

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

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

PREAMBLE

A. GOAL OF THESE PRINCIPLES

These principles are developed as a guide to aid defenders in advocating most effectively for an indigent juvenile client's release from detention in delinquency court.¹ Defenders can be at a distinct disadvantage at the detention determination, whether it is at the beginning of the case, when indigent defense counsel often has the least information about the child and the charge compared to every other person in the courtroom,² or at the end of the case, when the child is post-disposition, and an unspoken but unmistakable presumption to detain creeps into the case discourse.³ But juvenile indigent defense counsel have a duty "to explore promptly the least restrictive form of release, the alternatives to detention, and the opportunities for detention review, at every stage of the proceedings where such an inquiry would be relevant."⁴ Therefore, it is critically important for juvenile defenders to be as well-prepared as possible when they walk into detention hearings, where counsel's often seemingly impossible goal is to present a history of the client leading up to the present day, along with an individualized release plan that is responsive to the client's expressed legitimate interests⁵ and that bears in mind the needs of the court.

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

B. DETENTION ADVOCACY IS CRUCIAL TO EVERY ASPECT OF THE CASE, INCLUDING THE DEVELOPMENT OF THE ATTORNEY/CLIENT RELATIONSHIP.

There are several reasons defenders must advocate aggressively at detention hearings. First, the detention decision is critical to the client's ability to prepare for trial.

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

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

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

C. INDIGENT DEFENSE DELIVERY SYSTEMS MUST PAY PARTICULAR ATTENTION TO THE DISPROPORTIONATE DETENTION OF THE MOST VULNERABLE AND OVER-REPRESENTED GROUPS OF CHILDREN IN THE DELINQUENCY SYSTEM.

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

TEN PRINCIPLES

1

AT THE DETENTION HEARING, AS AT ALL OTHER STAGES OF A CASE, DEFENDERS FULFILL THEIR ETHICAL OBLIGATION TO ADVOCATE FOR THE EXPRESSED LEGITIMATE INTERESTS OF EACH CHILD CLIENT.

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

2

DEFENDERS CONSULT WITH THE CHILD CLIENT AS EARLY AS POSSIBLE, AND IN ALL CASES PRIOR TO THE DETENTION HEARING.

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

3

DEFENSE COUNSEL PREPARES FOR THE HEARING WITH CREATIVE AND THOROUGH INVESTIGATION.

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

4

DEFENDERS USE ALL AVAILABLE ARGUMENTS AND INFORMATION TO OPPOSE A FINDING OF PROBABLE CAUSE.

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

5

DEFENDERS ARGUE FOR JUDGES TO ABIDE BY STATUTORY CRITERIA FOR ORDERING DETENTION, SUCH AS RISK OF FLIGHT AND DANGEROUSNESS.

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

6

IN CONSULTATION WITH THE CLIENT, DEFENDERS INVESTIGATE AND ARGUE FOR ALTERNATIVES TO DETENTION.

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

7

DEFENDERS ARE AWARE OF CURRENT RESEARCH ON THE HARMFUL EFFECTS OF DETENTION AND, WHEN APPROPRIATE, USE THIS RESEARCH TO ARGUE AGAINST DETENTION.

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

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

8 DEFENDERS REQUEST THAT THE JUDGE MAKE WRITTEN FINDINGS AND AN ORDER REGARDING DETENTION.

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

9 DEFENDERS ENSURE THAT EACH CHILD CLIENT WHO IS RELEASED UNDERSTANDS THE CONDITIONS OF HIS OR HER RELEASE AND IS PREPARED TO FULFILL THESE CONDITIONS.

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

10 DEFENDERS APPEAL DETENTION DECISIONS IMMEDIATELY, IF WARRANTED AND IN CONSULTATION WITH THE CLIENT.

- A. After a detention hearing, defense counsel should immediately inform the client of his or her right to appeal, the timeline of an appeal, the likely outcome, and the affect that an appeal might have on the client's trial case.
- B. If counsel is not prepared to handle the client's appeal, counsel should transfer the case to another attorney who is.

ENDNOTES

- 1 For the purposes of these *Principles*, detention means confinement in a secure detention facility during the interim period between arrest and adjudication.
- 2 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 4 (2004), available on the web at http://www.njdc.info/pdf/detention_guide.pdf.
- 3 See generally, *Maine: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Maryland: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Montana: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters* (2003); *Florida: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2006). All of NJDC's state assessments are available at on the web at <http://www.njdc.info/assessments.php>.
- 4 Institute for Judicial Administration/American Bar Association (IJA/ABA), *Juvenile Justice Standards, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Standard 8.2 Standards for the Defense Attorney.
- 5 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties*, Standard 3.1 The Lawyer-Client Relationship (stating, "[h]owever engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance").
- 6 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 5 (2004).
- 7 National Juvenile Detention Association and Youth Law Center, *Crowding in Juvenile Detention Centers: a Problem Solving Manual* (Dec 1998) 5-10, on the web at www.njda.com/learn-materials-pub-r0711.html.
- 8 Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* 4 (2006).
- 9 *Id.* at 5.
- 10 Bart Lubow, 11 *Juvenile Justice Update* 1, 2, *Reducing Inappropriate Detention: A Focus on the Role of Defense Attorneys* (Aug/Sep 2005).
- 11 American Council of Chief Defenders & National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems* (January 2005) (http://www.njdc.info/pdf/10_Principles.pdf).
- 12 Bart Lubow, 11 *Juvenile Justice Update*, *Reducing Inappropriate Detention: A Focus on the Role of Defense Attorneys* 1, 2 (Aug/Sep 2005); see also Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* 12 (2006)(stating that "[e]ven in states with tiny ethnic and racial minority populations, (like Minnesota, where the general population is 90% white, and Pennsylvania, where the general population is 85% white) more than half of the detention population are youth of color").
- 13 *Id.* at 2, 14 (stating, "Indeed, detained youth are generally among the most disadvantaged and disconnected people in our country. . . These youth have some of the worst odds of making a successful transition to adulthood in our country, and detention lowers those odds still further.")
- 14 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties*, Standard 3.1 The Lawyer-Client Relationship.
- 15 *Id.*
- 16 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Standard 8.1 Conflicts of Interest.
- 17 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 14 (2004).
- 18 *Gerstein v. Pugh*, 420 U.S. 103 (1975).
- 19 Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Standard 4.2 Burden of Proof.
- 20 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 17-20 (2004) (listing potential detention hearing arguments concerning dangerousness and risk of flight).
- 21 *Id.* at 21.
- 22 *Id.* at 22.
- 23 The Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards, Standards Relating to Appeals and Collateral Review*, recognizes the importance of having hearings transcribed. According to Standard 3.2, The Right to Counsel and Records, "Any party entitled to an appeal under Standard 2.2, or his or her counsel, is entitled to a copy of the verbatim transcript of the adjudication and dispositional hearings and any matter appearing in the court file."

*For more information, please contact the National Juvenile Defender Center
at 202.452.0010 or at inquiries@njdc.info.*

ACHIEVING EXCELLENCE IN DETENTION ADVOCACY:

Guidelines for Juvenile Defenders to Provide Zealous Advocacy at Initial Detention Hearings

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

These guidelines are designed to assist defenders in assessing their advocacy at the traditional, three-part initial hearings held in most jurisdictions: arraignment, the probable cause determination, and the detention hearing. In some jurisdictions, these are all collapsed into a single hearing. Because many jurisdictions still allow children to waive their right to counsel and/or plead at the initial hearing, some questions allude to these practices.

This tool is divided into two main sections. The first presents a series of questions about juvenile defense practice. The second section reviews policy and system procedures that may be impacting practice. Taken together, these two sections should

provide defenders with the information necessary to identify practice gaps. Please contact NJDC with questions, suggestions, and technical assistance needs to move ahead. We look forward to working with defenders to enhance detention practice at JDAI sites.

Consider the three most recent cases in which you represented a child at an initial detention hearing. For each of these cases, consider the following questions. Use these questions to think about which elements of detention advocacy you regularly provide to your child clients. The more of the above elements you can provide in each case, the more effective your advocacy will be.

I. PRACTICE ISSUES

MEETING YOUR CLIENT

Establishing the Attorney-Client Relationship

- Did you meet with your client prior to the detention hearing?
- Did you meet in a private location where your conversations could not be overheard?
 - Did you speak with your client at any time without parents, guardians or any other people or parties present?
- Did you ascertain your client’s expressed legitimate interests with respect to detention?
 - If the jurisdiction has detention team meetings, in which parties decide their positions on the child’s detention status outside of the courtroom, does the defender advocate zealously for the child’s expressed interest both in this meeting and in court before the judge?
- Did you also discuss the following with each client using age-appropriate language:
 - attorney-client confidentiality rules
 - your ethical duty to zealously advocate for the expressed legitimate interests of your client, even when the child’s expressed interest conflicts with your sound legal advice or with your own personal judgment about what might be in the child’s best interests
 - if client is detained, how client is doing in detention
 - whether there is any evidence of harassment or mistreatment of the client in detention

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- o client's right to remain silent
 - o information relevant to the detention decision under your state's law, including whether the client has a prior record, the client's school attendance and performance, the client's home life, and, in jurisdictions that require them, what the results of the client's drug test will be
 - o the possible levels of detention (i.e., secure versus non-secure), and the client's opinion on possible alternatives to detention
 - o specific reasons that argue against detaining this child (vulnerability, age, special needs, health concerns, suicidal, etc.)
 - o client's objectives for your legal representation
 - o what the client should expect at the upcoming hearing, including an explanation of the purpose of the hearing and of the roles of each of the institutional actors (i.e. the judge, the prosecutor, and the probation officer) involved
 - o client's choice about whether to admit or deny the charges (plead guilty or not guilty)
 - o client's version of events to prepare for the probable cause hearing, to get names, contact information, descriptions, or hang-out locations of potential witnesses, and/or to begin investigation planning
- Did you give the client your contact information and explain how s/he can reach you?
 - Did you bring and get the client's signature on the appropriate release forms to allow you to subpoena the client's educational, medical, mental health, and other records?
 - If you are not appointed with enough time to meet with each client individually, do you enlist the aid of a social worker, law student, or legal intern to interview clients for you before their hearings while you are appearing in court?

PREPARING FOR THE HEARING

Knowledge of Applicable Detention Law and Alternatives

- Are you aware of the current case law, statutes, and court rules that define when a child can be detained in your jurisdiction?
- Are you aware of current research on the harmful effects of detention, both generally and specifically with respect to the places where the client is likely to be held?
- Are you aware of the current community-based alternatives to detention?

Taking a Comprehensive Client History

- Did you learn about the client's histories in the following areas (*see* Sample Detention Interview Form):
 - o education
 - o extracurricular activities, hobbies, and other strengths
 - o special needs
 - o mental health and health issues, including the names and doses of any prescribed medications
- Did you consider, in consultation with your client, family members to whom the client could be released?
- Did you consider, in consultation with your client, community-based services that the client believes could help the client stay in the community?
- Did you consider, in consultation with your client, other community-based programs besides family members to whom the client could be released?

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- Are you aware of other family and community contacts willing to participate in the child's release plan in ways besides allowing the client to be released into their custody?
 - Did you contact these people and/or programs before the hearing?

Preparing Your Client's Family

- Did you explain the purpose of the hearing to the child's family?
- Did you explain your role as the child's counsel to the child's family?
- Did you talk with the client's family before the hearing to ascertain whether they were willing to have the client released to them?
 - If the parent or guardian would not allow the client to return home, did you explore with the parents realistic conditions under which the parent or guardian might allow the child back in the home?
 - If the parent or guardian would not allow the client to return home, did you explore with the parent or guardian other people to whom the client could be released?
 - If the parent or guardian did not want the client to return home, did you explain to the parent or guardian the potential effects and consequences of detention?
- If the parent or guardian did not come to the hearing, did you try to contact the parent or guardian to ascertain why the parent or guardian did not attend the hearing, and whether the parent or guardian will allow the client to return home?
- If the parent or guardian did not come to the hearing, did you explore having the parent or guardian appear by phone?
- Did you prepare the parent or guardian for the possibility that the court will solicit the views of the parent or guardian in open court concerning your client's school behavior, home behavior, and overall social functioning?

Obtaining Discovery

- Did you request, receive and review the risk assessment instrument (RAI)?
- Did you discuss the RAI score with the intake probation officer?
- Did you request, receive and review the police reports in your client's case?
- Did you request, receive and review a copy of your client's prior delinquency, truancy, and/or dependency history?

If the client decided to plead at the initial hearing

- If your client decided to accept a plea at the initial hearing, did you discuss, in age-appropriate language:
 - the fact that, because the client is pleading at the initial hearing, you have not been able to do adequate investigation, so that the client can make a fully-informed decision about whether to plead
 - the advantages and disadvantages of pleading, including the potential maximum and minimum penalties, including any fines and community service requirements, the strengths and weaknesses of the government's case, and potential dispositions
 - the finality of the plea
 - that the plea takes the place of the trial, and so there will never be a trial in the client's case if s/he pleads
 - that pleading guilty may not be the only way to secure release
 - the long-term collateral consequences of a guilty plea
 - whether your client understood that s/he did not have to plead, and that it is the client's constitutional right to go to trial, no matter what the client's parents, police officers, judge, or any other adult might have told the client

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- o whether your client was coerced in any way to plead
 - o whether your client was clearheaded enough to make the decision to plead
 - o that, though the client can consider others' advice, the decision to plead belongs to the client alone
 - o the client's right to hold the government to its unshifting burden to prove guilt beyond a reasonable doubt
 - o the client's right to present evidence, to introduce documents, and to cross examine the government's witnesses and to call witnesses on his or her own behalf
 - o the client's right to testify at trial if s/he wished, and that, if the client chose not to testify, it could not be held against him or her
 - o whether your client understood that s/he has a right to counsel on appeal
 - o the expungement process

REPRESENTATION AT THE HEARING

Defender Arguments at the Hearing

- If the detention hearing was not scheduled within the time required by your jurisdiction's statute or rules, did you file a motion to have your client released?
- If you were not able to speak with the client before the detention hearing, due to untimely appointment to the case or any other reason, did you request that the case be continued for a few hours to allow you to consult with the client?
- If you did not receive the RAI before the hearing, did you raise this point at the hearing?
 - o If no one except the intake probation officer had access to the RAI before the hearing, did you raise this point at the hearing?
- If you did not receive or were not afforded an opportunity to review your client's prior record before the hearing, did you raise this point at the hearing?
- If you did not receive or were not afforded an opportunity to review the police reports in your client's case, did you raise this point at the hearing?

Probable Cause Hearing

- If the government sought to detain your client, did you marshal all available evidence to argue against a finding of probable cause?
 - o If the jurisdiction has probable cause hearings where testimony is taken, did you cross examine the government's witnesses, and use the witnesses' testimony to argue against probable cause?
 - o If the jurisdiction has probable cause hearings where testimony is taken, and you calculated that you had little to no chance of winning the probable cause hearing, did you use the probable cause hearing as a tool for discovery?
 - o If the jurisdiction has probable cause hearings in which the court determines probable cause based on an officer's affidavit, did you try to argue against probable cause based on, *inter alia*, a deficient attestation, a lack of evidence concerning one or more of the elements of the charged offense, or an insufficient nexus between your client and the offense?
 - o Did you argue to hold the prosecution to the required burden and standard of proof?

Detention Hearing

- Did you argue that detention cannot be imposed unless the relevant statutory criteria, as explicated by current case law, were met, and did you argue against a finding that the criteria were met?

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- Did you argue that your client should be placed in the least restrictive environment possible?
 - Did you introduce research on the risks and harmful effects of detention for children?
 - Did you present and argue for a detention alternative, tailored and responsive to the judge's concerns about the individual client, complete with specific names and contact information of people willing to be involved in the youth's release conditions, and detailed representations concerning how the youth will be monitored?
 - If the jurisdiction allows the presentation of evidence to support arguments in aid of the detention decision, did you call witnesses or introduce other evidence to support your arguments against secure detention or in favor of alternatives?
 - Did you advocate for your client's expressed legitimate interests, even when the child's expressed legitimate interest conflicted with your reasoned legal advice or with your own personal judgment about what might be in the child's best interests?

Making a Record

- At the end of the hearing, did you request that the judge prepare and issue written findings and an order?

For jurisdictions in which juveniles can waive counsel or plead guilty at the initial hearing

- Did you ask to be assigned to represent the child, at least to put on the record that the child's waiver of counsel and plea were entered without the benefit of counsel?
- Did you ask the court to inform the child that, should the child change his or her mind, you or your office would be available to represent him or her?
- Did you state for the record that you had not had a chance to investigate the matter or subpoena relevant documents before the client pled?

AFTER THE HEARING

Keeping the Client and the Client's Family Informed

- If the client was released, did you thoroughly and clearly explain the conditions of release to the client and parents and provide information about how to satisfy the conditions?
- If the client was released, did you get contact information for the client, including the client's name, address, phone number, and similar information for the client's relatives and friends?
- If the client was detained, did you make sure that the client's family knows where and how to visit the client?
- If the client was detained, did you visit the client within 48 hours of the detention decision?
- Did you schedule your next in-person meeting with the client?
- Did you discuss with your client, using age-appropriate language, what happened at the hearing, and answer any questions the client might have?
- Did you explain to your client, in detail and with age-appropriate language, the next steps in the case?

Challenging the Decision to Detain

- If the client was detained, did you file a motion to reopen the probable cause hearing in cases where you subsequently received exculpatory information?
- If the client was detained, did you file a motion to reconsider the detention decision in cases where you subsequently discovered favorable information (e.g., the charge is reduced, or a new placement option emerges)?
- If the judge's detention decision was influenced by a lack of community resources, did you challenge this basis for the decision?

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- If the judge's detention decision appeared to be influenced by the parent's unwillingness to allow the child to return home, did you challenge this ground for the decision, and consider, in careful consultation with you client, filing a dependency petition?
 - Did you inform your client of the right to appeal the detention decision?
 - If the client wished to appeal, did you follow the procedural steps needed to secure the right to an appeal?
 - Did you handle the appeal or transition the case to another attorney?
 - Did you consider petitioning for an extraordinary writ (*habeas corpus*, *mandamus*, or prohibition) to obtain the release of a client who was wrongfully detained?

II. POLICY CONSIDERATIONS

Think about which elements of detention advocacy you did not or could not provide to your juvenile clients. If you could not provide a service, what were the barriers to your representation? How would you characterize those barriers? Are they systemic (e.g., excessive caseloads, inadequate compensation, insufficient supervision, insufficient non-legal resources like support staff, social workers, and experts), or technical (e.g., lack of training opportunities in juvenile-specific practice), or do they result from tradition (e.g., no one files motions to reconsider because no one ever has)? What are the sources of those barriers – your office, state laws or rules, local habits, your court system, or something else?

Drawing Strength from the Defender Community

If you could have provided a service, but did not, what were the reasons? What barriers do you need to overcome, and how will you do so? What resources can help you to serve your clients better? Consider the following avenues. Can you, as defenders:

- keep and share a regularly-updated list of the current community-based alternatives to detention, with contacts at each facility and phone numbers?
- regularly update and share model motions to reopen, motions to reconsider, motions arguing the conditions of the local detention center?
- convene regular case review meetings with defenders in other jurisdictions?

Juvenile Court Policies and Procedures

Are there ways for you, as a defender charged with protecting your clients' due process rights, to improve juvenile court policies and procedures for your clients? Could you, as a defender:

- in jurisdictions where children are allowed to plead after waiving counsel, coordinate with your colleagues to make sure a defense attorney is present and ready to counsel a child who wishes to plead after waiving counsel before the child pleads?
- in jurisdictions where children are allowed to plead at the initial hearing, begin a practice of stating on the record you have not had a chance to investigate the matter or subpoena relevant documents before the client pled?
- if you were in the courtroom when a child waived the right to counsel, could you, before the waiver colloquy, ask the court for a brief pass to allow you or one of your colleagues to advise the child about the advantages and disadvantages of waiving counsel outside of the presence of the court and of the child's parents?

JDAI Process Issues

As a defender, are you meaningfully engaged in the JDAI process? Could you, as a defender:

- organize, with the assistance of your Team Leader, training on the RAI in each of the jurisdictions in which you practice?
- make sure that defenders are on the RAI subcommittee?

Adapt this diagnostic tool to the practices of your jurisdiction: does your jurisdiction's statute hold that criminal procedure does not apply at detention hearings? If it does, what does that mean for you to advocate zealously at detention hearings? Does your jurisdiction's statute forbid the introduction of evidence at detention hearings by defenders? If it does, brainstorm how you can get information that is favorable to your client before the court. NJDC is available to work with defenders to ensure that these guidelines lead to juvenile defenders' being engaged in both the JDAI process and meaningful reform of detention practice.

Thank you.

*For more information, please contact the National Juvenile Defender Center
at 202.452.0010 or at inquiries@njdc.info.*

ACHIEVING EXCELLENCE IN DETENTION ADVOCACY:

A Diagnostic Tool for Team Leaders to Evaluate Defense Representation at Detention Hearings

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

This diagnostic tool is designed to assist JDAI Team Leaders in determining the effectiveness of defense counsel at arraignment, the probable cause determination, and the detention hearing. In some jurisdictions, these are all collapsed into a single hearing. Because many jurisdictions still allow children to waive their right to counsel and/or plead at the initial hearing, some questions allude to these practices.

Team Leaders who conduct both in-court observation *and* in-person interviews of juvenile defenders will get the most accurate picture of

current practice. This tool is divided into two main sections. The first presents a series of questions about juvenile defense practice. The second section reviews policy and system procedures that may be impacting practice. Taken together, these two sections should provide Team Leaders with the information necessary to identify gaps and areas ripe for improvement.

Please contact NJDC with questions, suggestions, and technical assistance needs to move ahead. We look forward to working with Team Leaders to enhance detention practice in JDAI sites.

I. PRACTICE ISSUES

ACCESS TO COUNSEL

- Are youth represented by counsel at detention hearings?

Appointment of Counsel

- Is counsel appointed *prior* to the detention hearing?
- On average, how much time does defense counsel have to prepare?
- When does counsel first meet with the client?
- Where does counsel first meet with the client?
- Is there a presumption of indigence applied to youth in delinquency proceedings?
- Is parents’ income considered when determining whether a youth in delinquency court is indigent?
 - o Are fees to receive juvenile indigent defense services assessed?

Waiver of Constitutional Rights

- Are youth permitted to waive counsel without first consulting an attorney?
 - o Do judges conduct individual waiver colloquies, using age-appropriate language, to determine whether each youth who waives counsel is doing so knowingly, voluntarily and intelligently? (*see* Sample Colloquy in Appendix A)

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- Are youth permitted to plead at the initial hearing?
 - Do judges conduct individual plea colloquies, using age-appropriate language, to determine whether each youth who pleads is doing so knowingly, voluntarily and intelligently? (*see* Sample Colloquy in Appendix B)
 - If judges take pleas in groups, do defenders object?
 - If youth are represented, does the defender thoroughly discuss the plea with the client?
 - If youth are represented, does the defender thoroughly review the rights to be waived?
 - If youth are represented, does the defender thoroughly discuss collateral consequences of the plea with the client?
 - If unrepresented youth are permitted to plead at the initial hearing, do defenders make themselves available to advise the youth concerning the consequences of a delinquency finding, including the detention possibilities, before the youth pleads?
 - Are unrepresented youth more likely to plead than represented youth?
 - Is the threat of detention one of the main tools prosecutors use to bargain for pleas at the initial hearing, whether the prosecutor is bargaining with represented or unrepresented youth?

Ongoing Communication

- Does the defender give the client contact information and explain how the client can reach the defender?
- If in line with the client's expressed interests, does the defender give the client's family contact information and explain how the family can reach the defender?
- Does the defender explain the defender's role to the client's family?

QUALITY OF REPRESENTATION

A. GENERAL

Duty to Represent Client's Expressed Interests

- Does the defender consult with the juvenile client?
- Does the defender clearly explain the defender's role and duty of confidentiality to the client?
- Does the defender advocate for the juvenile client's expressed views and interests at all stages?
 - If the jurisdiction has detention team meetings, in which parties decide their positions on the child's detention status outside of the courtroom, does the defender advocate zealously for the child's expressed interest both in this meeting and in court before the judge?

B. PREPARING FOR THE HEARING

Client Interview

- If appointed ahead of time, does the defender meet with each child before the detention hearing?
 - If appointed ahead of time, does the defender meet with each child out of the presence of that child's parent or guardian?
- Does the defender bring and get the client's signature on the appropriate release forms to allow the defender to subpoena the client's educational, medical, mental health, and other records?
- If the defender is not appointed with enough time to meet with each client individually, does the defender enlist the aid of a social worker, law student, or legal intern to interview clients before their hearings while the defender is appearing in court?

Taking a Comprehensive Client History

- Does the defender take from the client and/or receive from the government information comprising a complete client history, including information about the client's strengths and skills, as well as the client's prior delinquency, truancy, and dependency record, special health needs, mental health needs, and family history? (see Sample Client Interview Form in Appendix C)
- Does the defender consider, in consultation with the client, people to whom the client could be released, as well as community-based services that the client believes could help him stay in the community?
- Does the defender get the names, phone numbers, and other contact information for these potential community-based options?
 - Does the defender contact potential community programs to ascertain whether they are willing to take the client pending trial?
 - Or does the defender rely solely on the recommendation of the probation officer?
- Is the defender aware of other family and community contacts willing to participate in the child's release plan in ways other than being a placement resource?
 - Does the defender contact these people and programs to ascertain whether they are willing to participate in the child's release plan?
- If the defender is not able to take a comprehensive detention hearing history because the defender is appearing in court, does the defender enlist the aid of a social worker or legal intern to take the information and pass it to the defender before the child's detention hearing?

Preparing the Client's Family

- Does the defender explain the purpose of the hearing to the client's parent or guardian?
- Does the defender explain the defender's role as the child's counsel to the child's family?
- Does the defender ascertain whether the client's parents will allow the client to return home?
 - If the parent or guardian will not allow the client to return home, does the defender explore with the parents realistic conditions under which the parent or guardian might allow the child back in the home?
 - If the parent or guardian will not allow the client to return home, does the defender explore with the parent or guardian other people to whom the client could be released?
 - If the parent or guardian does not want the client to return home, does the defender explain to the parent or guardian the potential effects and consequences of detention?
- If the parent or guardian does not come to the hearing, does the defender try to contact them to ascertain why they are not attending the hearing, and whether they will allow the client to return home?
- If the parent or guardian does not come to the hearing, does the defender explore having the parent or guardian appear by phone?
- Does the defender prepare the parent or guardian for the possibility that the court will solicit the views of the parent or guardian in open court?

Obtaining Detention Hearing Discovery

- Does the defender request, receive and review the police reports in the client's case?
- Does the government regularly turn over, and/or does the defender request, receive and review the client's complete court history and all available records before the hearing?
- Does the government regularly turn over, and/or does the defender request, receive and review the client's completed risk assessment instrument (RAI) before the hearing?
- Does the defender make it a point to speak with intake probation about the RAI score?

Knowledge of Applicable Detention Hearing Law

- Is the defender aware of applicable current case law on detention?
- Is the defender aware of the statute or court rule that defines when a child can be detained in your jurisdiction?
- Is the defender aware of current research on the harmful effects of detention, both generally and specifically with respect to the places where the client is likely to be held?

C. REPRESENTATION AT THE HEARING

Defender Arguments at the Hearing

- If the defender has not met with the child due to untimely appointment of counsel, does the defender state that issue at the detention hearing and request a brief continuance?
- If the detention hearing is not scheduled or held within the time limits required by law or court rule, does the defender file a motion for the child's release?
- If the defender did not receive or was not afforded an opportunity to review the client's RAI before the hearing, did the defender raise this point at the hearing?
- If no one except the intake probation officer had access to the RAI before the hearing, did the defender raise this point at the hearing?
- If the defender did not receive or was not afforded an opportunity to review the client's prior record, did the defender raise this point at the hearing?
- If the defender did not receive or was not afforded an opportunity to review the police reports in the client's case, did the defender raise this point in the hearing?

Probable Cause Hearing

- Is the defender aware of the required burden and standard of proof for probable cause, and does the defender hold the prosecution to its burden?
- Regardless of the particular jurisdiction's type of probable cause hearing, does the defender marshal available evidence to argue against a finding of probable cause?
 - If the jurisdiction has probable cause hearings where testimony is taken, does the defender cross examine the government's witnesses, and use the witnesses' testimony to argue against probable cause?
 - If the jurisdiction has probable cause hearings in which the court determines probable cause based on an officer's affidavit, does the defender try to argue against probable cause based on, *inter alia*, a deficient attestation, a lack of evidence concerning one or more of the elements of the charged offense, or an insufficient nexus between your client and the offense?

Detention Hearing

- Does the defender make arguments related to current case law and the statutory criteria for imposing detention, and argue that the child cannot be detained unless the required criteria are met?
- Is the defender aware of and arguing current research on the harmful effects of detention, both generally and specifically with respect to the places where the client is likely to be held?
- Is the defender aware of each child's individual strengths and needs, and how these are relevant to the detention decision?
- Does the defender present and argue for a detention alternative, complete with specific names and contact information of people willing to be involved in the youth's release conditions, and detailed representations concerning how the youth will be monitored?

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- If the jurisdiction allows the presentation of evidence in aid of the detention decision, does the defender call witnesses or present evidence to support arguments on behalf of the child – even if the court’s tradition is not to call witnesses or present evidence?

D. AFTER THE HEARING

Keeping the Client and the Client’s Family Informed

- If the child is released, does the defender thoroughly and clearly explain the conditions of release to the child and family and provide information about how to satisfy the conditions?
- If the client is released, does the defender answer the client’s questions about the hearing, and preview the next steps in the case for the client and the client’s family?
- If the client is released, does the defender get contact information for the client, including the client’s name, address, phone number, and similar information for the client’s relatives and friends?
- If the client is released, does the defender schedule the next meeting with the client before the client leaves the court building?
- If the client is detained, does the defender make sure that the client’s family knows where and how to visit the client?
- If the client is detained, does the defender give the client the date and time of the next time the defender will visit?
- Regardless of the client’s detention status, does the defender explain, in detail and with age-appropriate language, the next steps in the case?

Challenging the Decision to Detain

- If the client is detained, does the defender file motions to reopen the probable cause hearing if the defender subsequently receives exculpatory information from the government, or motions to reconsider the detention decision if the defender learns of relevant favorable information (e.g., the charges are reduced or a new, community-based placement option emerges)?
- If the child is detained and the detention decision appeared to be influenced by a lack of community resources, does the defender challenge this ground for the decision?
- If the child is detained and the detention decision appeared to be influenced by the parent’s unwillingness to allow the child to return home, does the defender challenge this ground for the decision and, in careful consultation with the client, consider filing a dependency petition?
- If the child is detained, does the defender file a motion to reconsider the detention decision?
- Does the defender file appeals from detention decisions?
- Does the defender file petitions for extraordinary writs (*habeas corpus*, *mandamus*, or prohibition) to seek the release of a child who is wrongfully detained?

II. POLICY CONSIDERATIONS

Team leaders can use the questions above to think about whether the defenders in your jurisdiction are providing zealous defense advocacy regarding all aspects of detention. Assess which elements of detention advocacy your defenders regularly provide to their juvenile clients, and which they do not.

For the elements of detention advocacy that defenders were consistently unable to provide to their juvenile clients: what are the barriers to their representation? How would you characterize those barriers? Are they systemic (e.g., excessive caseloads, inadequate compensation, insufficient supervision, insufficient non-legal resources like support staff, social workers, and experts), or technical (e.g., lack of training opportunities in juvenile-specific practice), or do they result from tradition (e.g., no one files motions to reconsider because no one ever has)? What are the sources of those barriers – your office, state laws or rules, local habits, your court system, or something else? What can you do to help defenders change or overcome those barriers?

Strengthening the Defender Community

Are there avenues available to you to help defenders work with, learn from, and share resources with each other? Consider whether the following might be useful in your jurisdiction. Could you, as a Team Leader:

- convene regular meetings for your defenders to have case reviews for detained clients?
- lead an effort to populate a pleadings bank with model motions to reopen the probable cause hearing or reconsider the detention decision?
- organize a twice-yearly resource fair so that defenders can learn about community-based detention alternatives?
- designate someone to keep a regularly-updated list of the current community-based alternatives to detention, and to make that list available to defenders?

Juvenile Court Policies and Procedures

Are there ways for you, as a Team Leader, to improve juvenile court policies and procedures for juvenile defenders? Could you, as a Team Leader:

- if counsel is not appointed prior to the detention hearing, help defenders devise a strategy to advocate for earlier appointment, or for initial hearings to be held in the afternoon so that defenders can interview clients in the morning?
- if youth are interviewed by intake probation officers before they have been afforded an opportunity to consult with an attorney, work with probation staff to ensure that youth are advised of their right to an attorney?

Ease of Communication

- ensure that detention facilities allow clients liberal and free telephone access to their attorneys?
- ensure that families of youths detained pending their initial hearing are able to convey social information crucial to the detention hearing to the defender?
- help arrange for a private space in the juvenile court building where defense counsel can meet privately with clients?

Representation at the Hearing

- work with prosecutors, judges, and probation officers to ensure that, during the probable cause hearing, defense counsel is given the opportunity to present evidence, to challenge the prosecution's evidence through cross examination, introduction of defense evidence, and to argue the evidence?

JDAI Process Issues

Additionally, are defenders meaningfully engaged in the JDAI process? Is there more that you, as a Team Leader, could be doing to help your defenders become engaged or participate meaningfully? Could you, as a Team Leader:

- make sure defenders are on the RAI subcommittee?
- talk with defenders' supervisors to give juvenile defenders time to participate in JDAI?
- organize training for defenders on reading or potentially challenging the RAI being used in each JDAI jurisdiction in which the defender practices?
- meet with the local juvenile defender unit (if there is one) to discuss the successes, challenges, and their overall views of the JDAI process?

This diagnostic tool can be adapted to the practices of your jurisdiction. For example, in some jurisdictions, criminal procedure does not apply at detention hearings. In others, defenders are not allowed to introduce evidence at detention hearings. NJDC is available to work with Team Leaders to adapt this tool, to ensure that it is effective and leads to meaningful practice reform and engagement of juvenile defenders in the JDAI process.

Thank you.

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at 202.452.0010 or at inquiries@njdc.info.*