A Child’s Right to Counsel: We’ve Come a Long Way, Baby, But Still so Far to Go!

13th Annual Ohio Juvenile Defender Leadership Summit
May 31, 2017
Kim Tandy - Moderator
Panel: Jill Beeler, Lea Pagels, Rebecca Steele
Ohio’s poor children were frequently denied lawyers at all critical stages.

Zealous representation from well-trained attorneys varied by jurisdiction, but there was a significant lack of meaningful lawyering often based on geography.

The systemic barriers which impeded effective representation include lack of qualified lawyers, high caseloads, “best interest” representation, lack of compensation, and inconsistency in office support and technology.

Ohio lacked leadership on juvenile justice issues to effectively ensure that the rights of children are protected.
Justice Cut Short (2003)

**Systemic Barriers:**
- No uniform appointment process
- Qualifications of lawyers was not uniform
- Indigency determinations unclear
- Lack of juvenile specific training
- Over-dependence upon probation
- Over-dependence upon incarceration
- Criminalization of mentally ill youth
- Over representation of minority youth in the system

“I always waive my right to an attorney because it’s easier and quicker than waiting for someone who won’t care about my case anyhow.” (Youth at DYS)
A Juvenile’s Right to Counsel in Ohio

The Work:

- Standards of Representation
- Juvenile Rule 3
- In re C.S.
- J.P. v. Taft
- JDAI
STANDARDS OF REPRESENTATION
OF CLIENTS IN JUVENILE DELINQUENCY CASES

Introduction
These Standards promote quality representation and uniformity of practice throughout Ohio for attorneys who represent juveniles in delinquency cases. The Standards were written by a working group of public defenders and court-appointed counsel from across Ohio, along with the Office of the Ohio Public Defender and Children’s Law Center, Inc. The Standards were written with the difficulties of day-to-day practice in mind, but also with the goal of raising the quality of representation. While local adjustments may be necessary to apply these standards in practice, jurisdictions should strive to meet their fundamental principles and spirit.

The Standards have been adopted by the Ohio Public Defender Commission as part of the Office of the Ohio Public Defender’s ongoing efforts to both increase the number of youth who are represented by counsel in delinquency proceedings and improve upon the quality of such representation.

These Standards recognize that attorneys practicing in juvenile delinquency cases require specialized skills and knowledge to assure quality legal representation for young clients who are the subjects of delinquency complaints.

The purpose of these Standards is to provide juvenile defense attorneys with a general guide to appropriate and diligent advocacy on behalf of clients involved in delinquency proceedings in Ohio.

The Standards are divided into the following categories:

1. Role of defense counsel
2. Training and experience
3. Preparation
4. Review of the complaint
5. Meeting with the client
6. Communication issues
7. Competency
8. Investigation and discovery
9. Informal court processes
10. Delinquency hearing
11. Pre-trial motions
12. Adjudicatory hearing
13. Dispositional hearing
14. Requesting continuance
15. Adequate recording of proceedings and objections during court hearings
16. Objections to Magistrate’s decision
17. Right to appeal
18. Post-dispositional advocacy
19. Transfer proceedings to adult court / Serious Young Offender proceedings
Juvenile Rule 3

- The Warriors: Gault’s Army!
  - Children’s Defense Fund
  - Franklin County Public Defender
  - The Greater Cincinnati Criminal Defense Lawyers Association
  - Juvenile Justice Advocacy Alliance
  - Juvenile Justice Coalition
  - The Maumee Valley Criminal Defense Lawyers Association
  - Montgomery County Public Defender
  - Ohio Council of Churches
  - Public Children Service Association of Ohio
  - Voices for Children in Ohio
  - Peter E. Leone, Ph.D., University of Maryland
  - Earl L. Dunlap, National Partnership for Juvenile Services
  - National Juvenile Defender Center
  - National Association of Criminal Defense Lawyers

March 9, 2006

Secretary Jo Ellen Cline
Commission on the Rules of Practice and Procedure
Supreme Court of Ohio
60 S. Front St.
Columbus, OH 43215

Dear Secretary Cline:

The American Civil Liberties Union (ACLU), the Children's Law Center, the ACLU of Ohio, and the Office of the Ohio Public Defender have come together to seek the Supreme Court of Ohio's Commission on the Rules of Practice and Procedure to consider changes to the Ohio Rules of Juvenile Procedure regarding waiver of the right to counsel.

An estimated two-thirds of the 147,987 juveniles who were the subject of delinquency or unruly complaints resolved in 2004 faced those proceedings without an attorney. (See Attachment 2.) A recent report from the Children's Law Center found that roughly 15% of children committed to Ohio Department of Youth Services facilities and 20% of those placed at community corrections facilities were unrepresented by counsel during their delinquency proceedings. (See Attachment 3.)

Most of these children waive their right to counsel. They do so, however, without an appreciation of their constitutional rights and without fully understanding the consequences of their waiver.

Transcripts and observations of juvenile court proceedings reveal that many judges, magistrates, prosecutors, and probation officers do not take sufficient time to ensure that these children are aware of the role that defense counsel can play and the possible repercussions of a finding against them. (See Attachment 4.) In addition, social science researchers have found that a disproportionate number of children in the juvenile justice system suffer from mental illness or have learning disabilities and developmental delays that compromise their abilities to safeguard their own interests. (See Attachment 5.)

Standards set forth by the Institute of Judicial Administration, the American Bar Association, the American Council of Chief Defenders, and the National Juvenile Defender Center state that children should never be permitted to waive appointment of counsel. (See Attachment 6.) In 2006, the National Council of Juvenile and Family Court Judges published “Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases,” a
Juvenile Rule 3

- The Kids of Juvenile Rule 3: Gault’s Amy!
  - Kristal
  - Ryan
  - Pamela
  - A.C.
  - R.B.
Juvenile Rule 3

Before:

“The rights of a child may be waived with permission of the court.”

After:

July 1, 2012:

Specific cases when a child may not waive their right

Informed of the right to counsel

Informed of the disadvantages of self representation

Consultation with a lawyer if charged with a felony

Knowing, Intelligent, Voluntary waiver

In court and in writing

Totality of the circumstances

Consultation with parent

But no parent or other person may waive the child’s right
A juvenile may waive his constitutional right to counsel, if he is counseled and advised by his parent, custodian, or guardian.

If the juvenile is not counseled by his parent, custodian, or guardian and has not consulted with an attorney, he may not waive his right to counsel.

Strong presumption against waiver of the constitutional right to counsel!

Footnote 3: Though there may be a number of policy reasons to support the legislative imposition of a bright-line rule requiring a juvenile to consult with an attorney before waiving his constitutional rights, we do not believe that it is required by the Due Process Clause of the United States Constitution.
J. P. v. Taft
Filed July 29, 2004

Gault’s Amy:
  J. P.
  S. J.
  D. B.
  H. H.
Youth Services program would help offenders sue the system

By Carrie Spencer G hose

Ohio's juvenile-justice system will make it easier for offenders to find attorneys and file claims over the length or conditions of their detention under a proposed settlement to a three-year-old lawsuit alleging unconstitutional denial of legal representation.

The Department of Youth Services started helping juvenile offenders find attorneys after the action lawsuit was filed.

Under the settlement, Youth Services does not acknowledge that any offenders were denied legal representation or were dismissed by such a denial. The department wanted to end the lawsuit and agrees that there is a good chance that a federal lawsuit will not be filed at all.
Juvenile Detention Alternatives Initiative (J DAI)

• First 5 Counties Paved the Way:
  • Franklin, Montgomery, Summit, Lucas, Cuyahoga

• Gault’s Amy – Angela Chang!
  • Appoint counsel early and often

THE ANNIE E. CASEY FOUNDATION
THE EFFORT TO ENSURE A LAWYER FOR EVERY CHILD AT EVERY PHASE OF THE PROCESS

THE FRANKLIN COUNTY SYSTEM

REBECCA STEELE
FRANKLIN COUNTY PUBLIC DEFENDER'S OFFICE
THE PROBLEM: UNREPRESENTED CHILDREN

- THE FRANKLIN COUNTY PUBLIC DEFENDER’S OFFICE
- APPROACH TO ADDRESS THIS ISSUE:
  - OUR OFFICE STRIVES TO BE AVAILABLE TO THE PUBLIC WHEN NEEDED, EVEN PRIOR TO COURT HEARINGS THROUGH
    - 24/365 PAGER AVAILABILITY
    - WALK IN INTERVIEW HOURS
  - WE COLLABORATE WITH THE COURT, LOCAL BAR, JDAI, AND OTHERS TO TRY TO ACHIEVE REPRESENTATION IN ALL JUVENILE CASES.
  - WE USE MOTION PRACTICE TO SUPPRESS UNCOUNSELED STATEMENTS.
  - WE ALWAYS CONSIDER WITHDRAWAL OF UNCOUNSELED PLEAS.
COLLABORATION BEGINS WITH IDENTIFYING PARTNERS

- FRANKLIN COUNTY PLAYERS:
  - COURT
  - JUDGES/MAGISTRATES/PROBATION/OTHER COURT PROGRAMS
  - PUBLIC DEFENDER’S OFFICE
  - PRIVATE BAR/BAR ASSOCIATIONS
  - JDAI (JUVENILE DETENTION ALTERNATIVE INITIATIVE)
  - FRANKLIN COUNTY CHILDREN’S SERVICES
  - PROSECUTOR’S OFFICE
  - LAW ENFORCEMENT AGENCIES
THE COLLABORATIVE EFFORT

- Our office starts the process by getting in early,
- Establishing a screening process for eligibility at first hearing,
- Representing all qualifying clients possible,
- Working to identify PD conflicts at outset whenever possible.
- Working with appointed counsel clerk to expedite appointments in conflict cases, and
- Advocating system reform through the court.
OUR PRELIMINARY HEARING PROCEDURES

- All children and families appearing for preliminary hearing are directed to PD satellite office at the detention center to complete indigency affidavits and be screened for counsel.

- PD attorneys are assigned cases and appear at preliminary hearing. Attorneys are single assignment and follow case.

- In cases of PD conflict, private list attorneys attend delinquency prelims and accept appointments prior to hearing.

- The expectation and practice in Franklin County is for there to be an attorney for every child at the preliminary hearing and only in rare circumstances does any child appear pro se.
How Court Practices Have Changed Over Time

- Before agreement to have private list attorneys at preliminary hearings, children who were PD conflicts went unrepresented at preliminary hearing.

- Before C. S., children, many times at parent’s behest, often waived attorney and pled, usually with minimal, if any, negotiation.

- Parent/child conflict has evolved from a technical application (D. v., parent as victim, etc.) to a more in-depth analysis as to whether a factual conflict exists.

- Our bench applies C. S. very strictly and rarely, once the family has appeared before the bench, is attorney waived.
AREAS OF SUCCESS

- Children in Franklin County rarely appear in court without counsel.
- Collaboration and communication with Children’s Services has resulted in better understanding of the child’s right to counsel, although this is a continuing struggle.
- The Court, the PD, JDAI, and the private bar have cooperated to give the greatest number of children access to counsel.
- Participation in JDAI has resulted in greater awareness by the Court and the legal community about practices in other JDAI jurisdictions.
Although rare, some children still appear in court without counsel, perhaps for financial reasons (cost assessment due to family income), impatience with the pace of the system, disappointment and anger directed toward child, or a lack of recognition of the impact of court involvement on the child and the family.

Children in placement out of county make pleas and their case is certified for disposition. The circumstances of these pleas are unclear, although since C. S. there are fewer uncounseled pleas, the child has often pled to all charges.

Law enforcement routinely and actively discourage or prevent children’s access to both counsel and family during interrogation.
Recommendation 3.0: Implement Strong, Well-resourced, and Specialized Juvenile Defense Systems

Recommendation 3.1: “Juvenile Units should include...social workers!”
How Can Social Workers Help You?

- Ethical Principles of Social Work
  - **Service**: Social workers’ primary goal is to help people in need and to address social problems.
  - **Social Justice**: Social workers challenge social injustice.
  - **Dignity and Worth of the Person**: Social workers respect the inherent dignity and worth of the person.
  - **Importance of Human Relationships**: Social workers recognize the central importance of human relationships.
  - **Integrity**: Social workers behave in a trustworthy manner.
  - **Competence**: Social workers practice within their areas of competence and develop and enhance their professional expertise.
How Can Social Workers Help You?

Social workers can perform a variety of tasks, including:

- Investigation & Mitigation – Record Collection!
- Assessments
- Placements
- Dispositional Advocacy
How Can Social Workers Help You?

Social Workers are Experts at Locating Resources!

- Resources to consider:
  - [http://www.drc.ohio.gov/reentry](http://www.drc.ohio.gov/reentry)
    - Re-Entry Programs
    - Housing
    - Education
    - Family Resources
  - Local Social Work Field and Education Program
    - Undergraduate vs. Graduate Skills
    - Intensives and/or Volunteers
  - Record Collection
    - [http://opd.ohio.gov/Trial-Services/Mitigation-Investigation/Records](http://opd.ohio.gov/Trial-Services/Mitigation-Investigation/Records)
    - [https://moe.fd.org/Dev_Mitigation.php](https://moe.fd.org/Dev_Mitigation.php)
    - See Handout in Summit Materials
  - Google
    - And follow-up with a phone call!
Access Denied: A National Snapshot of States’ Failure to Protect Childrens’ Right to Counsel

- **Children in the United States are not guaranteed lawyers.**

  Only 11 states provide every child accused of an offense with a lawyer, regardless of financial status.

- **Children do not get lawyers until it is too late.**

  No state guarantees lawyers for every child during interrogation, and only one state requires it under limited circumstances.

- **Children must pay for their constitutional right to counsel.**

  Thirty-six states allow children to be charged fees for a “free” lawyer.
Access Denied: A National Snapshot of States’ Failure to Protect Children’s Right to Counsel

- **Children’s rights are not safeguarded by the states**
  
  Forty-three states allow children to waive their right to a lawyer without first consulting with a lawyer.

- **Children’s access to counsel ends too early**
  
  Only 11 states provide for meaningful access to a lawyer after sentencing, while every state keeps children under its authority during this time.
Defend Children: A Blueprint for Effective Juvenile Defender Services (NJ DC 2016)

- Champion, uphold and fund children’s right to counsel.
- Ensure meaningful access to counsel throughout the delinquency process.
- Implement strong, well resourced, and specialized juvenile defense systems.
- Eliminate racial and ethnic disparities.
- Attract and retain new and diverse talent to the field of juvenile defense.
- Protect the rights of youth who face additional discrimination and violation of their constitutional rights.
- Fund and implement mechanisms to collect data, conduct assessments and court observations, and initiate evaluation and research.
What’s next?
Juvenile Court Survey 2017

- 38 Counties responded
- Are youth provided with counsel at initial appearance?
  - Yes: 14 + 1 if felony charge
  - No: 19 + 1 if misdemeanor charges
  - No Response: 2

- What’s the earliest opportunity for appointment?
  - Initial Appearance/Detention Hearing: 31
  - Upon receiving notice of charges/summons: 5
What’s next?
Juvenile Court Survey 2017

- How many youth were found indigent for purposes of appointment?
  - Most: 209 out of 312 adjudications
  - All of them: 88 out of 241 adjudications
  - All who applied: 20 out of 179 adjudications
  - Data not tracked: 181 out of 904 adjudications
  - 44 out of 116 adjudications
  - 72 out of 783 adjudications
  - 38 out of 399 adjudications
  - 72 out of 191 adjudications

- How many waivers occurred in felony cases?
  - None / Court does not allow: 27
  - Few waivers: 2
  - Data not tracked: 7
What’s next?

OPD, Children’s Law Center and Ohio ACLU have requested a change to Juv. R. 3 on May 15, 2017 which would:

- Require appointment of counsel at the earlier stage for all children who could face out of home placement of any type
- Permit waiver only after appointment and consultation
- Presume indigent without consideration of income of parents
- Prohibit waiver for any youth detained after adjudication
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