideration and experience underlying the Institute of Judicial Administration/American Bar Association Juvenile Justice Standards while considering this proposed legislation.

House Bill 600 contains several significant changes to the detention procedures in juvenile courts that are extremely positive.

I commend this Committee for holding hearings on this proposed legislation.