Honoring Gault:

Ensuring Access to Counsel in Delinquency Proceedings

Every jurisdiction is different and has different resources and laws governing whether children have access to counsel and at what stage in the proceedings. The recommendations that follow may be more difficult to implement in some jurisdictions than others. It is hoped that to the extent the recommendations cannot be fully implemented within your jurisdiction, they can at least set aspirational goals for changes in practice which, with leadership, could be closely implemented in the future.

Due Process & Juveniles' Right to Counsel

In 1964, without an attorney, notice of the charges, or a trial, Gerald Francis Gault, a fifteen-year-old youth accused of making an annoying phone call, was sentenced to the state youth correctional agency until his twenty-first birthday. An adult accused of comparable conduct would have received a fine of five dollars or a jail term for not more than two months. As the United States Supreme Court concluded, "There is no material difference…between adult and juvenile proceedings….A proceeding where the issue is whether the child will be found 'delinquent' and subjected to the loss of liberty…is comparable in seriousness to a felony prosecution....The child 'requires the guiding hand of counsel at every step in the proceedings against him.'"[1] This includes providing an attorney to the child to assist in making the critical decision of how to proceed prior to conducting a hearing regarding possible waiver of the right to counsel.

Access to counsel is essential to due process. Beyond being a matter of justice, the perception of fairness strengthens the legitimacy of the court. "Treating youth fairly and ensuring that they perceive that they have been treated fairly and with dignity contribute to positive outcomes in the normal process of social learning, moral development, and legal socialization during adolescence."[2] If youth feel they have been treated fairly, recidivism is reduced.[3]

1 In re Gault, 387 U.S. 1, 36 (1967).
2 NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 6 (Richard Bonnie, Robert Johnson, Betty Chemers, & Julie Schnuck eds, Nat'l Academies Press, 2013).
3 Id. at 187.

Ethical Standards

Juvenile defense is a specialized area of law requiring client-directed advocacy. It is ultimately the court's responsibility to ensure that each child has the opportunity to be represented by qualified counsel at every stage of the proceedings. Juvenile court judges should encourage all attorneys to display in-depth knowledge of juvenile law and adolescent brain development, to keep up with changes in juvenile law and appropriate care and treatment of juveniles, and to be familiar with community-centered, evidence-based programs. Every judge has a duty to promote public confidence in the justice system and require professionalism, access to justice, and due process. Therefore, juvenile court judges should encourage ongoing training of all attorneys, encourage law libraries to create and maintain juvenile law and social science sections, and implement impartial and merit-based appointment of counsel procedures where required. A judge should refer lawyers who do not exhibit sufficient professionalism to juvenile training programs.

Without showing partiality or favoritism, a judge should take appropriate steps to improve professionalism and access to justice. The severity of a situation should dictate the manner and degree of judicial action. Widespread issues might be addressed by local seminars, court rules, or published articles. Attorney-specific issues might be addressed by contact with a supervisor, questions or comments during a status or pretrial conference, a specific ruling, or a referral to a law library or to a juvenile training program consistent with the National Juvenile Defense Standards.[4]

4 NAT'L JUVENILE DEFENDER CENTER, NATIONAL JUVENILE DEFENSE STANDARDS (2012).

NCJFCJ est. 1937 NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES WWW.NCJFCJ.ORG
SJI State Justice Institute
Resource Center Partnership ModelsforChange
NJDC NATIONAL JUVENILE DEFENDER CENTER

Key Elements of Ensuring Meaningful Access to Counsel for Juveniles:

01 Counsel Should Be Appointed Prior to the First Court Appearance

Counsel should be appointed for all juveniles prior to the first court appearance. The appointed counsel can then meet with the juvenile prior to the first court appearance and be present and prepared at the initial hearing. If the juvenile will be detained and there is a pre-screening or assessment process in place in your jurisdiction, this is a good place to establish a consistent process to appoint counsel for every detained juvenile. The local public defender's office or contract counsel for indigent juveniles can be notified when a juvenile is screened for placement or placed in detention. A copy of the arrest affidavit, if any, and the results of any pre-detention screening should be provided to defense counsel, the court, and the prosecuting authority. The appointment of counsel prior to the first court appearance is critical, as "the child requires the guiding hand of counsel at every step in the proceedings against him." [5]

02 Courts Should Presume All Juveniles Indigent for Purposes of Appointment of Counsel

In order to protect a juvenile's individual right to counsel, avoid unnecessary fear and worry by the juvenile and his or her family, and ensure that there are no conflicts of interest in a defender's representation, all juveniles should be presumed indigent by virtue of their status as children.[6] Accordingly, for purposes of appointment of counsel, the court should automatically appoint client-directed counsel early in the proceedings. This will allow time for the juvenile to meet with an attorney who can advise the juvenile of his or her rights and explain the procedural process and role of counsel.

03 Courts Should Ensure Meaningful Consultation with An Attorney Before Accepting Waiver of Counsel

Children, like adults, have a legal right to waive any number of rights. However, the ability to waive a right, including waiver of counsel, should only occur after a child has had meaningful consultation with a qualified juvenile defense attorney about the potential direct and collateral consequences of such a decision to ensure that the juvenile is making a fully informed decision. Anything less would make it difficult to ascertain whether the waiver was knowing, intelligent, and voluntary, given the developmental capacities of youth. Before the juvenile waives counsel, the court must conduct a thorough searching inquiry on the record that the juvenile received meaningful consultation with an attorney on the meaning of the fundamental right to counsel and the dangers of giving up that right.

04 Courts Should Discourage the Practice of Accepting an Admission of Delinquency or the Entry of a Plea at the Initial Court Appearance

At the initial court appearance, the juvenile may feel motivated or pressured to enter an admission or a plea in order to expedite the court process or to obtain release. Entering an admission or a plea at this stage is often done without a thorough understanding of the rights being waived, or the immediate and long-term consequences of doing so. Waiver of counsel for the purpose of entering an admission or a plea should not be permitted at any time unless the juvenile has had a meaningful consultation with a qualified juvenile defense attorney. Further, the court should not accept an admission or plea at the initial hearing unless the juvenile has had a meaningful consultation with a qualified juvenile defense attorney. Even when counsel is appointed prior to the first court appearance, the juvenile and his or her counsel will rarely have had access to discovery and a full opportunity to discuss and investigate the circumstances of the case. Thus, a court should discourage an admission or plea at the initial hearing even when counsel has been appointed. Additionally, as long as the court retains jurisdiction over a child, counsel should remain on the case.

5 In re Gault, 387 U.S. 1, 36 (1967); *see* NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 78-79 (2005).
6 A diverse group of states deem every juvenile indigent for the purpose of appointing counsel. *See* Ind. Code Ann. § 31-32-4-2; La. Child. Code Ann. art. 320(A); N.Y. Fam. Ct. Act § 249; N.C. Gen. Stat. Ann. § 7B-2000(b); 42 Pa. Cons. Stat. Ann. § 6337.1.

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